GREAT POWER INTERVENTIONS IN THE MIDDLE EAST SINCE 1917:

THE DOOMED PURSUIT OF NATIONAL INTEREST IN VIOLATION OF INTERNATIONAL LAW

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The decision, in 2003, by the United States and the United Kingdom to go to war against Iraq was seen by many as a watershed moment for international law. Operation *Iraqi Freedom* seemed to herald the ultimate triumph of those "realist" critics of international law who had always maintained that powerful states should and did ignore international law when their national interest is at stake.

This thesis offers a defence of international law in the face of such criticism. By analysing key Great Power interventions in the Middle East prior to the War on Iraq, it will be shown that international law has always been a minor concern for those leaders who believed their state's national interest would be furthered by intervening in the Middle East. Operation *Iraqi Freedom* was thus far from being a watershed moment.

More importantly, however, the thesis will dispel the notion that international law necessarily conflicts with the national interest of powerful states. A detailed analysis of Great Power interventions in Palestine (1917-1948), at Suez (1956), and in Afghanistan (1979-2011) will demonstrate that in none of these key events did the pursuit of national interest in conscious violation of international law actually benefit the intervenor. Rather, the subsequent "blowback", resulting from these illegal endeavours, was frequently more serious than the danger the intervenor originally sought to combat. Here, too, the Iraq War and its disastrous aftermath seem to have followed the rule, rather than being the exception.

The latter conclusion, it will be argued, does allow for some optimism as to the future role of international law. The repeated failure by the Great Powers to obtain their objectives by illegal means evidences that it is not adherence to international law, but rather the conduct of an unrealistic foreign policy in violation of it, that harms a state's national interest. International law, far from being utopian, is grounded in states' past experiences, therefore reflects the realities of international life, and can consequently be a useful guide for a more successful foreign policy.

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List of Abbreviations

ABAJ	*American Bar Association Journal*
AJIL	*American Journal of International Law*
Alb. L. Rev.	*Albany Law Review*
Am. Soc'y Int'l L. Proc.	*American Society of International Law Proceedings*
Ann. Dig. ILC	*Annual Digest and Reports of Public International Law Cases*
B.C. Int'l & Comp. L. Rev.	*Boston College International and Comparative Law Review*
BFSP	*British and Foreign State Papers*
BYIL	*British Yearbook of International Law*
Cal. W. Int'l L. J.	*California Western International Law Journal*
Cambridge L. J.	*Cambridge Law Journal*
Case W. Res. J. Int'l L.	*Case Western Reserve Journal of International Law*
Chi. J. Int'l L.	*Chicago Journal of International Law*
Colum. J. Transnat'l L.	*Columbia Journal of Transnational Law*
Columb. L. Rev.	*Columbia Law Review*
Cornell Int'l L. J.	*Cornell International Law Journal*
CTS	*Consolidated Treaty Series*
Dalhousie J. Leg. Stud.	*Dalhousie Journal of Legal Studies*
Denv. J. Int'l L. & Pol'y	*Denver Journal of International Law and Policy*
Dept. of State Bulletin	*Department of State Bulletin*
Dick. J. Int'l L.	*Dickinson Journal of International Law*
E. Eur. Const. Rev.	*East European Constitutional Review*

EJIL	*European Journal of International Law*
Fletcher F.	*Fletcher Forum of World Affairs*
Fletcher F. World Aff.	*Fletcher Forum of World Affairs*
Fordham Int'l L. J.	*Fordham International Law Journal*
Foreign Aff.	*Foreign Affairs*
GA	*General Assembly*
Ga. J. Int'l & Comp. L.	*Georgia Journal of International and Comparative Law*
Geo. Wash. Int'l L. Rev.	*George Washington International Law Review*
Geo. Wash. L. Rev.	*George Washington Law Review*
Harv. Int'l L. J.	*Harvard International Law Journal*
Harv. J. L. & Pub. Pol'y	*Harvard Journal of Law and Public Policy*
Harvard L. Rev.	*Harvard Law Review*
Hastings Int'l & Comp. L. Rev.	*Hastings International and Comparative Law Review*
Houston J. Int'l L.	*Houston Journal of International Law*
ICJ	*International Court of Justice*
ICLQ	*International and Comparative Law Quarterly*
ICTY	*International Criminal Tribunal for the former Yugoslavia*
Int'l J.	*International Journal*
Int. J. Middle East Stud.	*International Journal of Middle East Studies*
Int'l L. Q.	*International Law Quarterly*
Isr. L. Rev.	*Israel Law Review*
James Cook U. L. Rev.	*James Cook University Law Review*
J. Armed Conflict L.	*Journal of Armed Conflict Law*

(J.) Comp. Legis. & Int'l L.	*Journal of Comparative Legislation and International Law*
J. Conflict & Sec. L.	*Journal of Conflict and Security Law*
J. Transnat'l L. & Pol'y	*Journal of Transnational Law and Policy*
Law & Contemp. Probs.	*Law and Contemporary Problems*
League of Nations O. J.	*League of Nations Official Journal*
LNTS	*League of Nations Treaty Series*
L.Q. Rev.	*Law Quarterly Review*
Melb. J. Int'l L.	*Melbourne Journal of International Law*
Mich. L. Rev.	*Michigan Law Review*
N.C. Cent. L. J.	*North Carolina Central Law Journal*
Newcastle L. Rev.	*Newcastle Law Review*
Nordisk Tidsskrift Int'l Ret.	*Nordisk Tidsskrift for International Ret*
N.Y.U.J. Int'l L. & Pol.	*New York University Journal of International Law and Politics*
OAS	*Organisation of American States*
PCIJ	*Permanent Court of International Justice*
Rev. Jur. U. P. R.	*Revista Juridica Universidad de Puerto Rico*
ROW	*Recht in Ost und West*
Rutgers L. Rev.	*Rutgers Law Review*
Stan. J. Int'l L.	*Stanford Journal of International Law*
Sw. U. L. Rev.	*Southwestern University Law Review*
SYBIL	*Singapore Yearbook of International Law*
Syracuse J. Int'l L. & Com.	*Syracuse Journal of International Law and Commerce*
Temple Int'l & Comp. L. J.	*Temple International and Comparative Law Journal*

Texas Int'l L. J.	*Texas International Law Journal*
Transnat'l L. & Contemp. Probs.	*Transnational Law and Contemporary Problems*
UN	*United Nations*
UN SC	*United Nations Security Council*
UNTS	*United Nations Treaty Series*
U. Pa. L. Rev.	*University of Pennsylvania Law Review*
U. Pitt. L. Rev.	*University of Pittsburgh Law Review*
U. Queensland L. J.	*University of Queensland Law Journal*
U. Toronto Fac. L. Rev.	*University of Toronto Faculty of Law Review*
U.W. Austl. Ann. L. Rev.	*University of Western Australia Annual Law Review*
Va. J. Int'l L.	*Virginia Journal of International Law*
Willamette J. Int'l L. & Disp. Res.	*Willamette Journal of International Law and Dispute Resolution*
Wis. Int'l. L. J.	*Wisconsin International Law Journal*
Yale J. Int'l L.	*Yale Journal of International law*
Yale Stud. World Pub. Ord.	*Yale Studies in World Public Order*
Yale J. World Public Ord.	*Yale Journal of World Public Order*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht*

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I. Introduction

Against the siren song of a world order created through the 'rational choice' of a single superpower must be set the 'rational choice' represented by adherence to the rule of law. This is not a form of moral philosophy but a hard-headed realization of the limits of power and of law's potential for serving everyone's long-term interest.[1]

A decent respect for international law, inter alia as international lawyers will say, might have occasioned a weekend's pause in which we could have considered our interests rather than merely giving in to our impulses. That, largely, is what law is about.[2]

In early 2003, a "Coalition of the Willing", led by the USA and the UK, attacked Iraq. At first, Operation *Iraqi Freedom*, which commenced on March 20, 2003, seemed a great success. On May 1, 2003, US President George Bush was able to make a speech before US sailors in front of a banner titled "Mission Accomplished".

This, however, turned out to be gravely premature. Iraq descended into civil war, while local resistance against the occupying forces continued. Not only were at least 100,000 Iraqis and thousands of allied soldiers killed in the next few years, [3] but Iraq's infrastructure was badly damaged, and, despite two elections having taken place, stability in the country is still fragile. A partition of Iraq along ethnic/religious lines (Kurds, Sunni Arabs, Shiite Arabs) can still not be safely dismissed as a possibility, and outside powers, such as Iran, have tried to increase their influence in

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[1] Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium", AJIL, Vol. 100, 2006, 88-106, 106.

[2] Daniel Patrick Moynihan, *Loyalties*, Orlando: Harcourt Brace Jovanovich, 1984, 96 (commenting on the US invasion of Grenada in 1983).

[3] According to the leaked "Wikileaks Iraq War logs" 66081 civilians, 15196 Iraqi security forces, 23894 "enemies", and 3771 members of the "coalition forces" were killed, and 176382 people (of "all categories") were wounded between 2004 and 2009; "Wikileaks Iraq: data journalism maps every death", Simon Rogers, *The Guardian*, 23/10/2010; available at: http://www.guardian.co.uk/news/datablog/2010/oct/23/wikileaks-iraq-data-journalism#data; last accessed 18/11/2011; the UN estimated that more than 34000 Iraqis were killed in 2006 alone; "Iraqi Death Toll exceeded 34,000 in 2006, U.N. Says", Sabrina Tavernise, *The New York Times*, 17/01/2007; available at: http://www.nytimes.com/2007/01/17/world/middleeast/17iraq.html?_r=1; last accessed 18/11/2011.

the country.[4] Regional stability therefore seems as elusive as it was before Saddam Hussein was toppled. Politicians responsible for the unpopular war were often punished. Notably, former UK Prime Minister Tony Blair has become a *persona non grata* for many British citizens, mainly due to the Iraq War.

As far as international law is concerned, many viewed Operation *Iraqi Freedom* as a watershed moment. Having failed to obtain clear UN authorization for the use of force, and not able to claim a case of self-defence under Article 51 of the UN Charter, the allies, in their legal justifications, claimed to have obtained, in Resolution 1441, an "implied authorization" by the UN Security Council. They also relied on an alleged "revival" of Resolution 678.[5] Some academics argued that the war on Iraq was the first application of the newly developed American concept of "pre-emptive self-defence", outlined in the USA's *National Security Strategy* of September 2002.[6]

These attempts at legal justification proved to be far from convincing. Outside of the United States the invasion of Iraq was widely seen as illegal, and even within the USA there was some controversy.[7] Many within the American, and, especially, within

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[4] "Fragile Iraq threatened by the return of civil war", Patrick Cockburn, *The Independent on Sunday*, 04/12/2011, 35.

[5] Security Council Resolution 678 (1990) authorized the use of force against Iraq in the aftermath of the Iraqi invasion of Kuwait; *Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*; UN Doc. S/2003/351; in the letter the USA relied almost exclusively on Resolutions 1441 and 678 to legally justify the attack on Iraq, although the necessity to "defend" the USA and the "international community" were also mentioned, albeit in only one sentence; *Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*; UN Doc. S/2003/350; the UK's official justification only mentioned Resolutions 1441, 678, and 687 as the legal basis for the use of force; Gerry Simpson, "The War in Iraq and International Law", Melb. J. Int'l L., Vol. 6, 2005, 167-188, 173-175; Bill Bowring, *The Degradation of the International Legal Order?, The Rehabilitation of Law and the Possibility of Politics*, Abingdon: Routledge-Cavendish, 2008, 62-63.

[6] *The National Security Strategy of the United States of America*, September 2002, 15-16; Hanspeter Neuhold, "Law and Force in International Relations- European and American Positions", ZaöRV, Vol. 64, 2004, 263-279, 274-279; Simpson, "The War", 171-173.

[7] *Dutch Military Mission to Iraq, Conclusions of the Committee of Inquiry on Iraq*, Report, 21/04/2010; articles 18 and 20; available at: http://www.government.nl/dsc?c=getobiect&s=obj&objectid=126735; last accessed 18/11/2011. In a case before the German Federal Administrative Court (the *Bundesverwaltungsgericht),* the court, in 2005, declared that there were "grave doubts" as to the legality, under international law, of the attack on Iraq by the USA and the UK as both governments "could not rely on authorization by the Security Council",

the British governments agreed that Operation *Iraqi Freedom* was incompatible with international law.[8]

Suddenly, the concept of the rule of law in international relations seemed to be seriously under threat. If the USA, after all one of the main architects of modern international law, was prepared to commit such a blatant violation of international law, then surely it no longer felt bound by it. Before the launch of the attack on Iraq, in June 2002, the UK House of Commons *Foreign Affairs Committee* had concluded:

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nor on Article 51. It therefore decided that a German soldier who had been demoted and charged with disobeying orders after refusing to participate in improving a computer program for the AWACS planes (and ordering his subordinates to do the same) had in this instance been within his rights to do so. The planes were supposed to relieve British and American troops in their supervision of Turkish airspace during the Iraq conflict. The soldier had argued that the war on Iraq and any practical support of it were illegal. The court decided that, due to the "grave doubts" as to the war's legality under international law, the soldier had been within his rights when disobeying the order. He could therefore not be charged with the offence of disobeying orders, and had to be reinstated in his old rank (the court stated: "Gegen den am 20. März 2003 von den USA und vom Vereinigten Königreich (UK) begonnenen Krieg gegen den Irak bestanden und bestehen gravierende rechtliche Bedenken im Hinblick auf das Gewaltverbot der UN-Charta und das sonstige geltende Völkerrecht. Für den Krieg konnten sich die Regierungen der USA und des UK weder auf sie ermächtigende Beschlüsse des UN-Sicherheitsrates noch auf das in Art. 51 UN-Charta gewährleistete Selbstverteidigungsrecht stützen"); *Bundesverwaltungsgericht,* Urteil/Judgement, 21/06/2005, *BVerwG 2WD 12.04*; Leading Principle 6; available at: http://www.bverwg.de/media/archive/3059.pdf; accessed 22/11/2011; letter by sixteen leading legal academics in Britain to *The Guardian* on 07/03/2003, 29 ("War would be illegal"); Tom Bingham, *The Rule of Law*, London: Allen Lane, 2010, 122-124; Phillipe Sands, *Lawless World*, London: Penguin Books Ltd., 2006, 174-204, 258-275; Franck, "The Power", 95, 97, 103; Neuhold, "Law", 276-278; Simpson, "The War", 172-178; Bowring, *The Degradation*, 7, 63-64.

[8] Sir Michael Wood, Legal Advisor to the Foreign Office from 2001-2006, giving evidence at the Chilcot Inquiry on January 26, 2010, declared: "I considered that the use of force against Iraq in March 2003 was contrary to international law... In my opinion the use of force had not been authorized by the Security Council, and had no other basis in international law"; see: Iraq Inquiry, Statement by Sir Michael Wood, 5, para. 15; available at: http://www.iraqinquiry.org.uk/media/43477/wood-statement.pdf, last accessed 18/11/2011; the Deputy Legal Advisor to the Foreign Office, Elizabeth Wilmshurst, even resigned from the UK Civil Service, because she believed the Iraq War to be a "crime of aggression", as she explained when giving evidence before the Chilcot Inquiry on January 26, 2010; see: "Lord Goldsmith changed legal view of Iraq War in two months, says adviser", Helen Pidd, Hélène Mulholland, *The Guardian*, 26/01/2010; available at: http://www.guardian.co.uk/uk/2010/jan/26/iraq-war-illegal-chilcot-inquiry; last accessed 18/11/2011; for further details of Elizabeth Wilmshurst's evidence consult the Transcript; available at: http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf; last accessed 18/11/2011; in his Draft Advice of 14/01/2003, the Attorney General, who, of course, later changed his mind, came to the conclusion: "In conclusion therefore, my opinion is that resolution 1441 does not revive the authorisation to use of force contained in resolution 678 in the absence of a further decision by the Security Council"; Attorney General's Draft Advice to Prime Minister, 5; available at: http://www.iraqinquiry.org.uk/media/46493/Goldsmith-draft-advice-14January2003.pdf; last accessed 18/11/2011; similarly, in the USA, the Chairman of the *Defense Policy Board Advisory Committee* (an important advisory body, as far as the US Secretary of Defence is concerned) under the Bush Administration, Richard Perle, declared, during a visit to Britain, that, "in this case international law stood in the way of doing the right thing" as "international law ... would have required us to leave Saddam Hussein alone"; see: "Bush in Britain: War critics astonished as US hawk admits invasion was illegal", Oliver Burkeman, Julian Boger, *The Guardian*, 20/11/2003, 4; and "Iraq Invasion was illegal: US hawk", *Taipei Times* (Taiwan), 21/11/2003; available at: http://www.taipeitimes.com/News/world/print/2003/11/21/2003076682; last accessed 18/11/2011.

> *The impression we obtained from those with whom we discussed the question was that, instead of establishing first whether military action would be legal, the US would act first and then use international law to defend its action retrospectively if it were possible to do so.*[9]

The unrivalled hegemon was obviously no longer prepared to be constrained by lesser nations.[10]

These fears as to the future of international law did not appear out of thin air. Rather, the invasion of Iraq was seen by many as the culmination of a process, by which the USA ever more frequently refused to participate in international treaties,[11] while, at the same time, quite ferocious and sustained attacks on international law were launched by influential academics and civil servants within the United States.[12]

Broadly speaking and without claiming the list to be exhaustive, there seem to be three sometimes divergent, sometimes convergent lines of argument in the USA questioning the role of law in international relations. They range from the more moderate critique offered by Professor Michael Glennon, all the way to John Bolton's denial of the existence of such a thing as international law.

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[9] House of Commons, Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism, Seventh Report of Session 2001-02*, 54-55, para. 221; available at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/384/384.pdf; last accessed 18/11/2011.

[10] Benvenisti has described US attitudes to international law as follows: "... since the end of the Cold War the US Administration has failed to see both moral and strategic reasons for adhering to outsiders' views about international law"; Eyal Benvenisti "The US and the use of force: double-edged hegemony and the management of global emergencies", EJIL, Vol. 15, 2004, 677- 700, 684; Detlev F. Vagts, "Hegemonic International Law", AJIL, Vol. 95, 2001, 843-848; Franck, "The Power", 89; Bowring, *The Degradation*, 39 (quoting David Chandler).

[11] Some of the more prominent examples of US non-participation in international treaties were the Kyoto Protocol and the Rome Statute of the ICC; Nico Krisch, "International law in times of hegemony: unequal power and the shaping of the international legal order", EJIL, Vol. 16, 2005, 369-408, 399; Pal Wrange, "Of Power and Justice", *German Law Journal*, Vol. 4, 2003, 935-962, 941-942, 954; Sands, *Lawless*, 14-15.

[12] Bingham, *The Rule*, 127; Franck, "The Power", 89; Neuhold, "Law", 279; Rüdiger Wolfrum, "American-European Dialogue: Different Perceptions of International Law- Introduction", ZaöRV, Vol. 64, 2004, 255-262, 261; Wade Mansell, Emily Haslam, "John Bolton and the United States' Retreat from International Law", *Social & Legal Studies*, Vol. 14, 2005, 459-485, 481; Wrange, "Of Power", 942-945, 950, 951-953, 956; Sands, *Lawless*, 13-15.

Glennon[13] claims the UN Charter-based rules on the use of force have become inoperable due to desuetude. Because they have, in the past, been violated so often, they no longer reflect the law on the use of force.[14] According to him, the failure of the UN system is due to ignoring realities: a system that does not recognize the power and exceptionalism of the hegemon, currently the USA, is doomed to fail.

The United States' desire to retain its "towering pre-eminence" within the international community[15] meant it would "use", "avoid", or "ignore" the UN Security Council as necessary in order to "maintain a unipolar system".[16] Glennon concludes: "Disagreements over Iraq did not doom the Council. Geopolitical reality doomed the Council."[17]

Any attempt at creating new rules will, according to Glennon, have to acknowledge the USA's power in order to achieve US participation and cooperation. Glennon believes that a "new international legal order must reflect the underlying dynamics of power, culture and security needs."[18] Most importantly, Glennon argues, it was necessary to finally rid international law of such "stale dogmas" as the "just war theory", and from "myths" such as "the notion of sovereign equality".[19] After all, it was "not realistic to expect the United States to permit its power to be 'checked' by that of China or Russia."[20]

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[13] Michael Glennon, a Professor of International Law at the Fletcher School of International Affairs, served as a Consultant to the US Department of State between 2004 and 2007; his profile is available at: http://fletcher.tufts.edu/Fletcher-Directory/Find-Fletcher-People/Faculty%20Profile?personkey=7B7E5873-3A9E-4C26-BF94-6D307379EA2A; accessed 18/11/2011.

[14] Michael J. Glennon, "The UN Security Council in a Unipolar World", Va. J. Int'l L., Vol. 44, 2003-2004, 91-112, 98-100; a more nuanced version of his arguments can be found in "The Rise and Fall of the U.N. Charter's Use of Force Rules", Hastings Int'l & Comp. L. Rev., Vol. 27, 2003-2004, 497-510.

[15] Glennon, "The UN Security Council", 94, 102.

[16] Glennon, "The UN Security Council", 102.

[17] Glennon, "The UN Security Council", 103.

[18] Glennon, "The UN Security Council", 108.

[19] Glennon, "The UN Security Council", 109, 110.

[20] Glennon, "The UN Security Council", 105.

Bolton,[21] on the other hand, disputes the existence of the rule of law in international relations, something he claims to be evidenced by its lack of enforcement.[22] According to Bolton, customary international law is a fiction,[23] and treaties are no more than political promises that can be reneged on when the national interest so demands.[24] Bolton views current international law as mostly an attempt by lesser powers to constrain the USA.[25] His conclusion therefore is:

> *International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.*[26]

John Yoo[27] is somewhere in between. While acknowledging the existence of international law, he argues that it has repeatedly failed the international community.[28] He therefore believes states should revert to "great power politics", which, according to him (and Delahunty), was practised "successfully" in Europe in the second half of the 19th century: [29] "a system of great power politics...would do equally well and

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[21] John Bolton is a lawyer. Under the Bush Administration he served as Undersecretary of State for Arms Control and International Security (2001-2005), and subsequently as US Ambassador to the United Nations (2005-2006); his profile is available at: http://www.aei.org/scholar/121; last accessed 18/11/2011.

[22] John R. Bolton, "Is There Really 'Law' in International Affairs?", Transnat'l L. & Contemp. Probs., Vol. 10, 2000, 1-48, 2-8; Jack L. Goldsmith, Eric A. Posner, *The Limits of International Law*, Oxford: Oxford University Press, 2005, 202; although not as dismissive of international law as Bolton, Goldsmith and Posner seem to concur with Bolton in that they conclude that international law is "politics, but a special kind of politics"; they base this on their observation that international law is "built up out of rational self-interest" of states. Although that point can be conceded, it remains unclear why it should then follow that international law is not law. Any law creation process, whether at the international or domestic level, is based on achieving a concordance of the interests of those creating law and/or those affected by it. Goldsmith's and Posner's assertion is thus applicable to law in general.

[23] Bolton, "Is There", 6-7.

[24] Bolton, "Is There", 4.

[25] Bolton, "Is There", 37-48.

[26] Bolton, "Is There", 48.

[27] John Yoo is a Law Professor. He was at one time General Counsel of the Senate Judiciary Committee (1995-1996) and served in the Department of Justice's Office of Legal Counsel during the Bush Administration (from 2001-2003); his profile is available at: http://www.law.berkeley.edu/phpprograms/faculty/facultyProfile.php?facID=235; last accessed 18/11/2011.

[28] Robert J. Delahunty, John Yoo, "Great Power Security", Chi. J. Int'l L., Vol. 10, 2009-2010, 35-54, esp. 36, 42-46, 53-54.

[29] Delahunty, Yoo, "Great", 36-38, 40, 41, 46-53, 53-54.

probably better at maintaining international peace and security than the current approach."[30]

Some of the arguments outlined above seem far from novel. After all, there had, in the USA, always been a strong current of scepticism as far as international law was concerned.[31] It is therefore hardly surprising that many of the arguments put forward by Glennon, Yoo, Bolton, and others could easily be placed within the realism school of international relations, pioneered, in respect of international law, by Hans Morgenthau.[32]

Morgenthau believed that states basically only acted in furtherance of their "aspirations for power", and would therefore not be bound by international law when that law seemingly conflicted with these "motivating forces in international relations".[33] Only rules that had been developed over a long period of time, and obviously benefitted all states, such as the laws governing diplomatic privileges, could

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[30] Delahunty, Yoo, "Great", 47.

[31] Francis A. Boyle, in an article written in 1980, deplored the influence realist critics of international law had on US foreign policy; "The Irrelevance of International Law: The Schism Between International Law and International Politics", Cal. W. Int'l L. J., Vol. 10, 1980, 193-219, 196-201; Moynihan, *Loyalties*, 66, 77,94; and *On the Law*, 120-177; writing in 1984 and 1990 he echoes these fears; J.S. Watson, "A Realistic Jurisprudence of International Law", *The Year Book of World Affairs*, Vol. 30, 1980, 265-285; reprinted in *International Law*, Martti Koskenniemi (ed.), Aldershot: Dartmouth Publishing Company Ltd., 1992; Watson concluded that international law was in effect no more than "codification of State practice". Its "prescriptive effect" was entirely dependent on the "accuracy" of that codification as it had no "coercive" effect independent of actual state practice. In 1984, the American UN Ambassador, Jeane J. Kirkpatrick, declared that the US could not "permit" itself "to feel bound to unilateral compliance with obligations which do in fact exist under the Charter but are renounced by others"; Jeane J. Kirkpatrick, "Law And Reciprocity", Am. Soc'y Int'l L. Proc., Vol. 78, 1984, 59-68, esp. 67. In 1999 Charles Krauthammer, an influential columnist, declared that "the international arena is a state of nature with no enforcer and no universally recognized norms. Anarchy is kept in check, today as always, not by some hollow bureaucracy on the East River, but by the will and power of the Great Powers, and today, in particular, of the one great superpower."; "A World Imagined", *The New Republic*, 15/03/1999, 26; Martti Koskenniemi, "International Law in Europe: Between Tradition and Renewal", EJIL, Vol. 16, 2005, 113-124, 117; Yasuaki Onuma, "International law in and with international politics: the functions of international law in international society", EJIL, Vol. 14, 2003, 105-139, 112; Mansell, Haslam, "John Bolton", 461.

[32] Boyle, "The Irrelevance", 202-204; China Miéville, *Between Equal Rights, A Marxist Theory of International Law*, Leiden: Brill, 2005, 19-24; Onuma, "International law", 112-113; Wrange, "Of Power", 943-945; Moynihan, *Loyalties*, 74; Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations", in *The Role of Law in International Politics*, Michael Byers (ed.), Oxford: Oxford University Press, 2000, 2009, Chapter 2, 17-34; Mary Ellen O'Connell, *The Power & Purpose of International Law, Insights from the Theory & Practice of Enforcement*, Oxford: Oxford University Press, 2008, 59-60.

[33] Hans J. Morgenthau, "Positivism, Functionalism, And International Law", AJIL, Vol. 34, 1940, 260-284.

achieve the quality of "non-political", and therefore "permanent and stable" law.[34] The bulk of international law, which Morgenthau refers to as "political" international law, was, on the other hand, of "precarious validity", "exposed to continuous change", "uncertain", and indeterminate, as it only expressed "temporary interests" of the states concerned.[35] The failure of the legal system created in the aftermath of the First World War, in his view, proved that the "idealistic assumptions", reflected in a legalistic approach to foreign affairs, and a lack of awareness of the distinction between political and non-political international law, could contribute "nothing to the betterment of international relations."[36]

Some of the arguments put forward by the influential American critics of international law are also reminiscent of Carl Schmitt.[37] Schmitt, seeking to legally justify Nazi Germany's hegemony in Central and Eastern Europe, claimed that any system of international law that did not recognize the exceptional role of the great and powerful states, at least within their region of influence, was unrealistic.[38] Schmitt's arguments, as far as international law based on the *Versailles Peace Treaties* is concerned, are similar to Glennon's in respect of the UN Charter. Schmitt, writing in 1941, also claimed that the League of Nations' "jurisprudence" was bound to fail, as it was based on unrealistic assumptions which had led it to be no more than a "contradictory, fictitious construct".[39] As for a future international legal order, it would have to dispose of the "fiction" of sovereign equality, which was evidently contrary to truth and reality. Instead, international law needed to recognize the Great Powers'

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[34] Morgenthau, "Positivism", 278-279.
[35] Morgenthau, "Positivism", 279-280.
[36] Morgenthau, "Positivism", 264-265, 282-283.
[37] Vagts, "Hegemonic", 845-846; Koskenniemi, "International", 118; Wrange, "Of Power", 958; Koskenniemi, "Carl Schmitt", 17-34; O'Connell, *The Power*, 59.
[38] Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte*, Berlin: Duncker & Humblot, 3rd ed., 2009 (first edition 1941); all translations by the author.
[39] Schmitt, *Völkerrechtliche*, 42.

uniqueness, as only they were the true "upholders" and "creators" of the international legal order.[40]

Bolton's point of view, finally, can be traced back even further. Writing in the early 16th century, Machiavelli had already recommended the following course of action:

> *There are two ways of fighting: either with laws or with force. The first is peculiar to men, the second to beasts. But because the first often does not suffice, one has to resort to the second ... but a wise ruler cannot and should not keep his word when it would be to his disadvantage to do so, and when the reasons that made him give his word have disappeared...Nor does a prince ever lack legitimate pretexts for the fact that he has broken his word. There are countless examples from our times of the many peace treaties and promises that have been rendered null and void through the fickleness of princes.*[41]

It was therefore not so much the novelty of the arguments put forward by these US academics and civil servants, which worried adherents to the rule of law in international relations; it was the critics' position of influence within the Bush Administration which seemed to augur badly for international law.[42]

These worries seemed to be confirmed by the two *National Security Strategies* published by the Bush Administration.[43] While the *National Security Strategy* of September 2002 at least mentioned international law, even if this was coupled with legal arguments of dubious validity,[44] the *National Security Strategy* of March 2006 omitted any reference to "international law", beyond demands that other states, such as Iran, adhere to specific "rules".[45] This attitude seemed to be summed up by

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[40] Schmitt, *Völkerrechtliche*, 51, 54.
[41] Niccolo Machiavelli, *The Prince, A New Translation by Peter Constantine*, London: Vintage Books, 2009, 64-66; *The Prince* was written between 1512 and 1520.
[42] Bingham, *The Rule*, 127; Franck, "The Power", 89, 90; Neuhold, "Law", 279; Mansell, Haslam, "John Bolton", 460, 481; Wrange, "Of Power", 959-960; Sands, *Lawless*, 13-15; O'Connell, *The Power*, 99-100.
[43] Neuhold, "Law", 264; Mansell, Haslam, "John Bolton", 464; Wrange, "Of Power", 936, 941.
[44] *The National Security Strategy of the United States of America*, September 2002, 13-16.
[45] *The National Security Strategy of the United States of America*, March 2006, 18-24.

President George W. Bush in his 2004 *State of the Union Address*: "America will never seek a permission slip to defend the security of our country."[46]

The War on Iraq in 2003 therefore was for many a manifestation of the USA's growing disdain for, and at least partial abandonment of international law, in turn aggravated by the support offered to the USA by close allies, such as the UK and Australia. The USA, as the most powerful state in the world, would obviously no longer be restrained by international law in the pursuit of its national interest.

This pessimistic outlook implies two assumptions: firstly, that the "Great Powers", prior to President George W. Bush and the Iraq War, had a much better record of adhering to international law when intervening elsewhere, especially in the Middle East; and, secondly, that the "national interest" of the powerful will by definition often be in conflict with international law.

This thesis will argue and demonstrate that both assumptions are incorrect. In blind pursuit of their national interest, the "Great Powers" of the day have regularly and demonstrably violated rules of international law when intervening elsewhere, certainly in the Middle East. This conclusion ties in with some similar studies on the Middle East and with post-colonial or Third-World approaches to international law in general.[47] The analysis in this dissertation differs from such approaches in that it emphasizes the violation of international law by the Great Powers, instead of blaming international law for legitimizing "plunder".[48]

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[46] President George W. Bush, *State of the Union Address* 2004, delivered January 20, 2004; available at: http://www.americanrhetoric.com/speeches/stateoftheunion2004.htm; last accessed 18/11/2011.

[47] Jean Allain, *International Law in the Middle East, Closer to Power than Justice*, Aldershot: Ashgate Publishing Ltd., 2004; B.S. Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach", Melb. J. Int'l L., Vol. 8, 2007, 499-515; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005; Ugo Mattei, Laura Nader, *Plunder, When the Rule of Law is Illegal*, Malden/Oxford: Blackwell Publishing Ltd., 2008.

[48] For the other approach, see, for example: Mattei, Nader, *Plunder*, esp. 10-34, 137-144.

By analysing key events in the Middle East this dissertation will then offer a defence of international law. This thesis is obviously based on the assumption that international law exists and is law.[49] Bolton's arguments are therefore explicitly and implicitly repudiated throughout the thesis. This has a number of justifications: there is no state practice in support of Bolton's arguments, because not one state has declared that there is no such thing as international law;[50] state practice actually evidences the contrary, as governments have unfailingly gone to great lengths to legally justify even the indefensible, and employ many legal advisors to advise them on international law;[51] and it could be argued that international relations are,

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[49] Bingham, *The Rule*, 110-111; Wolfrum, "American-European", 256; Miéville, *Between*, 15-19; Moynihan, *Loyalties*, 83.

[50] Franck, "The Power", 92, 96; Onuma, "International law", 116, 122; Mansell, Haslam, "John Bolton", 470; Oscar Schachter, *International Law in Theory and Practice*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991, 11; O'Connell, *The Power*, 3; Miéville, *Between*, 19; as Miéville, referring to Austin's work, points out those denying the existence of international *law* fail to explain why "positive morality" (Austin's view of international law) should "masquerade as law", and why states in practice revert to the "legal form" if there is no law in international relations.

[51] British government ministers are required "to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life"; Ministerial Code, Cabinet Office, May 2010, para. 1.2; available at: http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf; last accessed 18/11/2011; in Article 25 (which is entitled "Primacy of International Law") the German constitution (the so-called "*Grundgesetz*" or "*Basic Law*") states: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." [translation by Professor Christian Tomushat and Professor David P. Currie for the German Parliament, the *Bundestag*; available at: https://www.btg-bestellservice.de/pdf/80201000.pdf; accessed 28/11/2011]; the European Union, in its *European Security Strategy* of December 2003, declared: "We are committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter.", *A Secure Europe in a better world*, 14; available at: http://www.iss.europa.eu/uploads/media/solanae.pdf; last accessed 18/11/2011; the US Constitution authorizes Congress "to define and punish...Offences against the Law of Nations" (Article I, Section 8); it also declares (emphasis by author): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" (Article VI); Daniel Patrick Moynihan repeatedly refers to this obligation under the American Constitution, see: "On the Occasion of Receiving the Wolfgang Friedman Award: A World Regained?", Colum. J. Transnat'l L., Vol. 29, 1991, 555-561, esp. at 556; and *On the Law*, 7, 173-174; Franck, "The Power", 96; he states: "A brief examination of the history of interstatal behaviour since World War II and up to the 2003 invasion of Iraq quickly demonstrates not only that states never challenged the legitimacy of the law they were violating, but even at the risk of failing the laugh test, insisted that they were acting in full compliance with it."; a very similar point is made by O'Connell in relation to the so-called "torture memos" prepared during President Bush Junior's presidency: "This definition and much of the analysis in the memos seriously misconstrue international law and, as a result, supplied badly flawed advice. Nevertheless, the memos are also evidence of the extraordinary lengths to which the Bush administration's legal team believed they needed to go to evade international law. They did not simply ignore international law; they attempted to circumvent it. Their memos at least succeed in demonstrating that international law has power even for the sole remaining superpower." (*The Power*, 1; see also at 114, 169); Krisch, "International law", 374; Onuma,

diametrically opposed to what Bolton argues, becoming ever more "legalized", with an increasing number of international tribunals being created, and ever more treaties being negotiated.[52]

Bolton's argument that international law cannot be law due to its lack of enforcement is similarly unconvincing: as D'Amato has explained, that same argument could be applied to many areas of domestic constitutional law, as well as to all cases where an individual sues the government. After all, domestic courts, finally, cannot force the government to comply with their decisions.[53] Furthermore, many areas of criminal law, such as the rules on theft or tax evasion, suffer from a severe lack of enforcement in most states, but nobody would seriously question the legal status of the rule prohibiting both activities.[54]

Furthermore, Bolton ignores the sanctions that can be and are imposed on violators of international law, such as loss of reputation and diplomatic isolation, trade sanctions and, in extreme cases, even war, as seen in the international community's reaction to

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"International law", 112-113, 125-126, 128; Schachter, *International Law*, 6-7; Arthur Watts, "The Importance of International Law" in *The Role of Law in International Politics*, Michael Byers (ed.), Oxford: Oxford University Press, 2000, 2009, Chapter 1, 5-16, 7; Louis Henkin, *How Nations Behave, Law and Foreign Policy*, 2nd ed., New York: Council on Foreign Relations, 1979, 65; Wolfrum, "American-European", 256; Wolfrum sees US and British attempts at legal justification of the Iraq War in 2003 as evidence of this.

[52] Douglas Hurd, *The Search for Peace, A Century of Peace Diplomacy*, London: Little, Brown and Company, 1997, 4-5;Wolfrum, "American-European", 256-257; O'Connell, *The Power*, 13-14; O'Connell, in fact, argues that the increasing legalization of international relations is precisely the reason for this "new attempt to undermine the authority of international law."; Mansell, Haslam, "John Bolton", 474; Krisch, "International law", 370; Watts, "The Importance", 6-7, 13; Bingham, *The Rule*, 113-114, 128-129; he views compliance with international law as a "sheer necessity" for even the most powerful states in the face of the many serious global problems; Michael Byers; "War, law, and geopolitical change", Int'l J., Vol. 61, 2005-2006, 201-213; he makes the same point, particularly in relation to actual US practice, even under the Bush Administration. He, for example, refers to the US reliance on international treaties in the global fight against terrorism; China Miéville, "Anxiety and the Sidekick State: British International Law After Iraq", Harv. Int'l L. J., Vol. 46, 2005, 441-458; Miéville analyses the way international law is regarded in Britain in the aftermath of the Iraq War in 2003. According to him, everybody still claims to be a firm adherent to international law. He therefore concludes that international law theory "is wrestling not with the usual issue of law being ignored, but with law's missionary application" by "imperialist power" and those fighting against it.

[53] Anthony D'Amato, "Is International Law Really 'Law'?", *North Western University Law Review*, Vol. 79, 1984-1985, 1293-1314, esp. at 1293-1301; reprinted in *International Law*, Martti Koskenniemi (ed.), Aldershot: Dartmouth Publishing Company Ltd., 1992.

[54] O'Connell, *The Power*, 8; Franck, "The Power", 92-93; Mansell, Haslam, "John Bolton", 470.

the Iraqi attack on Kuwait in 1990-1991.[55] Oscar Schachter has observed in this regard: "Violations, in short, are rarely cost-free even to powerful states."[56]

Lastly, as Lord Bingham has explained, international law has become so entwined with domestic law in many areas that it must be concluded that "the interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other."[57] This development is, of course, precisely what Bolton, believing in the United States' all-encompassing superiority, is worried about.[58]

As far as the interpretation of the rules of international law is concerned, a rigorous approach will be adopted in this thesis in order to demonstrate that it is too simple to argue that international law merely serves to justify and legitimate the actions of the powerful. It will be argued here that it is a misunderstanding to assume that the rules of international law are in any way less determinate than other rules of law.[59] As

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[55] Onuma, "International law", 119, 128, 137; Mansell, Haslam, "John Bolton", 470-471; Schachter, *International Law*, 7-8; Moynihan, *Loyalties*, 64; Henkin, *How*, 54-56, 58-60; O'Connell, *The Power*, 9-13, 76-77, 153-155.

[56] Schachter, *International Law*, 7; that violations of international law can have negative consequences, even for the USA, is confirmed by the former US Secretary of State, Condoleezza Rice, in her memoirs. She explains: "Yet early in my tenure as secretary of state it became increasingly clear that those policies [on detainees] were creating their own security challenges. Diplomatic relations with our allies, particularly the Europeans, were increasingly strained by the mistaken perception that the United States' detention and interrogation policies operated outside the bounds of international law. Given the transnational nature of the threats, we depended heavily on our allies' cooperation in intelligence gathering and battlefield operations. Even our closest ally, the United Kingdom, had expressed deep misgivings over the continued detention without trial of four British nationals in Guantánamo." (*No Higher Honour, A Memoir of My Years in Washington*, London: Simon & Schuster, 2011, at 497).

[57] Bingham, *The Rule*, 119; Chimni, "The Past", 509-510; D'Amato, "Is International", 1303-1313.

[58] Bolton, "Is There", 26-37; and "Should We Take Global Governance Seriously?", Chi. J. Int'l L., Vol. 1, 2000, 205-221; that fear is shared by many other US academics, such as Paul B. Stephan; see: "International Governance and American Democracy", Chi. J. Int'l L., Vol. 1, 2000, 237-256; O'Connell, *The Power*, 14; she shares the view that the increasingly "wide acceptance" of international law is at the root of the "new attempt to undermine international law."

[59] Franck, "The Power", 94-95, 105; Onuma, "International law", 131-132; Bowring, *The Degradation*, 41-42 (referring to the UN Charter); Henkin, *How*, 41, 320.

Chimni has indicated, international law's content is nearly always determinate.[60]

Referring to the McDougal-Laswell approach to international law, he states:

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[60] B. S. Chimni, *International Law and World Order, A Critique of Contemporary Approaches,* New Delhi: Sage Publications, 1993, 102-105, 143-145, 271-273; Bowring, *The Degradation*, 41-42 (referring to the UN Charter); see also: Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford: Oxford University Press, 2008; Orakhelashvili's impressive work on interpretation is "based on the premise of the effectiveness and determinacy of international legal regulation" (at 1).- For the contrary view, see, for example: Martti Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument*, Cambridge: Cambridge University Press, 1989 (re-issued 2005). Koskenniemi believes that international law's content is basically indeterminate. He views this as the unavoidable consequence of the fact that international law cannot retain "its independence *vis-à-vis* international politics" (at 17). This is due, he argues, to the fact that international law intends to be both "concrete" (i.e., related to actual state practice) and "normative" (i.e., maintaining a distance between the law and states' "behaviour, will or interest"). Koskenniemi believes that these two concepts are basically irreconcilable, which, in turn, means that international law veers between them: if international law becomes too "concrete" it risks becoming no more than a "non-normative apology" for states' behaviour; if, on the other hand, international law became too distant from actual state practice it "would seem utopian, incapable of demonstrating its own content in any reliable way". The attempts by international lawyers to overcome this deficiency by employing "descending and ascending patterns of justification" in international legal argument must, in his view, fail. Again Koskenniemi views these two patterns of justification as irreconcilable: the "descending" view relying on a "normative code which precedes the State and effectively dictates" its behaviour, the "ascending" view believing that "factual state behaviour, will and interest" are the basis of "the normative order" (at 58-70). Based on these irreconcilable contradictions, Koskenniemi therefore believes that "international law is singularly useless as a means for justifying or criticizing international behaviour" as it is always both "over- and underlegitimizing" (at 67). He concludes that there are always at least two plausible solutions to any "normative problem" in international law, and that the choice between them is down to political preferences. Therefore the "argumentative structure" employed by, for example, the ICJ is "there only to avoid openly political rhetoric" (at 68). Consequently, international lawyers should, in his view, reject the "idea that law is different from politics by being more 'objective'" and should "take a stand on political issues" (at 69, 533-561, 615-617).

For a critical appraisal of Koskenniemi's views, see: Iain Scobbie, "Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism", BYIL, Vol. 61, 1990, 339-362, 339-352 (a review of the 1989 version of Koskenniemi's book).

Koskenniemi's views are not confirmed by state practice. Only rarely have states claimed that the law -in a specific area- is indeterminate. Rather, they tend to insist that their interpretation of a specific rule is the correct, determinate one (Chimni, *International Law*, 48-49, 144-145). If states are thus, as Koskenniemi implies, "living in an illusion" (at 535), it begs the question why they should want to do so.
Koskenniemi also fails to demonstrate that there are many instances of *genuine* disagreement between states as to the interpretation of international law, surely a major pillar of any indeterminacy argument. As this thesis will show, the overwhelming majority of states in fact seem to regularly agree on a specific interpretation of a specific rule, a phenomenon hardly reconcilable with indeterminacy. Many of the disputes arising in international law are not a result of differing interpretations of the applicable rule, but of the facts. Koskenniemi seeks to circumvent that problem by arguing that even if only *one* state disagreed with the majority view, the majority view could only be enforced in respect of that state by violating the principle of sovereign equality. He, however, does not examine whether that hypothetical state genuinely disagrees with the majority view, something he claims we never know. As will be shown in the case studies examined here, the violators of international law have in fact themselves invariably come to the conclusion that their conduct was -at best- of dubious legality. The -in Koskenniemi's view- "plausible" counter-arguments put forward by these states were thus not genuinely viewed as such even by them. It must follow that if even the perceived violator -unofficially- agrees with the interpretation seen as correct by other states, then the problem becomes one of enforcement, and is not one of indeterminacy. Furthermore, as Scobbie ("Towards", at 351) has pointed out, a violation of the principle of sovereign equality by preferring one state's interpretation over another seems very doubtful, as a state participating in a legal dispute (for example, before the ICJ) will presumably have agreed to abide by the rules inherent to participation. As Chimini has therefore correctly concluded, it "is erroneous to conclude that a rule loses all restraining power when faced with pseudo interpretations" as, in a "decentralised society", "auto-

> *This explicitly political, ... standpoint would have had much to recommend if only it was true that international legal rules are indeterminate. But this turns out to be a pseudo-allegation....While it is true that rules cannot uniquely determine specific facts and that an element of uncertainty will always prevail in marginal cases, it is important to remember that it has not always been the marginal (as opposed to paradigm) cases which have posed problems of interpretation in international legal history.*[61]

Henkin came to a similar conclusion:

> *It* [a state's government] *knows that ordinarily nations will judge and react to its actions in the light of the law as it is deemed to be now. A government may sometimes seek escape from the law as it is, but it recognizes that in most instances there is no escape, and it, in turn, will deny escape to others. From its perspective, uncertainties of law are occasional and peripheral, change is small and slow and often to be resisted.*[62]

A *correct* interpretation of the rules found in treaties, customary international law, and other sources of international law can be ascertained in the overwhelming number of cases,[63] a fact which must also be the rationale behind the rules of interpretation

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interpretation is matched with auto-judgement", with "power and interest implications for the state advancing them" (Chimni, *International Law*, 57-58).
Koskenniemi's views also seem circular, in that he claims that international law's content as a whole is indeterminate as every "normative problem" has at least two *prima facie* plausible solutions (at 27). He, however, ignores the many cases when there is no disagreement on interpretation between the states involved, beyond the assertion that it was "doubtful" that "hard cases" were "few and easily distinguishable" (at 43). But an analysis that claims that international law as a whole is indeterminate cannot simply ignore those cases without enquiring why they exist. Based on his views it also remains unclear why he singles out international law as *the* "indeterminate" area of the law. Many of the issues raised by Koskenniemi are certainly reminiscent of discussions in constitutional or administrative law in the domestic sphere. The main difference seems to be that the interpretative "solution" to a "normative problem" preferred by a domestic court in those areas of the law will, of course, usually be subject to enforcement -the relative lack of which in international law is generally acknowledged, but unrelated.
Lastly, Koskenniemi's solution to the dilemma he sees, by asking international lawyers to acknowledge international law's lack of distinction from politics and to take a political stand, is in truth no solution at all. It remains unclear what should be gained by adding another layer of political discussion, this time conducted by lawyers who have no natural knowledge of or affinity to the area. As far as "government lawyers" are concerned, it remains a mystery why it should be legitimate for two government lawyers (usually unelected civil servants) to attempt to solve their states' "legal" disputes by advancing their personal political goals. And, lastly, the proposition is also unrealistic, as only few lawyers will be able to advance their personal political views irrespective of their clients' wishes (be they private or governmental).

[61] Chimni, *International Law*, 144.
[62] Henkin, *How*, 39-45, 67, (quote at 41).
[63] Chimni, *International Law*, 102-105,143-145, 271-273; Onuma, "International law", 131-132; Henkin, *How*, 41, 320; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford: Oxford University Press, 2008; Orakhelasvili argues that the "consensual nature" of international law necessitates "an approach" to interpretation based on "the effectiveness of legal regulation". By adopting a stringent method of interpretation it is possible, he argues, to "provide for transparency, predictability and consistency of international legal regulation" (at 3). He subsequently goes beyond explaining rules of interpretation in respect of customary international or treaty law, to demonstrate "the feasibility of applying the

codified in the *Vienna Convention on the Law of Treaties,*[64] and behind Article 38 of the *Statute of the International Court of Justice,* which enumerates the sources the ICJ must consider when interpreting the applicable rules in reference to a particular case.

The fact that an academic or a government argues in favour of a particular interpretation of the law, does not automatically make that point of view genuinely "arguable". Differing interpretations of the law are much more frequently due to political considerations on the part of the government or the political view of the academic writing than to "grey areas" of the law which are probably much rarer than commonly assumed.[65] As Chimni concludes in respect of the differing interpretations of Articles 2 (4) and 51 UN Charter put forward during the Cuba quarantine and the Vietnam War:

> *the problem was not that the rules were not determinate vis-à-vis the factual situations but rather the assertion that only that sense was determinate which secured the ends...the free world should defend.*[66]

As will be shown in this thesis, the assertion that it is most often politics, and not the indeterminate nature of international law that is the origin of divergent, allegedly "arguable" interpretations of international law is evidenced by two recurring phenomena:

Firstly. in the great majority of cases there is a surprisingly large consensus on what is to be viewed as legal or illegal under international law.[67] Leaving aside the admittedly

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principles of interpretation" (at 4-5) even to what he refers to as "non-law" (at 1) -such as the phrase "threat to the peace" in Article 39 UN Charter (at 540-547).

[64] The rules of interpretation are laid down in Articles 31-33; the *Vienna Convention on the Law of Treaties* had, by December 2011, been ratified by 111 states. Many of those states that have not ratified the treaty, such as the USA, accept the rules as being reflective of customary international law and therefore binding on them (as far as the United States' position is concerned, see: U.S. Department of State, "Vienna Convention on the Law of Treaties", available at: http://www.state.gov/s/l/treaty/faqs/70139.htm; accessed 04/12/2011).

[65] Chimni, *International Law,* 143-145; Onuma, "International law", 131-132.

[66] Chimni, *International Law,* 143-145.

powerful and very influential voices emitting from the United States,[68] the vast majority of states, covering every continent, regularly come to the same conclusions as to the legality or illegality of specific conduct under international law.[69] If international law were as indeterminate as is often claimed that could not be easily explained, because the allegedly indeterminate nature of international law would normally necessitate a much larger spectrum of differing views to emerge.

Secondly, despite some academics vehemently making the case in favour of the legality of their respective government's actions, thereby probably hoping to make that point of view "arguable", in nearly all the cases examined here, the legal advisors to, and sometimes even government ministers within the government concerned, privately came to the conclusion that their government's actions were most likely illegal or of doubtful legality. This, too, seems to prove that many allegedly "arguable" interpretations of international law were not seen as such even by the actors responsible for the actions thus justified.

Having subjected the interventions in the Middle East analysed here to a legal analysis based on the assertion that the content of international law can be determined quite precisely in the vast majority of cases, it will be concluded that none of the examined "Great Power" interventions in the region were compatible with international law.

This analysis does, however, not exhaust the thesis's scope. It goes beyond the traditional analyses of international law in the Middle East by laying out the

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[67] Franck, in fact, argues that the international community's reaction to the Iraq War in 2003 "demonstrates most states' continued reliance on Charter rules, conduct that does not conduce any theory of their obsolescence or delegitimation" ("The Power", 95).

[68] Benvenisti has described US attitudes to international law as follows: "... since the end of the Cold War the US Administration has failed to see both moral and strategic reasons for adhering to outsiders' views about international law" ("The US", 684).

[69] In fact, even the violators of international law often claim to adhere to the same interpretation of international law, and instead attempt to manipulate the facts so that they are in accord with that interpretation; Franck, "The Power", 90, 96.

respective intervenor's reasons for intervention and then comparing these aims with the results achieved in each event examined here. Despite putting international law to one side in the "national interest", the "Great Powers" could not once have been considered successful in their illegal ventures. This furthers the argument that is to be made, namely that respecting international law is in the national interest of all states, even the powerful. [70]

This thesis will not, however, attempt a counter-factual historical analysis. It will therefore not be argued that the powerful would have been more successful in achieving their goals had they respected the rules of international law. The case studies undertaken will merely demonstrate that the objectives sought by the powerful were not realised, thus allowing the tentative conclusion that many lives could have been spared, a lot of money saved, and international reputations maintained, had a legal course of action been followed. In most cases illegality simply does not bring benefit.

The history of illegal interventions in the Middle East since WW I is not a happy one but does allow for some optimism. After all, the repeated failure by the Great Powers to obtain their objectives by illegal means enables the conclusion that respect for international law is closely aligned to every state's national interest because it ultimately reflects common sense. [71] The Deputy Legal Advisor to the UK Foreign Office at the time of the Iraq War came to the same conclusion; when giving evidence at the Chilcot Inquiry in 2010, she declared: "Certainly that was the lesson I draw

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[70] Bingham, *The Rule*, 112; Moynihan, *Loyalties*, 67, 94, 96; and *On the Law*, 149, 176-177; Franck, "The Power", 93; Krisch, "International law", 375; Onuma, "International law", 138; Watts, "The Importance", 7; John Quigley, "International Law Violations by the United States in the Middle East as a Factor behind Anti-American Terrorism", U. Pitt. L. Rev., Vol. 63, 2001-2002, 815-835; Henkin, *How*, 29; Chalmers Johnson, *Blowback, The Costs and Consequences of American Empi*re, New York: Owl Books, 2000, 2004.

[71] Franck, "The Power", 92; Benvenisti, "The US", 687; Benvenisti concurs as far as what he refers to as "the old law" during the Cold War is concerned (he, however, goes on to argue that a "new law" was now needed to meet new challenges).

from Suez: that it is in the UK's interest to keep within international law and within the UN Charter."[72]

This is not a coincidence. The rules of international law are mainly to be found in treaties and customary international law. Both are created by states that presumably -if the traditional "realists" are correct- were pursuing their national interest when doing so.[73] That is the point Henkin makes, when he states that

> *whether a nation desires more law or less and whether it will desire some new law or agreement are also questions of foreign policy, and nations accept or refuse new law ...in terms of their national interest as they see it.*[74]

International law, as it has developed in the last 100 or so years, is the result of experiences, history, and state practice often going back for many centuries, in some cases even millennia.[75] In effect, international law is the result of an evaluation of what does work, and what does not work in the relations between states.[76] It is simply

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[72] Elizabeth Wilmshurst, giving evidence at the Iraq Inquiry on January 26, 2010, Transcript, 10; available at: http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf, last accessed 18/11/2011.

[73] Henkin, *How*, 30, 32, 35-37; Daniel Patrick Moynihan, "International Law & International Order", Syracuse J. Int'l L. & Com., Vol. 11, 1984, 1-8, 2; he points out that there was no alternative to Wilson's idea of submitting "to law" in international relations after WW I. Moynihan concludes that the USA was "losing" its "understanding of the realism of Wilson's thought"; Miéville, *Between*, 20-21; he makes the point that Wilson's Fourteen Points of January 1918 were far from utopian, but actually "a weapon of realpolitik". By appealing to nationalism it was hoped that the possible popular appeal of Russia's Revolution in 1917 could be counter-acted. He quotes Wilson's Secretary of State Lancing as stating that the Fourteen Points served to create "a zone of small nation-states to form a sort of quarantine belt against the Red virus." ; Onuma, "International law", 116-117; Schachter, *International Law*, 24; Moynihan, *Loyalties*, 67; Goldsmith, Posner, *The Limits*, 3, 7-10, 202; they then, however, go on to use this assertion to justify their conclusion that international law is only "a special kind of politics". According to them it follows that international law remains binding only as long as adherence to it is the "rational choice" of the state concerned. This is unconvincing. Without providing any evidence for this, the authors imply that states' "rational choices" will frequently lead to violations of international law. The vast number of instances, when international law is adhered to by virtually every state on a daily basis, seems to evidence the opposite conclusion. Furthermore, Goldsmith and Posner undermine their argument by stating that violations of international law should not be automatically condemned but judged on whether the violation is "likely to change international law for the better from a moral perspective" (at 198-199). This argument seems far removed from the "rational choice" argument. It also remains the authors' secret how such "morally better" international law is to be assessed in a community of states making "rational choices". Lastly, their argument that international law lacked moral authority in comparison to domestic law due to the latter's "democratic pedigree" (at 199) seems to ignore the fact that a minority of states can be described as "democratic" in any sense of the word, and that nevertheless all states seem to have a domestic legal order. Also, any attempted definition of the term "democratic" in that context, which the authors tellingly avoid providing, would almost certainly be highly controversial.

[74] Henkin, *How*, 30.

[75] Moynihan, *On the Law*, 15-79; Schachter, *International Law*, 6; Henkin, *How*, 30.

[76] Schachter, *International Law*, 30-31; Moynihan, *Loyalties*, 67; Henkin, *How*, 28-38.

incorrect to assume that international law, as it has developed since the early 20th century, is a product of dreamers and utopians.

As far as treaty law is concerned that seems obvious. States employ many legal advisors in order to negotiate treaties. Negotiations can go on for many years, followed in many states by internal scrutiny in the respective legislatures.[77] Of course, states sometimes get the necessary assessments wrong, but the assumption that treaties come about without each state, whether powerful or weak, weighing the advantages and disadvantages of treaty norms, is itself unrealistic.[78]

It must also be stressed that the lawyers and civil servants, who have negotiated treaties in the last 100 years, have often done so in the aftermath of catastrophes that shook, and in some cases, shattered their worlds.[79] It is therefore difficult to believe that, for example, the negotiators of the UN Charter, hardened by two World Wars, were living in utopia.[80]

This is evidenced by the fact that none of the supposedly novel constellations of events in the modern world, which international law is allegedly unable to deal with,[81] are in fact truly novel.[82] As early as 1877 Russia claimed to be acting for humanitarian reasons when intervening in the Ottoman Empire.[83] Following a wave of anarchist terrorist attacks across Europe and in the USA, nine European states, in

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[77] Krisch, "International law", 380; Onuma, "International law", 112-113, 125-126.
[78] Onuma, "International law", 112-113, 116, 124.
[79] Onuma, "International law", 134; Watts, "The Importance", 10; Moynihan, *Loyalties*, 69-72; and *On the Law*, 15-79.
[80] Neuhold, "Law", 266-267; Watts, "The Importance", 10; Moynihan, *Loyalties*, 69-7; and *On the Law*, 15-79.
[81] Benvenisti, "The US", 684, 687-690, 696-697; Neuhold, "Law", 265; Simpson, "The War", 179, 180.
[82] Franck, "The Power", 89-90; Franck points out that many of the US sceptics prefer not to argue in an openly hegemonic fashion, as far as international law is concerned, but instead rely on the argument that international law has become "antiquated"; Simpson, "The War", 179-180.
[83] Koskenniemi, "International", 114, 123-124; the Russians claimed to be intervening on behalf of the Orthodox Christians within the Ottoman Empire after apparent Ottoman massacres of Bulgarian Christians, and brutal Ottoman suppression of Serbian and Bulgarian revolts against Ottoman rule.

1904, concluded a secret treaty on combating anarchist terrorism.[84] In 1934 the League of Nations felt compelled to remind states of their obligation to prevent terrorist acts in other states being carried out from their territory.[85] Spain, during its civil war from 1936-1939, saw strife surely comparable to the former Yugoslavia, or to many African states since the end of WW II. And, having experienced Nazi Germany, the drafters of the UN Charter were most certainly aware of what a "rogue" state was.

The reason these constellations of events have not been dealt with in a way many commentators critical of international law deem satisfactory, is therefore most likely neither due to utopian dreams, nor to ignorance.[86] It is most likely due to the fact that, having experienced all these upheavals, the negotiators of many of the international treaties concluded in the aftermath of the two World Wars were realistic about what outside intervention, and the use of force could actually achieve.[87]

Despite not being the result of long and arduous negotiations, a similar argument can be made in respect of customary international law. Before a rule is recognized as a

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[84] *Protocole concernant les mesures de représailles contre le mouvement anarchiste*, signed at St. Petersburg on March 14, 1904; Russia, Romania, Serbia, Bulgaria, the Ottoman Empire, Austria-Hungray, Germany, Denmark and Sweden-Norway were signatories; Portugal and Spain joined shortly afterwards, and Luxemburg subsequently concluded a similar treaty with Germany and Russia; for more information, see also: Richard Bach Jensen, "The International Anti-Anarchist Conference of 1898 and the Origins of Interpol", *Journal of Contemporary History*, Vol. 16, 1981, 323-347; "The International Campaign Against Anarchist Terrorism, 1880-1930s", *Terrorism and Political Violence*, Vol. 21, 2009, 89-109; Sven Reichardt, "Die verdorbenen Burschen wollen von sich reden machen und finden auch noch ein Echo", *Frankfurter Allgemeine Zeitung*, 07/09/2011, N 3.

[85] Resolution of the League of Nations Council, Sixth Meeting (Public), December 10, 1934; League of Nations O. J., Vol. 15, 1934, 1758-1760, 1758-1759.

[86] Boyle, "The Irrelevance", 195; he approvingly quotes Professor Harold Berman (Harvard) as follows: "Anyone who can become a senior partner at Covington & Burling must *a foritiori* be a superb realist"; Boyle argues that it seems far-fetched to accuse lawyers -of all people-, who serve as legal advisors to their respective governments, of being utopian.

[87] Koskenniemi, based on his own experience, offers a convincing description of a government lawyer's duties: "For politicians every situation was new, exceptional crisis. The lawyer's task was to link it to what happened previously, a case, a precedent, tell it as part of a history. The point of the law was to detach the particular from its particularity by linking it with narratives in which it received a generalized meaning, and the politician could see what to do with it" ("International", 120); Neuhold, "Law", 266-267; Moynihan, *On the Law*, 15-79.

part of customary international law state practice and *opinio juris* must be present.[88] Although there are controversies as to the extent of state practice necessary, and the way *opinio juris* is expressed, customary international law can only come into being when at least those states, whose interests are most affected by the new rule, do not object to its creation.[89] Thus it is guaranteed that, before a rule becomes customary law, at least those states most affected will consider whether the rule's benefits outweigh its disadvantages.[90]

Nevertheless, the thesis does not attempt to make a statist case for international law. Obviously times change and that may require adjustments in the law. Doing so is a wearisome process, but following through with it ensures that a result emerges that reflects a realistic solution given the world climate prevailing.[91] The great weakness in Bolton's, Glennon's, and Yoo's arguments is that they provide no alternative to the current rule of law, besides returning to a pre- WW I state of affairs, which demonstrably failed spectacularly.[92] All they therefore really offer, in Franck's words, is "fantasy realism, at best".[93]

Given the law creation process in international law, it is therefore not that surprising that states ignoring it will do so at their peril. It is for that reason that Professor Bowring is absolutely right when he claims that a "realist case" for international law can be made,[94] as is O'Connell, when she claims that Henkin, a vigorous defender of

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[88] Article 38 (1) (b) *Statute of the International Court of Justice*; see also: ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement, 27/06/1986, I.C.J. Rep. 1986, 14, para. 186.
[89] *International Court of Justice*, *The North Continental Shelf Cases*, Federal Republic of Germany v. Denmark and the Netherlands, Judgement, 20/02/1969, I.C.J. Rep. 1969, 3, paras. 73-74; Krisch, "International law", 380; Schachter, *International Law*, 11-12; Henkin, *How*, 29, 33-35.
[90] Henkin, *How*, 29, 33-35.
[91] Franck, "The Power", 105; Krisch, "International law", 378, 380; Henkin, *How*, 41.
[92] Franck, "The Power", 92; Krisch, "International law", 377; Simpson, "The War", 182; Watts, "The Importance", 7; Watts, "The Importance", 15-16.
[93] Franck, "The Power", 103; Henkin, *How*, 4.
[94] Bowring, *The Degradation*, 64, 208; Franck, "The Power", 92, 93, 103, 106.

international law's role in international relations, "offered a more realistic picture of international life than the realists."[95]

The War on Iraq in 2003 thus does not serve as a worrisome precedent for future illegal endeavours in the region by the powerful. Rather, Operation *Iraqi Freedom* is only the latest episode of illegal interventions carried out by the powerful and their allies and rewarded with failure.[96] The rule of law in international relations is therefore not only, as is often argued, in the long-term interest of the powerful based on the danger of losing power at some point in the future,[97] but also, as Moynihan has pointed out, a good advisor in the short and medium term.[98]

As has already been mentioned, the thesis, in order to make this argument, examines key events in the Middle East, as to the legality of the respective "Great Power" intervention, and the success of that intervention in relation to the intervenor's objectives. The wider Middle East was chosen for this research because it has remained a volatile and unstable region since the end of the First World War. At the same time, for strategic reasons, the region has become increasingly important in world affairs. Not only are its resources, in particular, of course, its oil reserves, of vital importance to the economies of many of the most powerful states in the world, but many essential routes of transport, such as the Suez Canal, are situated there.

This has in turn meant that the attention of the powerful states has constantly been focused on the region since the end of WW I, which has resulted in many instances of intervention in the affairs of the individual states of the area, not only of a military

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[95] O'Connell, *The Power*, 61.
[96] Quigley, "International Law", 815-835; Allain, *International Law*, esp. at 2-12, 274-275.
[97] Bingham, *The Rule*, 112; Franck, "The Power", 93; Krisch, "International law", 375; Onuma, "International law", 138; Michael Byers, "International Law and the American National Interest", Chi. J. Int'l L., Vol. 1, 2000, 257-261; Watts, "The Importance", 7; Moynihan, *On the Law*, 148-150, 176-177; Henkin, *How*, 29, 31.
[98] Moynihan, *Loyalties*, 94, 96; and *On the Law*, 117-119; Bingham, *The Rule*, 113-115; Schachter, *International Law*, 7-9.

kind. International law's role has been controversial, with Allain, among others, concluding that international law, as applied in the Middle East, was "closer to power than justice".[99] Nonetheless, the powerful states have seemingly had enormous difficulties in imposing their solutions to the problems in the region, thus creating ever more conflicts, potentially necessitating ever more interventions.

In order to be able to conduct the relevant research exhaustively, it was necessary to select specific events among the many that have occurred in the Middle East. "Great Power" interventions in Palestine, Egypt and Afghanistan were chosen for analysis.

They have been selected because they arguably represent "watershed" moments in the Middle East. The developments in Palestine between 1917 and 1948, leading to the creation of the State of Israel, are suitable to allow an examination of the implementation of US President Wilson's Fourteen Points following WW I, and also offer a glimpse of how the principles developed during WW II by the victorious allies were reflected in the machinations following the end of that war. Palestine also offers the opportunity to evaluate the conduct of the UK, the waning Great Power of the day, in the region in the wake of WW I. Great Power actions that, finally, led to the creation of the State of Israel, laid the foundations of a seemingly never-ending crisis situation in the area referred to as "Palestine".

The Suez Crisis of 1956 marks the end of European dominance in the Middle East. Suez is widely viewed as symbolizing the replacement of Britain and France by the USA as the key power in the region. It also gives an opportunity to review Britain's conduct in relation to assets viewed as strategically important.

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[99] Jean Allain, *International Law in the Middle East, Closer to Power than Justice,* Aldershot: Ashgate Publishing Ltd., 2004.

Afghanistan is relevant because nearly all the major powers got involved in its internal affairs at some point. Following three Anglo-Afghan Wars, it was the Soviet Union that invaded the country in 1979. This ultimately led to US involvement in support of anti-Soviet resistance fighters. In 2001 the US-led War on Terror was launched in the country.

Palestine, Suez, and Afghanistan thus cover distinctive periods of history, from the end of WW I to the end of WW II, through the Cold War to the present day, sometimes referred to as the age of the "New World Order".[100] Arguably, in these 100 or so years, "modern" international law was created and developed. Furthermore, the choice of these particular case studies has the advantage of reflecting the whole geographic range of the Middle East, from Northern Africa through to the borders of the region with Central and Southern Asia.

Chapter II will therefore begin with the developments in Palestine from 1917 to 1948, thereby focusing on the Palestine Mandate, awarded to Britain by the League of Nations after WW I, and the almost simultaneous recognition of the State of Israel by the United States and the Soviet Union in 1948.

The chapter commences with an examination of the Balfour Declaration, its meaning, and its legal validity. It covers the contentious questions of whether the area later identified as Palestine had already been promised to the Arabs, and whether the Jews -

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[100] President George Bush (Senior); *Address Before a Joint Session of Congress*, September 11, 1990; available at: http://millercenter.org/scripps/archive/speeches/detail/3425; accessed 18/11/2011; in the speech Bush was responding to Iraq's invasion of Kuwait in August 1990. As far as the so-called "new world order" was concerned, he declared: "Out of these troubled times, our fifth objective -a new world order- can emerge: a new era -freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace. An era in which the nations of the world, East and West, North and South, can prosper and live in harmony. A hundred generations have searched for this elusive path to peace, while a thousand wars raged across the span of human endeavor. Today that new world is struggling to be born, a world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak."

to whom, simultaneously, a "homeland" had been promised- could possibly lay claim to a right to found a state there.

Following on from that, the Palestine Mandate will be discussed in detail. In order to do that, the concept of self-determination and the League of Nations' mandates system will be analysed. The compatibility of the Palestine Mandate with the *Covenant of the League of Nations* will then be examined. These legal analyses are accompanied by a discussion of British motives, and of the consequences of their actions.

As far as the British actions regarding Palestine in this period are concerned, the chapter's conclusion is that not only did the mandates system fall far short of the ideal of self-determination, as espoused by President Wilson, but the Palestine Mandate itself, and the way the British implemented it, contravened Article 22 of the *Covenant of the League of Nations*. That the British were aware of the legal problems involved can be inferred by references to "regularizations" of the legal status of the area, following subsequent British attempts at post-action legal justifications.

Far from achieving a secure foothold in the vicinity of the Suez Canal, the British were, however, confronted by persistent rebellions, and ended up fighting both the Arabs and the Jews. Although the mandates system as such fell far short of what the Arabs were led to expect during the First World War, the *Covenant of the League of Nations* was the result of a compromise between the aspirations of the peoples of the region, and the extreme reluctance of most of the victors in WW I to relinquish their power over the area, having recognized the importance of the Suez Canal and the increasing relevance of oil.

The fact that the British -and the Council of the League of Nations- decided to ignore their own rules by drafting the Palestine Mandate in such a fashion as to contravene Article 22 of the Covenant, its implementation finally being even less in tune with the Covenant, was to bring the UK no luck. Just "pacifying" the region was, by 1948, to have cost the British a huge amount of money and soldiers, with no gain.

Moving on from the Second World War and the conclusion of the United Nations Charter, the thesis will then explore the road to the creation of the State of Israel. General Assembly Resolution 181 and the discussions surrounding the question of the partition of Palestine will be examined in detail. It is concluded that GA Resolution 181 was not legally binding, and could therefore not provide a legal justification for the creation of Israel.

This is followed by a legal classification of the Israeli *Declaration of Independence,* following British withdrawal from Palestine. Drawing on the results of the analysis of the classification of "A-Mandates" in respect of sovereignty in the preceding sub-chapter, it will be concluded that Israel seceded from Palestine which itself -although without an effective government- became independent on British withdrawal. It will also be mentioned that the *International Court of Justice*, in its recent Advisory Opinion on Kosovo's Declaration of Independence, came to the conclusion that unilateral declarations of independence are themselves not contrary to international law.

The almost immediate recognition of the State of Israel by the USA and the Soviet Union is then analysed. This entails a discussion of the criteria of statehood and the legal quality of the act of recognition, an issue explicitly not dealt with by the ICJ in its *Kosovo* Opinion. After a lengthy examination of the many controversial aspects of

state recognition in international law, i.e. customary international law, it is concluded that the American and Soviet recognitions were premature, and therefore in violation of customary international law, a fact the US Secretary of State was well aware of, as minuted discussions with US President Truman evidence.

These legal analyses will once again be accompanied by a discussion of possible American and Soviet motives for granting recognition. The chapter concludes that the recognition of the State of Israel was in violation of international law, but in the perceived strategic interest of the superpowers. The people actually living in the area were hardly relevant to the decision-makers. As we now know -sixty years later on- hardly any of the original strategic goals envisaged by the superpowers have been realized.

The Soviet Union, which was probably seeking a friendly face in the region that otherwise consisted of feudal, extremely conservative states, was severely disabused, once it turned out that Israel would become a very close US ally. The USA, on the other hand, did at least achieve modest success by securing the creation of an ally. However, that success has arguably been outweighed by the ongoing conflict the creation of the State of Israel has provoked in the region, binding US resources, and hindering its attempts at creating a stable and reliable partnership with Arab states that goes beyond elite cooperation.

Chapter III will then turn to the Suez Crisis of 1956. Following a brief outline of the events immediately prior to the conflict, the act of nationalization of the Suez Canal Company, announced by President Nasser on July 26, 1956, is analysed in detail.

The questions of ownership of the Suez Canal Company and Egyptian sovereignty over the Suez Canal and its surrounding territory are then examined. This is followed

by a discussion of the legality of the nationalization of (partly) foreign-owned property in international law. The conclusion is, that, contrary to all the official statements issued by France, Britain, and to some extent the USA, Egypt's nationalization of the Suez Canal Company was legal under international law, a fact the respective governments were well aware of.

The tripartite use of force (by Britain, France, and Israel) against Egypt that followed, and was at an early stage justified on the weak grounds of the illegality of the Canal's nationalization, is then analysed. The later official justifications put forward by the three allies are subsequently subjected to scrutiny. It will be argued that the Anglo-French justifications (protection of nationals, protection of property, and police action in favour of the international community) were contrary to the UN Charter and customary international law. Similarly, Israel's claim of self-defence is also shown to have in truth been, at best, no more than an excuse for an illegal armed reprisal.

Having concluded that the use of force, based on the official justifications, was illegal under international law, it is demonstrated that the three allies' disregard for international law went even further: not only had the attack on Egypt been pre-arranged at Sèvres, but government advisors had repeatedly warned that the use of force was illegal.

The analysis of the three states' motives then demonstrates the spectacular failure of their endeavour, especially in the case of France and Britain, the international reaction having heavily contributed to this outcome. Suez is seen as the moment European power in the region came to a visible end. What had started out as an illegal attempt to cling on to the trappings of imperial power had ended in disaster for the two European allies. Israel, although more successful than Britain and France, did also not manage

to achieve a state of peace with its neighbours by demonstrating its military prowess, as subsequent wars and the enduring conflict evidence.

Chapter IV will then proceed to analyse developments in Afghanistan from 1978 onwards. The Soviet invasion of the country in December 1979 is examined in detail. Civil War having erupted in the country in 1978, the legality of interventions in civil wars is discussed. It will be shown that a rule of customary international law had by then developed, by which interventions in civil wars had become illegal, whether at the request of the government, or the opposition. Not altogether surprisingly, Soviet Foreign Secretary Gromyko had come to the same conclusion.

The illegality of the Soviet move is compounded by the fact that, although there had been thirteen prior Afghan requests for Soviet intervention, it seems highly unlikely that the Afghan government had requested its own removal, which is what occurred. The Soviets had invaded in order to "save" the communist system in Afghanistan, to stabilize their southern borders, and to stop any external intervention from other sources. As is well-known, the Soviet endeavour ended in catastrophe. Having lost 15,000 men and spent billions of dollars, the Soviets decided to withdraw in 1989. In 1992 the communist government was toppled, after the Soviet Union itself had been dissolved.

However, the other superpower of the time, the USA, and some of its allies, also intervened in Afghanistan, by supporting the Afghan *mujahedeen* against the Soviets as of 1979. Despite appearing justified in the face of the illegal Soviet invasion, it will be argued here that massively supporting the Afghan rebels was also an illegal intervention in Afghanistan's internal affairs. No appropriate Afghan body had asked the USA for support, making a claim of collective self-defence impossible to uphold,

especially given the fact that the new Afghan government continued representing Afghanistan internationally, and finally signed the relevant *Geneva Peace Accords* in 1988.

Because the support of the Afghan rebels was officially a "covert" operation, no official justification was provided by the USA. However, the lack of discussion of the operation's legality in American government and academic circles, and the fact that the USA, despite officially not recognizing the new Afghan government, maintained diplomatic relations with the country, and did not recognize the *mujahedeen* as rightful representatives of the Afghan people imply some difficulty in finding a legal justification.

As it was to turn out, supporting the Afghan rebels proved to be a mistake on the part of the USA in the medium term. Although forcing the Soviet Union into retreat, the country sank into chaos once the Soviets had departed, as many in the American intelligence services had predicted, and some of the US-supported "freedom fighters", triumphant after the Soviet defeat, then turned their sights on their remaining enemy, the USA. Afghanistan itself, once again in turmoil, would also prove to be an ideal place to settle for a new generation of terrorists, Al Qaeda.

Once the Taliban had taken power over the country in 1996 and Osama Bin Laden had settled there, Afghanistan became home to thousands of Islamic extremists and training ground for even more. The devastating attacks on the USA on September 11, 2001 followed. Operation *Enduring Freedom*, the launch of the "War on Terror", proclaimed by President Bush and others, was initiated only a couple of weeks later. Despite the overwhelming support the attack on, and invasion of Afghanistan received

from the international community, it will be argued that the use of force could neither be reconciled with Article 51, nor with customary international law.

That there were at least some doubts even within the American government as to the legality of Operation *Enduring Freedom* is implied by two studies provided by the Congressional Research Service in 1998 and on September 13, 2001. In these studies the attack on terrorist bases in other countries, a much less far-reaching goal than what Operation *Enduring Freedom* with its regime change agenda encompassed, was seen as having the disadvantage of giving the impression that the USA did not adhere to international law. Furthermore, as will be shown, the international reaction to subsequent, comparable events, resulting in the use of force by states other than the USA, demonstrates that the international community at large has not accepted a change in the rules on self-defence. Even the USA has at times harshly criticized states that attacked terrorist bases in other states, reminding them of those states' sovereignty.

The perhaps emotionally quite understandable, but nevertheless illegal endeavour, undertaken by the USA and its allies, has led to even greater chaos in Afghanistan: there is the threat of a Taliban comeback; Pakistan, suffering under the influx of Taliban and Al Qaeda refugees from Afghanistan, and itself armed with nuclear weapons, has been brought to the brink of utter chaos; and Al Qaeda has been weakened, but not defeated, as subsequent terrorist attacks attributed to the organization demonstrate.

The case studies in chapters II, III, and IV will thus corroborate, as summarized in Chapter V, Jean Allain's assertion that international law as applied in the Middle East

by the Great Powers has been closer to "power than justice".[101] The Great Powers have repeatedly reverted to illegal means in order to achieve their national interest ends. Not much, if any, attention has been paid to the people living in the region.

What is striking, however, and what allows the conclusion that adherence to international law is common sense and closely aligned to the Great Powers' real national interest, is the fact that the Great Powers have in the end failed to achieve their goals by reverting to illegality. In none of the cases examined did the supposedly necessary deviation from the rules laid down in international law actually further the national interest of the intervenor in the medium and long term.[102]

What this suggests is that Glennon, who would probably agree with most, if not all of the legal analysis that follows, is wrong to assume that the fact the Great Powers' actions have to be deemed illegal demonstrates that current international law has been overtaken by events and is outdated. Rather, international law consists of carefully calibrated compromises, often arrived at after many decades of bad experiences, based on what does and does not realistically work in international relations.[103]

International law and its allegedly utopian foundations certainly cannot be blamed for the Great Powers' failures in the Middle East since 1917. Rather, as Martin Woollacott concluded in respect of the interventions at Suez in 1956 and in Iraq in 2003, it is a "foreign policy" that has "ceased to be anchored in reality",[104] and been pursued in violation of international law, which has led to recurring disasters. The fact that the "War on Terror" in Afghanistan was illegal is not, as Glennon argues, a sign

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[101] Jean Allain, *International Law in the Middle East, Closer to Power than Justice,* Aldershot: Ashgate Publishing Ltd., 2004.
[102] Quigley, "International Law", 815-835.
[103] Bowring, *The Degradation*, 43, 208; Franck, "The Power", 92; Moynihan, *Loyalties*, 67, 69-72.
[104] Martin Woollacott, *After Suez. Adrift in the American Century*, London: I.B. Tauris & Co. Ltd., 2006, 136.

of the "incoherence" of the UN Charter, [105] but the result of the UN drafters' significant and awful experiences, culminating in the Second World War. As far as the current mess in Afghanistan is concerned, they might well have replied that this was no less than was to be expected.[106]

Obviously, this thesis cannot offer an exhaustive analysis of the many interventions of the Great Powers in the Middle East or, indeed, in other regions. More research is required to further strengthen the "realist" case for international law. Other illegal interventions that have similarly failed dismally could be mentioned. Some of them are analysed in this thesis when examining the rules of customary international law. There are few who would, for example, doubt, that the US attack on Libya in 1986, followed by the Lockerbie terrorist attack in 1988,[107] or the US attacks on Sudan and Afghanistan in 1998, followed by 09/11,[108] belong in a similar category.

Israel's failure to achieve a peaceful coexistence with its neighbours in the last sixty years, despite regularly and often illegally resorting to the use of force,[109] the appalling state of US-Iran relations, at least partly resulting from the illegal US organized coup there in 1953,[110] and the lasting instability and hostility towards the USA to be found in many Latin America states, often a result of repeated US interventions there, point to the same conclusion.[111]

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[105] Michael J. Glennon, "The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter", Harv. J. L. & Pub. Pol'y, Vol. 25, 2001-2002, 539-558.
[106] Franck, "The Power", 103; he comes to a similar conclusion as far as the Iraq War of 2003 is concerned.
[107] Johnson, *Blowback*, 8; Bowring, *The Degradation*, 43-44.
[108] Quigley, "International Law", 825-828; Johnson, *Blowback*, 10.
[109] Johnson, *Blowback*, 11.
[110] Quigley, "International Law", 816-817; Johnson, *Blowback*, xi-xii; Moynihan, *Loyalties*, 86-92; Moynihan also mentions the aborted US hostage rescue mission to Iran in 1980 as a further example of "blowback".
[111] Johnson, *Blowback*, XI, 13-14; Hilary Charlesworth, "International Law: A Discipline of Crisis", *Modern Law Review*, Vol. 65, 2002, 377-392; Christine Chinkin, "Kosovo: A 'Good' or 'Bad' War?", AJIL, Vol. 93, 1999, 841-847, 845-847; Bowring, *The Degradation*, 49-55; they offer a critical evaluation of the results achieved by the "humanitarian" intervention in Kosovo in 1999.

The Iraq War in 2003 was no aberration. A venture undertaken in the national interest, and deemed illegal even by many government advisors, once again went badly wrong. The intervention in Iraq thus was just another episode of US policy in the Middle East whose "hallmarks", according to Bacevich, are "naivety compounded by miscalculation and domestic self-interest, creating situations that Washington attempts to redeem by plunging deeper into only dimly understood conflicts."[112]

As Moynihan has argued convincingly, politicians should therefore sometimes respond to crises with "a weekend's consideration" before rushing off into illegal endeavours apparently in the national interest.[113] Taking guidance from international law can be emotionally frustrating, as law often is, but at the same time can point to a more realistic way forward. Even if the nation's short-term goals are not achieved in that way, the national interest has been served by upholding the rule of law and by saving resources, the usually fruitless investment of which illegal actions entail.[114]

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[112] Andrew Bacevich, "A Hell of a Spot", *London Review of Books*, Vol. 33, No. 12, 2011, 1-6, 2; available at: http://www.lrb.co.uk/v33/n12/andrew-bacevich/a-hell-of-a-spot/print; last accessed 12/12/2011.

[113] Moynihan, *Loyalties*, 94, 96; "On the Occasion", 558, 561.

[114] A point made by Franck in respect of the Iraq War in 2003 ("The Power", 103); Watts, "The Importance", 7.

II. Palestine (1917-1948)

The contradiction between the letters of the Covenant and the policies of the Allies is even more flagrant in the case of 'independent' Palestine... What I have never been able to understand is how it can be harmonized with the declaration, the Covenant, or the instructions to the Commission of Enquiry...[115]

...it would be highly injurious to the United Nations to announce recognition of the Jewish State even before it had come into existence...[116]

The conflict in Palestine is one of the most enduring in the world. Many cannot understand why Israelis and Palestinian Arabs are not able to agree on a sensible and just solution based on international law.

Europeans and Americans often proclaim their astonishment at what they see as a profound reluctance on the part of Palestinian Arabs to adhere to international law. Various Palestinian groups are regularly reprimanded for not bringing their policies into line with what is portrayed to be a just international legal order; some, like Hamas, who are especially recalcitrant, are ostracized.

Many observers of the region are also very critical of Israel's steadfast refusal to follow international law. Israel has for decades ignored Security Council resolutions and its actions in the Middle East have frequently been viewed as illegal by the vast majority of the world's states. Condemnation of Israel's actions by the Security Council has on many occasions only been avoided by the commonplace US veto.

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[115] British Foreign Secretary Arthur Balfour in a Memorandum (dated 11/08/1919) to Earl Curzon; extracts reprinted in Doreen Ingrams, *Palestine Papers 1917-1922, Seeds of Conflict*, London: John Murray Publishers Ltd., 1972, 73 (PRO. FO. 371/4183).

[116] Under Secretary of State Lovett to the US President on May 12, 1948 (two days before the USA officially recognized the State of Israel); *Memorandum of Conversation, by Secretary of State,* May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 975; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 22/06/2011.

In this chapter it will be shown that the perceived irrelevance of international law to Palestinian and Israeli policies is more easily understood when Palestine's history between 1917 and 1948 is considered.

Beginning with the Balfour Declaration in 1917 and ending with the recognition of the State of Israel by the USA and the Soviet Union in May 1948, Palestine suffered the consequences of actions undertaken by powerful states from outside the Middle East, culminating in the creation of a new state. The statements accompanying these actions stressed their legality or, more commonly, ignored the issue of international law. In truth, virtually all the steps undertaken by Britain, the USA, and belatedly, the Soviet Union, were contrary to the international legal order they themselves had created.

Both World Wars had ended with the promise of stability and legality in international relations, Palestine was to be one of the first test cases on both occasions. However, it quickly emerged that the major powers of the day fell short of their expressed ideals when applying international law to Palestine.

The story of Palestine and international law begins in the First World War. Palestine, still Ottoman at the time, became the "too much promised land":[117] Britain and France had agreed it would be under an international regime in the event of victory; the British may have promised the Arabs that Palestine or parts of Palestine would be included in an independent Arab state; and the British government "viewed with favour" the establishment of a "Jewish national home" there.

Britain, having become reliant on the Suez Canal as a vital transport link, wanted to create a reliable European outpost near the Canal by establishing such a "homeland"

[117] A. E. Prince, "The Palestine Impasse", Int'l J., Vol. 1, 1946, 122-133, 125; Robert Gale Woolbert, "Pan Arabism and the Palestine Problem", Foreign Aff., Vol. 16, 1937-1938, 309-322, 311.

and hoped that by gaining Jewish favour the outcome of the First World War could be influenced in a positive way.

The United Kingdom did not achieve these objectives. There is no evidence Jewish support during WW I increased as a result of the Balfour Declaration or, even if it did, that it influenced the outcome of the war.[118] And, far from creating a stable outpost near the Suez Canal, Britain, burdened with having made too many promises, scrambled to remain in control of Palestine. Following occupation, Britain assured itself of the Palestine Mandate based on the newly developed mandates system. Irreconcilable promises and safeguards in the mandate soon meant that Britain was having ever more difficulties in adhering to its provisions. The attempt at remaining within the terms laid down after the First World War was finally abandoned in the late 1930s, when it proved too much for Britain to keep unrest at bay.

Exhausted by the Second World War, and realizing that the situation in Palestine had become insoluble, Britain gave up in late 1947, renouncing the mandate with effect of May 15, 1948. As far as British rule in Palestine from 1917 to 1948 is concerned, Avi Shlaim has rightly concluded that the "costs of the British presence were considerable and the benefits remained persistently elusive. Palestine was not a strategic asset; it was a source not of power but of weakness."[119]

Nevertheless, by 1948, both the USA and the Soviet Union had become increasingly interested in Palestinian affairs. Amidst chaos and against the backdrop of civil war in Palestine, Israel declared its independence. The new state was promptly recognized by the USA and the Soviet Union.

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[118] Avi Shlaim, *Israel and Palestine*, London: Verso, 2009, 10-11; Jonathan Schneer, *The Balfour Declaration, The Origins of the Arab-Israeli Conflict*, London: Bloomsbury, 2010, 152-153, 343, 366.
[119] Shlaim, *Israel*, 20.

In this chapter it will be demonstrated that none of the major actions undertaken by the Great Powers in Palestine were consistent with international law. After briefly explaining and interpreting the Balfour Declaration of 1917, and showing that it had no standing in international law, the British regime of occupation in Palestine will be examined. First attempts at implementing the Balfour Declaration as of 1920 will be shown to have been contrary to the 1907 Hague Regulations to which Britain was a party.

Following an analysis of the mandates system conceived by the victorious First World War Allies, which will demonstrate why that system fell short of US President Wilson's much heralded principle of self-determination, the Palestine Mandate will be examined in some detail. It will be argued that the terms of that mandate could not be reconciled with Article 22 (4) of the Covenant.

The difficulties the British had in implementing the mandate will then be summarized. It will be shown that the British, by the late 1930s, had realized they would not be able to fulfil their obligations. This in turn resulted in various u-turns based on contradictory commission reports.

Although the Second World War gave Britain some breathing space in Palestine, it will be shown that American interference there became increasingly frequent; a development which did not enhance respect for international law. Attempting to find a solution, but repeatedly undermined by Truman's desperate attempt to win Jewish votes in America, Britain gave up and turned to the United Nations.

The Report by the *United Nations Special Committee on Palestine (UNSCOP)* will then be analysed, and it will be shown that it was unfair and unworkable, as was to be confirmed by subsequent events. As will be explained, little attention was paid to

international law by either UNSCOP or the other powers when dealing with the problems in Palestine.

This will be followed by an outline of the events leading up to the Israeli "Declaration of Independence" on May 14, 1948; events which culminated in the prompt US and Soviet recognitions of the new state.

This dramatic last step, the recognition of the State of Israel by the USA and the Soviet Union, will be examined in detail. This was, after all, a crisis situation in which it was important to demonstrate the effectiveness of the new international legal order created just three years earlier. It will be demonstrated that the USA and the Soviet Union failed that test spectacularly.

Within eleven minutes[120] of Ben-Gurion having read out the "Declaration of Independence" in Tel Aviv on May 14, 1948, the USA granted recognition of the new state with the Soviet Union following suit on May 17, 1948.[121] Other states then followed the super-powers' example. Britain, the former mandatory power responsible for Palestine, however, refused to recognize the State of Israel in 1948, arguing that the new entity did not fulfil the "basic criteria of an independent state".[122] Many Arab states and groups even now refuse to recognize the State of Israel, arguing that it is an "illegal entity".[123]

After outlining the controversial customary international law rules on the recognition of states, these will be applied to Israel. It will be shown that there can be no doubt

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[120] Michael Ottolenghi, "Harry Truman's Recognition of Israel", *The Historical Journal*, Vol. 47, 2004, 963-988, 963-964; Stephen Kinzer, *Reset Middle East, Old Friends and New Alliances: Saudi Arabia, Israel, Turkey and Iran,* London: I.B. Tauris & Co. Ltd., 2011, 154; "No Time to Hesitate", *TIME Magazine*, 24/05/1948; available at: http://www.time.com/time/magazine/article/0,9171,794348,00.html; last accessed 22/07/2011.
[121] "Russian Recognition of Israel", *The Times*, 18/05/1948, 4.
[122] Philip Marshall Brown, "The Recognition of Israel", AJIL, Vol. 42, 1948, 620-627, 620 (quote); "British Caution", *The Times*, 18/05/1948, 4; "Britain is aloof to the New State", *The New York Times*, 15/05/1948, 2.
[123] "Hezbollah chief vows never to recognize Israel", *Haaretz Service*, 18/09/2009; available at: http://www.haaretz.com/news/hezbollah-chief-vows-never-to-recognize-israel-1.7598: accessed 22/07/2011.

that both the Soviet and the American recognition were premature, and therefore inconsistent with international law, a conclusion not altered by the ICJ's recent advisory opinion on Kosovo.

The controversial creation of the State of Israel in 1948 within the territory of the Palestine Mandate is an excellent example of the act of recognition being used as a tool of intervention. It will be shown that the recognition of Israel in 1948 by the super-powers was an attempt to enhance their influence in the Middle East by intervening in Palestine. The wishes of Palestine's inhabitants were irrelevant. The people of Palestine, whether Arab or Jewish -even if to the advantage of the latter- were treated as the people in distant, "less civilized" parts of the world had always been treated: as pawns in a chess game that had little to do with them.

Outside intervention in Palestine had by 1948 become so massive that it had actually led to the creation of a new state in the Middle East, inhabited mostly by a people that at that time could at best claim very distant historical ties to the area. However, both the United States and the Soviet Union were to be disappointed in their hopes of creating a useful ally in the region. In stark contrast to its goals, the Soviet Union had helped to create an important US ally. The USA, on the other hand, is still confronted with the aftermath of the imposition of a state on a volatile region in the form of widespread hostility towards itself in the Middle East which has, on occasion, led to expensive involvement in military conflict.

The Chapter therefore clearly illustrates that neither the UK, nor the USA or the Soviet Union in the end truly benefitted from their actions in Palestine. Repeatedly ignoring the rules of international law, apparently in the national interest, was clearly counter-productive.

It should be noted that this chapter will not deal extensively with the historic claims and counter-claims by both Jews and Arabs regarding Palestine and going back thousands of years[124] (besides mentioning them briefly when analysing the Balfour Declaration) as these can -at best- be described as providing a "dubious prescriptive right" in international law, [125] or, more accurately, as not providing any legal entitlement at all. [126]

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[124] For a more detailed look at these claims, see: Carsten Wieland, "Thousands of Years of Nation-Building? Ancient Arguments for Sovereignty in Bosnia and Israel/Palestine" in *Nation Building between National Sovereignty and International Intervention*, Henriette Riegler (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 2005, 81-100, 86-97; John A. Collins, "Self-Determination in International Law: The Palestinians", Case W. Res. J. Int'l, Vol. 12, 1980, 137-167, 155-156; he briefly describes Jewish claims going back to 1800 B.C. (Abraham) and Arab claims relating to the Canaanites, dating back to about 3000 B.C.; Prince, "The Palestine", 122-123; Eli Murlakov, *Das Recht der Völker auf Selbstbestimmung im israelisch-arabischen Konflikt*, Zürich: Schulthess Polygraphischer Verlag, 1983, 35-38.

[125] Felix Frankfurter, "The Palestine Situation Restated", Foreign Aff., Vol. 9, 1930-1931, 409-434, 411; it should be noted that Frankfurter was President of the American Zionist Organization.

[126] The King-Crane Commission, sent to the Middle East by the USA in 1919 in order to determine what local feeling was, pointed out: "For the initial claim, often submitted by Zionist representatives, that they have a "right" to Palestine, based on an occupation of two thousand years ago, can hardly be seriously considered."; "Recommendations of the King-Crane-Commission", 28/08/1919, para. 5; available at: http://www.jewishvirtuallibrary.org/jsource/History/crane.html; accessed 15/07/2011; similarly, the ICJ in a case concerning title to islands off the coast of Jersey, declared, referring to a judgement from 1202 France was relying on: "To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal principles"; later on in the judgement the court stated: "What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups"; ICJ, *The Minquiers and Ecrehos Case*, France v. United Kingdom, Judgement, 17/11/1953, I.C.J. Reports 1953, 47, 57; Lord Curzon (at the time British Foreign Secretary), responding to a draft of the Palestine Mandate, in a minute of August 6, 1920: "I do not myself recognise that the connection of the Jews with Palestine, which terminated 1200 years ago, gives them any claim whatsoever. On this principle we have a stronger claim to parts of France."; reprinted in Ingrams, *Palestine*, 98 (PRO. FO. 371/5245); Victor Kattan, *From Coexistence to Conquest, International Law and the Origins of the Arab-Israeli Conflict, 1891-1949*, London: Pluto Press, 2009, 2, 50-52; J.B. McGeachy, "Is it Peace in Palestine?", Int'l J., Vol. 3, 1947-1948, 239-248, 239, 241; Collins, "Self-Determination", 156; James Salt, *The Unmaking of the Middle East, A History of Western Disorder in Arab Lands*, Berkeley: University of California Press, 2008, 124; Phillip J. Gendell, Paul G. Stark, "Israel: Conqueror, Liberator, or Occupier Within the Context of International Law", Sw. U. L. Rev., Vol. 7, 1975, 206-235, 216; they seem to disagree. Without going into any detail or explaining on what basis they assume that the legal right of self-determination existed prior to WW II, they claim that the "most important concept" was "the right of the Jewish People to self-determination within the confines of the historical land of Israel"; Murlakov, *Das Recht*, 50; he argues that the historical connection of the Jews to Palestine justifies the realization of their right of self-determination there. This often repeated argument is to be rejected. Authors who put forward this argument invariably justify the treatment of the Palestinian Arabs on the grounds that there was no legal right of self-determination at that time (a notion supported here). It then, however, seems highly contradictory to base Jewish claims to Palestine on such a right. Furthermore, accepting the "historical connection" argument in international law would self-evidently lead to chaos, as many borders worldwide would have to be redrawn. It also seems obvious that religious notions should not determine international law, as there are five "world religions", apart from many others, that would have to be respected. Also, the fact that the Zionists even contemplated alternatives like Argentina or Uganda serves to undermine the argument. These arguments also militate against accepting Sol M. Linowitz's argument in "Analysis of a Tinderbox: The Legal Basis for the State of Israel", A.B.A.J., Vol. 43, 1957, 522-525, 524, who -based on

Furthermore, this chapter only deals with the recognition of Israel against the backdrop of the situation in Palestine in mid-1948. There can be little doubt that subsequent developments led to the establishment of the State of Israel, as evidenced by its admittance to the United Nations in 1949, its recognition by more than 100 states so far, and its continuing existence for more than sixty years.[127]

A. Britain in Palestine

1. The Balfour Declaration

a) The letter

The so-called Balfour Declaration is actually a letter by the British Foreign Secretary addressed to a prominent supporter and benefactor of the Zionist movement, Lord Rothschild, dated November 2nd, 1917.

Its contents are as follows:

> *Dear Lord Rothschild,*
>
> *I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet:*
>
> *His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.*

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ancient history- argues that the Jews were "deprived" of their "sovereignty by force" and had "never renounced it".

[127] John Dugard, *Recognition and the United Nations*, Cambridge: Grotius Publications Limited, 1987, 62; he makes a similar point when he states: "The meaning of the Balfour Declaration, the validity of the Partition Plan approved in Resolution 181 (II), and the moral basis of the State of Israel are still a cause for debate. However, this debate does not affect Israel's position as a State in the international community..."; John Quigley, *The Statehood of Palestine, International Law in the Middle East Conflict*, Cambridge: Cambridge University Press, 2010, 120-121.

I would be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

Yours, Arthur James Balfour[128]

b) Background

Many developments came together during the First World War that facilitated the adoption, in 1917, of this pro-Zionist statement on the part of the British government:

aa) The Zionists

Jews had persistently been subjected to appalling treatment in Europe, especially in Eastern Europe, sometimes culminating in pogroms, such as in Russia towards the end of the 19th century.[129] In time this led to the feeling within the Jewish community that the "Jewish problem", meaning that Jews were often treated as outsiders in European society, could best be solved if the Jews adopted a "national" approach to their predicament. This development was no doubt also due to the popularity and success of national movements all over Europe in the second half of the 19th century.[130]

The Zionist (political) movement, most commonly associated with Theodor Herzl, though he was by no means the first proponent of a national solution to the Jewish

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[128] "The Balfour Declaration", http://news.bbc.co.uk/1/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682961.stm; last accessed 22/07/2011.

[129] Dan Cohn Sherbok in Dan Cohn Sherbok, Dawoud El-Alami, *The Palestine-Israeli Conflict*, Oxford: Oneworld Publications, 3rd ed., 2008, 9; Kattan, *From Coexistence*, 1, 9; John Strawson, *Partitioning Palestine, Legal Fundamentalism in the Palestinian-Israeli Conflict*, London: Pluto Press, 2010, 18; Alain Gresh, *De quoi la Palestine est-elle le nom?*, Paris: LLL Les liens qui libèrent, 2010, 67; Margaret Macmillan, *Peacemakers, Six Months that Changed the World*, London: John Murray, 2002 (paperback edition), 421-423.

[130] J.R. Gainsborough, *The Arab-Israeli Conflict, A Politico-Legal Analysis*, Aldershot: Gower Publishing Company Ltd., 1986, 3; Kattan, *From Coexistence*, 9; Strawson, *Partitioning*, 15, 54; Gresh, *De quoi*, 54; Macmillan, *Peacemakers*, 422.

problems,[131] was subsequently able to establish itself. The Zionist idea was that the Jews should create an entity, a state, where they could fulfil their national aspirations.[132] Theodor Herzl's "Der Judenstaat" (1896) -which was his reaction to the Dreyfus affair in France and its anti-Semitic undertones-, was groundbreaking in that respect.[133] His work laid the foundation for the "First Zionist Congress" held in Basle in 1897 which adopted the aim of establishing "a home for the Jewish people in Eretz-Israel secured under public law."[134]

Based on their religious beliefs, the Zionists naturally tended to favour the creation of such a state in Palestine, from where the Jews had been dispersed 1200 years ago, and where in the first decade of the 20th century about 40,000-80,000 Jews[135] were living (about 10 % of the local population).[136] Nevertheless, other options, such as creating a Jewish state in the Argentine, were also discussed.[137]

At the beginning of the 20th century Herzl held talks with the Sultan of the Ottoman Empire, the then ruler of Palestine, and with the German Emperor.[138] However, he was not able to convince them of the advantages he saw in creating a Jewish state in

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[131] Leonard Stein, "The Jews in Palestine", Foreign Aff.,Vol. 4, 1925-1926, 415-432, 421; Murlakov, *Das Recht*, 42-44; Strawson, *Partitioning,* 16-19; Gresh, *De quoi,* 54.

[132] W. T. Mallison Jr., "The Zionist-Israel Juridical Claims to Constitute 'The Jewish People' Nationality Entity and to Confer Membership in it: Appraisal in Public International Law", Geo. Wash. L. Rev., Vol. 32, 1963-1964, 983-1075, 998; Prince, "The Palestine", 128-129; Murlakov, *Das Recht*, 44-46.

[133] Frankfurter, "The Palestine", 411-412; Collins, "Self-Determination", 157; Jill Allison Weiner, "Israel, Palestine, and the Oslo Accords", Fordham Int'l L. J., Vol. 23, 1999-2000, 231-274, 230-231; Günther Weiß, "Die Entstehung des Staates Israel, (Teil 1)", ZaöRV, 1950-1951, 146-172, 150; David Hirst, *The Gun and the Olive Branch*, 2nd ed., London: Faber and Faber, 1984, 137-138; Jean Allain, *International Law in the Middle East, Closer to Power than Justice*, Aldershot: Ashgate Publishing Ltd., 2004, 74; David Ben-Gurion, *Israel: Years of Challenge*, London: Anthony Blond Ltd., 1964, 4; Strawson, *Partitioning*, 19-22; Kattan, *From Coexistence*, 6, 10, 15; Gresh, *De quoi,* 55-57.

[134] Frankfurter, "The Palestine", 412; Kattan, *From Coexistence*, 21; Strawson, *Partitioning*, 15-16, 19-22.

[135] McGeachy, "Is it", 240 (65000); Strawson, *Partitioning,* 26 (73,000 in 1914, 55,000 in 1918); Kattan, *From Coexistence*, 3 (58,728 in 1918); John Keay, *Sowing the Wind. The Mismanagement of the Middle East 1900-1960*, London: John Murray Publishers, 2004 (paperback edition), 78 (60,000-80,000); Philip C. Jessup, *The Birth of Nations*, New York: Columbia University Press, 1974, 259 (50,000 by the end of WW I).

[136] Hirst, *The Gun*, 138-139; Strawson, *Partitioning*, 24-27; Kattan, *From Coexistence*, 3; Shlaim, *Israel*, 11.

[137] Allain, *International*, 75; Gresh, *De quoi,* 55.

[138] Mallison, "The Zionist", 999-1000; Cohn-Sherbok, *The Palestine*, 15-16; Kattan, *From Coexistence*, 26; Gresh, *De quoi,* 58.

Palestine.[139] Herzl also contacted the British government which, in 1903, offered to help establish a Jewish state in an area that is now part of Kenya/Uganda.[140] While Herzl seemed to be prepared to accept that solution[141] -and narrowly won a vote on the issue at the World Zionist Congress in Basle in 1903-[142] the fact that he died shortly afterwards, and that there was not a lot of enthusiasm for creating the Jewish national home outside of Palestine, led to the Zionist movement adopting the final position that the Jewish national home should be created in Palestine.[143]

It is, however, important to note that not all Jews were members of the Zionist movement. The main opponent of issuing the Balfour Declaration in the British Cabinet was the only Jew there, Edwin Montagu.[144] Many Jews, like Montagu, were opposed to a national solution to the problems the Jews were encountering in Europe, as they worried that the position of those Jews in Europe not wishing to emigrate to a new Jewish entity might deteriorate even further.[145] A divide between the "assimilated" Jews and other Jews opened up, and many Zionists claimed that the

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[139] Mallison, "The Zionist", 1000; Kattan, *From Coexistence*, 26.
[140] Mallison, "The Zionist", 1000; Weiß, "Die Entstehung, Teil 1", 146; Allain, *International*, 75; Kenneth Young, *Arthur James Balfour*, London: G. Bell and Sons, 1963, 388 (it should be noted that Balfour was the British Prime Minister at the time of the Uganda offer); David Fromkin, *A Peace to End All Peace, The Fall of the Ottoman Empire and the Creation of the Modern Middle East*, London: Phoenix Press, 2000, 274; Kattan, *From Coexistence*, 30-35; Strawson, *Partitioning*, 22-24; Macmillan, *Peacemakers*, 423.
[141] Mallison, "The Zionist", 1000; Cohn-Sherbok, *The Palestine*, 18; Kattan, *From Coexistence*, 35-36; Macmillan, *Peacemakers*, 423.
[142] Allain, *International*, 75; Fromkin, *A Peace*, 274; Strawson, *Partitioning*, 24.
[143] Kattan, *From Coexistence*, 35-37; he also mentions considerable opposition against the scheme on the part of the white settlers in British East Africa.
[144] Frankfurter, "The Palestine", 413; Prince, "The Palestine", 129; Fromkin, *A Peace,* 294; Ingrams, *Palestine*, 11; Kattan, *From Coexistence*, 15, 43; Strawson, *Partitioning,* 29; Schneer, *The Balfour,* 337-338; Shlaim, *Israel*, 12.
[145] During a meeting of the British War Cabinet on October 4, 1917, Edwin Montagu "urged strong objections to any declaration in which it was stated that Palestine was the 'national home' of the Jewish people...He based his arguments on the prejudicial effect on the status of British Jews of a statement that His Majesty's Government regarded Palestine as the national home of the Jewish people...Jews as nationals in the country in which they were born might be endangered."; reprinted in Ingrams, *Palestine*, 11 (Minutes of the War Cabinet Meeting, October 4, 1917, PRO. CAB. 23/4); Prince, "The Palestine", 129; Fromkin, *A Peace*, 294; Kattan, *From Coexistence*, 22-23, 71-74; Gresh, *De quoi,* 61; Macmillan, *Peacemakers*, 429-431.

opponents of a national solution were simply "rich" Jews who were only interested in maintaining their fortunes.[146]

One of the Zionist leaders in Britain was Dr. Chaim Weizmann, later to become the first President of Israel, who -as a chemist- had lent invaluable support to the British war effort in the First World War. Seen as a moderate proponent of Zionism, his influence on British politicians was considerable, which made the adoption of a pro-Zionist stance in Britain more likely.[147] He recognized that the First World War, and the possible dismemberment of the "sick man of Europe" -the Ottoman Empire-[148] would offer a unique opportunity to realize Zionist aspirations.[149] He therefore contacted the British government and tried to entice it into supporting the establishment of a Jewish entity in Palestine.

His actions were, however, not uncontroversial within the Jewish, as well as the Zionist movement. Many were worried about being associated with the allied war effort. German and Austrian Jews were, of course, overwhelmingly supportive of their home countries' war effort.[150] However, Weizmann persisted in his wooing in Britain and was ultimately successful.

bb) The British Government

The British government's approval of Zionist aspirations was mainly due to two rather different considerations: the religious beliefs of many of the decisive

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[146] Frankfurter, "The Palestine", 413; he describes Montagu as follows: "He was representative of the rich and powerful Jews who opposed Zionism, which was a movement of the common people"; Macmillan, *Peacemakers*, 423; she claims Weizmann "despised assimilated Jews".
[147] Mallison, "Zionist", 1001; Macmillan, *Peacemakers*, 424, 426.
[148] Sami Hadawi, *Palestinian Rights and Losses in 1948*, London: Saqi Books, 1988, 4; Valentine Chirol, "Islam and Britain", Foreign Aff., Vol. 1, 1922-1923, 48-58, 49; she describes the Ottoman Empire as being in "rapid decay"; Dawoud El-Alami in Dan Cohn-Sherbok & Dawoud El-Alami, *The Palestine-Israeli Conflict*, Oxford: Oneworld Publications, 3rd ed., 2008, 137-141.
[149] Frankfurter, "The Palestine", 412-413.
[150] Mallison, "The Zionist", 1018; Fromkin, *A Peace*, 277; Macmillan, *Peacemakers*, 423.

politicians,[151] and, more importantly, strategic concerns in the context of the First World War and its aftermath[152]

Many of the most influential supporters of Zionism were ardent Protestants.[153] Balfour and the Prime Minister, Lloyd George, were "brought up on the Bible" and - similar to the Christian fundamentalists in the USA nowadays- believed the return of the Jews to Palestine was inevitable.[154] These strongly held beliefs led them to be natural supporters of Zionist aspirations.[155]

The strategic concerns of many of the decision makers at least in part seem irrational. Some believed in a kind of worldwide "Jewish conspiracy", with Jews having the power to determine the outcome of the war.[156] Lord Robert Cecil stood for many when, in 1916, he remarked: "I do not think it is possible to exaggerate the international power of the Jews."[157] Therefore it was deemed necessary to win over the Jews before they threw in their lot with the Germans, especially as the Jews were suspected of pro-German leanings anyway.[158] Others had the suspicion that the Jews

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[151] Frankfurter, "The Palestine", 413 (he mentions "the sway that the Old Testament and thereby Palestine exercised over British imagination" as one of the motives for British policies in Palestine); Anthony Parsons, *From Cold War to Hot Peace, UN Interventions 1947-1995*, London: Penguin Books, 1995, 3; Salt, *The Unmaking*, 123; Fromkin, *A Peace*, 267-268, 274, 283, 298; Ingrams, *Palestine*, 5; Kattan, *From Coexistence*, 70; Strawson, *Partitioning*, 28; Shlaim, *Israel*, 11; Keay, *Sowing*, 79, 82.

[152] Herbert Louis Samuel, "Alternatives to Partition", Foreign Aff., Vol. 16, 1937-1938, 143-155, 143; Chaim Weizmann, "Palestine's Role in the Solution of the Jewish Problem", Foreign Aff., Vol. 20, 1941-1942, 324-338, 336; Gresh, *De quoi*, 63.

[153] Ilan Pappe, "Clusters of history: US involvement in the Palestine Question", *Race & Class*, Vol. 48, 2007, 1-28, 3-8; he describes the pro-Zionist influence of leading Protestants in America as early as the late 19th century, based on ideas derived from Scottish and Irish Protestants.

[154] Young, *Arthur*, 387-388; Fromkin, *A Peace*, 267-268, 274, 283, 298; Ingrams, *Palestine*, 5; Gresh, *De quoi,* 66-67 (he refers to the South African Smuts' religious beliefs; General Smuts was a member of the Imperial War Cabinet and instrumental in developing the whole concept of the mandates system); Macmillan, *Peacemakers*, 425, 426.

[155] Young, *Arthur,* 387-388; Fromkin, *A Peace*, 267-268, 274, 283, 298.

[156] Shlaim, *Israel*, 10-11; Schneer, *The Balfour*, 152-153, 168, 343; Gresh, *De quoi,* 63-64.

[157] Lord Robert Cecil, at the time Parliamentary Under Secretary of State for Foreign Affairs (in 1937 he was to win the Nobel Peace Prize); Minute, March 3, 1916 (NA, FO. 371/2671); quoted in Schneer, *The Balfour*, 343.

[158] British Foreign Secretary Arthur Balfour declared, in a Cabinet Meeting on Oct. 4, 1917, that "The German Government were making great efforts to capture the sympathy of the Zionist movement" (Minutes of the Cabinet Meeting). Even after the war these worries persisted. On March 29, 1919, a civil servant in the Foreign Office (George Kidston) minuted on a letter from Balfour to Lloyd: "Germany is founding all her hopes of re-establishing her commercial dominion on the immense power afforded by the international character of the

had enormous influence within the Ottoman Empire, especially among the Young Turk movement.[159] Many also thought that the Russian Jews might be decisive in keeping Russia in the war on the side of the allies before and after the Tsar had been overthrown: [160]

> *It is clear that at that stage His Majesty's Government were mainly concerned with the question of how Russia (...) was to be kept in the ranks of the Allies....The idea was that such a declaration* [of sympathy for Jewish national aspirations] *might counteract Jewish pacifist propaganda in Russia.*[161]

It was also believed that Jewish Americans might persuade the US Government to finally enter the war, and once that had been accomplished, they hoped that wealthy Jewish Americans might be more willing to support the Allied cause financially:[162]

> *It was supposed that American opinion might be favourably influenced if His Majesty's Government gave an assurance that the return of the Jews to Palestine had become a purpose of British policy.*[163]

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interests of her Jews"; extracts of both reprinted in Ingrams, *Palestine*, 10-11 (PRO. CAB. 23/4); and 62 (PRO. FO. 371/4179); Macmillan, *Peacemakers*, 427; Quigley, *The Statehood*, 14; he points out that subsequent to the Balfour Declaration being published, the British airdropped leaflets in Yiddish asking Jewish soldiers to desert the Central Powers, because the Allies would enable the Jews to "return to Zion"; Frank Owen, *Tempestuous Journey, Lloyd George, His Life and Times*, London: Hutchinson, 1954, 426; Hadawi, *Palestinian*, 15; Fromkin, *A Peace*, 292, 296; Weiß, "Die Entstehung, Teil 1", 150; Shlaim, *Israel*, 9; Kattan, *From Coexistence*, 70; Schneer, *The Balfour*, 156, 343-345; Allain, *International*, 76; Hirst, *The Gun*, 161; he believes the Balfour Declaration was also an attempt to deal with the Jewish refugees "flooding" into Britain from Eastern Europe which had led to riots and to the *Aliens Act* which restricted Jewish immigration, a point also made by Allain, *International*, 76; Kattan, *From Coexistence*, 16-20, 68-69; and Gresh, *De quoi*, 59-61.

[159] Fromkin, *A Peace*, 92; Kattan, *From Coexistence*, 70-71; Schneer, *The Balfour*, 153-154.

[160] Fromkin, *A Peace*, 286-288, 296; Quigley, *The Statehood*, 13; Kattan, *From Coexistence*, 70-71, 75-76; Schneer, *The Balfour*, 153-154, 214; Shlaim, *Israel*, 9; Owen, *Tempestuous*, 427; Macmillan, *Peacemakers*, 427.

[161] William Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, in a 1922 Memorandum (on the origins of the Balfour Declaration) for Winston Churchill, then Secretary of State for the Colonies; extracts reprinted in Ingrams, *Palestine*, 7-8 (PRO. CAB. 24/158); in a Memorandum by Ronald Graham, Assistant Under Secretary of State for Foreign Affairs, to Lord Hardinge, this view is expressed as follows: "We ought therefore to secure all the political advantage we can out of our connection with Zionism and there is no doubt that this advantage will be considerable, especially in Russia..."; reprinted in Ingrams, *Palestine*, 8 (PRO. FO. 371/3058). Fears remained even after the war: during a meeting of the Eastern Committee on December 5, 1918, the Director of Military Intelligence, General Macdonogh, declared that he had heard that "if the Jewish people did not get what they wanted in Palestine we should have the whole of Jewry turning Bolsheviks and supporting Bolshevism in all the other countries as they have done in Russia..."; reprinted in Ingrams, *Palestine*, 50 (PRO. CAB. 27/24).

[162] William Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, in a 1922 Memorandum (on the origins of the Balfour Declaration) to Winston Churchill, then Secretary of State for the Colonies; extracts reprinted in Ingrams, *Palestine*, 7; Fromkin, *A Peace*, 286-288, 296; Quigley, *The Statehood*, 14; Weiß, "Die Entstehung, Teil 1", 150; Allain, *International*, 76; Parsons, *From Cold War*, 3; Kattan, *From Coexistence*, 70-71, 75-76; Schneer, *The Balfour*, 154-155; Shlaim, *Israel*, 9; Owen, *Tempestuous*, 426, 427; Macmillan, *Peacemakers*, 427.

During a debate in the House of Commons, Winston Churchill partly confirmed this analysis of British motives:

> *They* [the pledges] *were made because it was considered they would be of value to us in our struggle to win the War. It was considered that the support which the Jews could give us all over the world, and particularly in the United States, and also in Russia, would be a definite palpable advantage.*[164]

These assumptions were based on illusions and rumours which were unfounded; [165] however, they were decisive in persuading a majority of the British cabinet to support the issuance of the Balfour Declaration.

Other strategic concerns were more rational. Some politicians, realizing the importance of the Suez Canal for trade and recognizing Palestine as a vital link in the route between the British possessions in Africa and India via the British-dominated Egypt, believed that it might turn out to be quite useful to have a "European people" - and the prospective Jewish settlers were, of course, mostly European- settling in the area, once the war had been won, as the Arabs were seen as less trustworthy.[166] Ronald Storrs, Military Governor in Palestine as of 1917, described this policy as

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[163] William Ormsby-Gore, Parliamentary Under Secretary of State for the Colonies, in a 1922 Memorandum (on the origins of the Balfour Declaration) for Winston Churchill, then Secretary of State for the Colonies; extracts reprinted in Ingrams, *Palestine*, 7-8 (PRO. CAB. 24/158); in a meeting of the War Cabinet on September 3, 1917, during a debate on whether to proceed with the Balfour Declaration, the Acting Foreign Secretary, Lord Cecil, declared that "there was a very strong and enthusiastic organization, more particularly in the United States, who were zealous in this matter, and his belief was that it would be of most substantial assistance to the Allies to have the earnestness and the enthusiasm of these people enlisted on our side."; extracts reprinted in Ingrams, *Palestine*, 10 (PRO. FO. 23/4); also quoted in Quigley, *The Statehood*, 14.

[164] Winston Churchill, Secretary of State for the Colonies, during a debate in the House of Commons on July 4, 1922; Hansard, Commons Sitting of 4 July 1922, ser 5 vol 156, Colonial Office, cc221-343, c329; available at: http://hansard.millbanksystems.com/commons/1922/jul/04/colonial-office; accessed 16/07/2011.

[165] Shlaim, *Israel*, 10-11; Kattan, *From Coexistence*, 75; Schneer, *The Balfour*, 152-153, 343, 366.

[166] Allain, *International*, 77; Parsons, *From Cold War*, 3; Quincy Wright, "Legal Aspects of the Middle East Situation", Law & Contemp. Probs., Vol. 33, 1968, 5-31, 12; Salt, *The Unmaking*, 123; Konrad W. Watrin, *Machtwechsel im Nahen Osten, Großbritanniens Niedergang und der Aufstieg der Vereinigten Staaten 1941-1947*, Frankfurt/Main: Campus Verlag GmbH, 1989, 58-59, 66; Fromkin, *A Peace*, 281, 295; Kattan, *From Coexistence*, 64, 70-71; Gresh, *De quoi,* 48-49, 57, 62-63; James Barr, *A Line in the Sand, Britain, France and the Struggle that Shaped the Middle East*, London: Simon & Schuster, 2011, 56; Barr adds another possible motive for issuing the Balfour Declaration. He claims the Declaration was published in order to ward off French pressure to adhere to the Sykes-Picot-Agreement regarding Palestine; Anghie, *Imperialism*, 141-144 (more generally on the European economic interests behind the establishment of the mandates system).

creating "a little loyal Ulster in the heart of a fundamentally hostile Arabia." [167] Furthermore, Palestine was seen as an ideal buffer between any other foreign presence in the region and Egypt with its canal:[168]

> *Palestine adjoins the Sinai Peninsula, the Suez Canal, and Akaba, and a British railway from Akka-Haifa to Iraq would traverse Palestine in its first section. It is therefore a British desideratum that if the effective government of Palestine demands the intervention of a single outside power in its administration, that Power should be either Great Britain or the United States...*[169]

cc) The Arabs

The consequences for the Muslim and Christian Arabs -who formed the vast majority of the population-[170] of creating a Jewish national home in Palestine, did not figure prominently among British politicians' concerns. [171] As the Prime Minister, Lloyd George, later put it:

> *We could not get in touch with the Palestinian Arabs as they were fighting against us.*[172]

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[167] Ronald Storrs, quoted in Keay, *Sowing*, 195; Weizmann is alleged to have described a future Jewish Palestine as an "Asiatic Belgium" (Macmillan, *Peacemakers*, 427).

[168] Shlaim, *Israel*, 9; Ingrams, *Palestine*, 36; Kattan, *From Coexistence*, 30, 38-39; Keay, *Sowing*, 81, 195, 244; Gresh, *De quoi,* 57, 62-63; Gresh views the Balfour Declaration partly as a British attempt to extricate itself from its obligations towards France according to the Sykes-Picot-Agreement of 1916; a point also made by Wright, "Legal Aspects", 12; Barr, *A Line*, 56; Macmillan, *Peacemakers*, 427.

[169] Arnold Toynbee (Political Intelligence Department at the Foreign Office) in a memorandum of October 1918; extracts reprinted in Ingrams, *Palestine*, 40-41 (PRO. FO. 371/4368); similar sentiments were expressed by the Minister without Portfolio, Chamberlain, during a meeting of the War Cabinet on August 15, 1918: "With regard to Mesopotamia, Palestine and East Africa, the question resolved itself into one of the security of the British Empire and of its allies."; reprinted in Ingrams, *Palestine*, 38-40 (PRO. FO. 800/221). During a meeting on September 10, 1919, General Shea pointed out that "from the point of the air he thought it essential to have Palestine. The necessity of this was to break up an air attack on the Suez Canal."; Minutes reprinted in Ingrams, *Palestine*, 75-78 (PRO. CAB. 21/153).

[170] Sir Gilbert Clayton, Chief Political Officer Egyptian Expeditionary Forces, on December 6, 1918, estimated the population in Palestine to be as follows:"Moslems 512,000; Christians 61,000; Jews 66,000"; reprinted in Ingrams, *Palestine*, 43-44; M. C. Bassiouni, "'Self-Determination' and the Palestinians", Am. Soc`y Int'l L. Proc., Vol. 65, 1971, 31-40, 35 (90 %); Ilan Dunsky, "Israel, The Arabs, and International Law: Whose Palestine Is It, Anyway?", Dalhousie J. Leg. Stud., Vol. 2, 1993, 163-200, 168 (85 %); Prince, "The Palestine", 125 (90 %).

[171] In a record of a meeting between British Foreign Secretary Balfour and the leader of the British Zionists, Chaim Weizman on December 4, 1918, it is stated that "Mr Balfour agreed that the Arab problem need not be regarded as a serious hindrance in the way of the development of a Jewish National Home."; reprinted in Ingrams, *Palestine*, 46 (PRO. FO. 371/3385); Fromkin, *A Peace*, 297.

[172] Lloyd George; quoted in Fromkin, *A Peace*, 297; the Military Governor in Palestine as of 1917, Ronald Storrs, later remarked: "The Declaration...took no account of the feelings or desires of the actual inhabitants of Palestine."(in: *Orientations*, London: Nicholson & Watson, 1943, 352).

Their "religious and civil rights" were protected in the Declaration, but not much more thought was given to local reaction. Since at the time Arab states did not exist in the area ruled by the Ottomans, some politicians might have believed that the Arabs would be getting so much territory for themselves that they may be indifferent to the establishment of a Jewish home in Palestine.[173] That approach, however, evidenced complete disdain for the people actually already living in Palestine.[174]

Some, including many Zionists, also believed that the local "backward" population could only benefit from the colonisation by a "civilized", mainly European people. [175] It was repeatedly argued that the Arabs of Palestine would probably become the wealthiest Arabs in the area, thanks to Zionist efforts.[176] Colonel Meinertzhagen, British Chief Political Officer in Syria and Palestine, probably summarized these feelings best in a report of March 31, 1920, to the British Foreign Secretary, Lord Curzon:

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[173] Hadawi, *Palestinian*, 6-9; he demonstrates how ridiculous such an assumption was, when he details resistance to Zionist landowners developing as early as the late 19th century. Nevertheless, even after the Second World War, this argument was still being put forward: Alba Eban, in "Israel: The Emergence of a Democracy" (Foreign Aff., Vol. 29, 1950-1951, 424-435, 434), argues that Arab states should accept Israel as that state only occupied "one hundredth " of the area in which Arabs had gained independence; Julius Stone, *Israel and Palestine: Assault on the Law of Nations*, Baltimore: The John Hopkins University Press, 1981; he provides the same statistics (at 16), and concludes that any Arab right to self-determination had therefore been fulfilled (at 17-18). Some within in the British establishment may also have deluded themselves that, no matter what they did, the local population would prefer British rule to a return of the Ottomans. That is implied by what Sir Valentine Chirol, one-time *Times* journalist and British diplomat, wrote in 1922. In "Islam and Britain" (Foreign Aff., Vol. 1, 1922-1923, 48-58) he acknowledges Arab disappointment at unfulfilled Allied promises (at 57-58), and specifically mentions Palestine, but goes on to state "Hatred of the Turk as a ruler is stronger than the tendency to sympathize with him as a brother in the Faith."; some within the British Establishment also accused the Arabs of "ingratitude". The British having liberated them from the Turks, the Arabs would surely "not begrudge that small notch [Palestine]."; Macmillan attributes this statement to Foreign Secretary Balfour (in: *Peacemakers*, 432).

[174] Stefan Tolin, "The Palestinian People and Their Political, Military and Legal Status in the World Community", N.C. Cent. L. J., Vol. 5, 1973-1974, 326-347, 336.

[175] Frankfurter, "The Palestine", 409-413; 415 (Frankfurter states that "no wise friend of Arab aspirations would seek to charge the Arab with responsibility for composing the delicate religious and racial problems in Palestine"); Ben-Gurion, *Israel*, 14-15; Shlaim, *Israel*, 11; Macmillan, *Peacemakers*, 431.

[176] Frankfurter, "The Palestine", 418; Winston Churchill, then Secretary of State for the Colonies and on a visit to Palestine in March 1921, remarked that he believed Jewish immigration into Palestine "will be good for the world, good for the Jews and good for the British. But we also think it will be good for the Arabs who dwell in Palestine..."; reprinted in Ingrams, *Palestine*, 118-119 (PRO. CO. 733/2); Strawson, *Partitioning,* 31-32.

> *It is not doubted that Zionism will and must succeed to the benefit of Palestine and all its inhabitants. Should the Arab, as is inevitable, fail to compete with a superior civilisation, and from his nature it is probable he will not compete, is it fair that Palestine with its undeveloped resources, should be refused progress because its inhabitants are incapable of it? The Arabs will be compelled under Zionism to enjoy increased prosperity and security,...*[177]

This arrogant neglect of the local population's wishes would come to haunt successive British administrations in Palestine, and has contributed to the area becoming one of the most dangerous in the world.

c) Controversies surrounding the Balfour Declaration

Nearly everything regarding the "Balfour Declaration" is highly controversial. Its status in international law, and the fact that Great Britain entered into other agreements which did or may have applied to Palestine, has led some to view the Declaration as invalid. Attempting to interpret the Declaration's actual meaning has, nevertheless, caused even more controversies due to its ambiguous terms.

aa) The "too much promised" land[178]

> *The Palestine position is this. If we deal with our commitments, there is first the general pledge to Hussein in October 1915, under which Palestine was included in the areas as to which Great Britain pledged itself that they should be Arab and independent in the future...Great Britain and France -Italy subsequently agreeing- committed themselves to an international administration of Palestine in consultation with Russia, who was an ally at the time...A new feature was brought into the case in 1917, when Mr. Balfour, with the authority of the War Cabinet, issued the famous declaration to the Zionists that Palestine should be the national home of the Jewish people,...*[179]

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[177] Colonel Meinertzhagen, Chief Political Officer in Syria and Palestine, to Lord Curzon, British Foreign Secretary, in a report of March 31, 1920, on the situation in Palestine; reprinted in Ingrams, *Palestine*, 82-83 (PRO. FO. 371/5034).

[178] Prince, "The Palestine", 125; Woolbert, "Pan Arabism", 311.

[179] Lord Curzon, Lord President of the Council, member of the Inner War Cabinet and future British Foreign Secretary, at a meeting of the "Eastern Committee" (previously the Middle Eastern Committee) on December 5, 1918; Minutes of the meeting reprinted in Ingrams, *Palestine*, 48 (PRO. CAB. 27/24).

(i) Sykes-Picot-Agreement (1916)

In late 1915 the British and the French began negotiations on determining the fate of the Middle East in the aftermath of the First World War. Regarding Palestine the British representative, Sykes, and the French negotiator, achieved a compromise: two ports and a stretch of land enabling the construction of a railway line to Mesopotamia should become British administered territory, while the rest of the territory was to be governed by an international regime.[180] The Sykes-Picot-Agreement was approved by both governments in early 1916, but kept secret. The Russians, in April 1916, also agreed to the outlines of the agreement. [181]

When the British government started contemplating expressing its support for Zionist intentions in Palestine, it was indeed the Sykes-Picot-Agreement and possible adverse French reaction to any such venture that worried officials most.[182] However, the Zionists managed to enlist French support. On June 4, 1917, Cambon, a leading official in the French Foreign Ministry, gave a Zionist representative a written confirmation that France felt "sympathy" for the Zionist endeavours in Palestine.[183] Subsequently, the Sykes-Picot-Agreement was no longer seen as an obstacle to British support of Zionism.[184]

(ii) McMahon-Hussein Correspondence (1915/1916)

As mentioned earlier, the possibility of Arab opposition to the "Balfour Declaration" was never taken very seriously by the British government. Nevertheless, the

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[180] Quigley, *The Statehood*, 12-13; Kattan, *From Coexistence*, 40-41; Schneer, *The Balfour*, 75-86; Barr, *A Line*, 31.
[181] Quigley, *The Statehood*, 13; Schneer, *The Balfour*, 80; Barr. *A Line*, 60.
[182] Fromkin, *A Peace*, 291, 297; Schneer, *The Balfour*, 159-160, 218-219, 232-236.
[183] Fromkin, *A Peace*, 292-293; Quigley, *The Statehood*, 18; he mentions a secret agreement between British Prime Minister Lloyd George and the French in December 1918, whereby Palestine should be British.
[184] Young, *Arthur*, 391-392; he also mentions Foreign Office efforts to convince the French; Schneer, *The Balfour*, 86.

correspondence of 1915/1916 between the British High Commissioner in Egypt, McMahon, and the Sharif Hussein of Mecca -who was seen as one of the main leaders of Arab resistance against Ottoman rule- which dealt with post-war Arab independence was to trouble the British government for many decades.[185]

It has indeed frequently been argued that the Balfour Declaration is invalid because the British had already promised the Arabs that Palestine would be part of the territory of an independent Arab state. In exchange for Arab support against the Ottomans, the British had promised the Arabs independence. Even now it is, however, highly controversial whether the territory promised to Hussein included Palestine or not.[186]

Based mainly on a letter by McMahon of Oct. 24, 1915,[187] many argue that Palestine was included in the territory to be ruled by the Arabs.[188] That view has been supported, among others, by a British Foreign Secretary and various civil servants in the Foreign Office.[189] Furthermore, in June 1922, the House of Lords, by a large

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[185] As evidenced by the Committee set up to investigate the correspondence in the late 1930s which produced the "*Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16*", 16/03/1939, Cmd. 5974; also available at: http://www.gwpda.org/1916/mcmahon_sharif.html; accessed 22/07/2011; Strawson, *Partitioning*, 55-56.

[186] Schneer, *The Balfour*, 64, 74.

[187] For a translated version of the letter, see: http://www.jewishvirtuallibrary.org/jsource/History/hussmac1.html; accessed 22/07/2011. It is the statements "The two districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded" and "Subject to the above modifications, Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca" which have led to the controversy. It has remained in dispute whether Palestine was excluded from the area in which Arabs were to be independent or not.

[188] H. St. J. B. Philby, "The Arabs and the Future of Palestine", Foreign Aff., Vol. 16, 1937-1938, 156-166, 157; he claims that in the correspondence only Aden was excluded from Arab independence; Prince, "The Palestine", 125; implicitly Woolbert, "Pan Arabism", 311 ("contradictory promises during the World War"); Günther Weiß, "Die Entwicklung der Palästina-Frage seit dem Peel-Bericht", ZaöRV, 1939-1940, 382-426, 416-417 (he offers a linguistic interpretation based on Turkish and Arab terms for "district", and comes to the conclusion that the Arabs could assume Palestine was included); and "Die Enstehung, Teil 1", 148; Hirst, *The Gun*, 160; Allain, *International*, 78; Hadawi, *Palestinian*, 11-14; Watrin, *Machtwechsel*, 60; Strawson, *Partitioning*, 3-4; Kattan, *From Coexistence*, 45-46, 98-111.

[189] Lord Curzon, Lord President of the Council, member of the Inner War Cabinet and future British Foreign Secretary, at a meeting of the "Eastern Committee" (previously the Middle Eastern Committee) on December 5, 1918; he declared that Palestine was "included in the areas as to which Great Britain pledged itself ... in a general pledge to Hussein in October 1915 ... that they should be Arab and independent in future"; Minutes of the meeting reprinted in Ingrams, *Palestine*, 48 (PRO. CAB. 27/24); Gainsborough, *The Arab-Israeli*, 5; he refers to a note on a map (Foreign Office Minute of 1918, also mentioned by Kattan, *From Coexistence*, 40),

majority, passed a motion which declared the Palestine Mandate "inacceptable" because, among other things, "it directly violates the pledges made by His Majesty's Government to the people of Palestine in the Declaration of October, 1915",[190] strongly indicating that a large majority in the House of Lords also believed Palestine to have been included in the territory promised to Hussein.

Officially, the British government always maintained that Palestine was not part of the territory promised to the Arabs, but had instead been explicitly excluded.[191] This view was supported by McMahon himself, [192] who is generally credited with having expressed himself as vaguely as possible in his correspondence with Hussein.[193] In later times, the British government somewhat modified its position regarding the promises made.

In the Arab-UK Committee Report of 1939 the UK representatives declared:

> *16. Both the Arab and the United Kingdom representatives have tried (as they hope with success) to understand the point of view of the other party, but they have been unable to reach agreement upon an interpretation of the Correspondence, and they feel obliged to report to the conference accordingly.*
>
> *17. The United Kingdom representatives have, however, informed the Arab representatives that the Arab contentions, as explained to the committee, regarding the interpretation of the Correspondence, and especially their contentions relating*

PRO. FO. 371/4352, which states:"Palestine was implicitly included in King Hussein's original demands and was not explicitly excluded in Sir H. McMahon's letter of 24.10.1915. We are therefore, presumably pledged to King Hussein by this letter that Palestine shall be 'Arab' and 'independent'"; a further memorandum, prepared by the Political Intelligence Department at the Foreign Office in preparation for the negotiations at Versailles states: "With regard to Palestine, H.M.G. are committed by Sir Henry McMahon's letter to the Sherif on October 24, 1915, to its inclusion in the boundaries of Arab independence"; see: *The Times*, "Light on Britain's Palestine Promise", 17/04/1964, 15-16, 15; also quoted in Kattan, *From Coexistence*, 38 (FO. 608/92); Quigley, *The Statehood*, 11-12; Frankfurter, "The Palestine", 414-415; though a leading Zionist, he only mentions the controversy without expressing an opinion; he only claims it is in the Arabs' best interest not to rule Palestine.

[190] Hansard, Palestine Mandate, HL Deb 21 June 1922 vol 50 cc994-1033, c994; available at: http://hansard.millbanksystems.com/lords/1922/jun/21/palestine-mandate; accessed 12/07/2011.

[191] Ben-Gurion, *Israel*, 11; Quigley, *The Statehood*, 12.

[192] McMahon (in 1937); quoted in "*Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16*", 16/03/1939, Cmd. 5974, para. 13 e: " I feel it is my duty to state, and I do so, definitely and emphatically, that it was not intended by me in giving the pledge to King Hussein to include Palestine in the area in which Arab independence was promised"; also available at: http://www.gwpda.org/1916/mcmahon_sharif.html; accessed 22/07/2011.

[193] Barr, *A Line*, 22-29.

to the meaning of the phrase "portions of Syria lying to the west of the districts of Damascus, Hama, Homs and Aleppo", have greater force than has appeared hitherto.

18. Furthermore, the United Kingdom representatives have informed the Arab representatives that they agree that Palestine was included in the area claimed by the Sharif of Mecca in his letter of the l4th July, 1915, and that unless Palestine was excluded from that area later in the Correspondence it must be regarded as having been included in the area in which Great Britain was to recognise and support the independence of the Arabs. They maintain that on a proper construction [sic] *of the Correspondence Palestine was in fact excluded. But they agree that the language in which its exclusion was expressed was not so specific and unmistakable as it was thought to be at the time.* [194]

Faced with this controversy, the British opted for a compromise solution regarding Palestine which resulted in its later partition and the creation of Trans-Jordan. In his White Paper of 1922 Colonial Secretary Winston Churchill already outlined the partition in the following terms:

With reference to the Constitution which it is now intended to establish in Palestine, the draft of which has already been published, it is desirable to make certain points clear. In the first place, it is not the case, as has been represented by the Arab Delegation, that during the war His Majesty's Government gave an undertaking that an independent national government should be at once established in Palestine. This representation mainly rests upon a letter dated the 24th October, 1915, from Sir Henry McMahon, then His Majesty's High Commissioner in Egypt, to the Sherif of Mecca, now King Hussein of the Kingdom of the Hejaz. That letter is quoted as conveying the promise to the Sherif of Mecca to recognise and support the independence of the Arabs within the territories proposed by him. But this promise was given subject to a reservation made in the same letter, which excluded from its scope, among other territories, the portions of Syria lying to the west of the District of Damascus. This reservation has always been regarded by His Majesty's Government as covering the vilayet of Beirut and the independent Sanjak of Jerusalem. The whole of Palestine west of the Jordan was thus excluded from Sir Henry McMahon's pledge. [195]

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[194] *"Report of a Committee set up to consider certain correspondence between Sir Henry McMahon and The Sharif of Mecca in 1915 and 16"*, 16/03/1939, Cmd. 5974, paras. 16-18; also available at: http://www.gwpda.org/1916/mcmahon_sharif.html; accessed 22/07/2011.

[195] Winston Churchill, *"The British White Paper"*, 03/06/1922; available at: http://avalon.law.yale.edu/20th_century/brwh1922.asp; accessed 22/07/2011 (emphases by author).

The precise meaning of the McMahon-Hussein-correspondence has remained controversial up to this day.[196] The feeling of betrayal on the Arab side, caused by the differing interpretations of the McMahon-Hussein correspondence, certainly seems justified, when it is considered that many British officials agreed with the Arab interpretation of that correspondence. [197]

Nevertheless, this discussion is, as far as international law is concerned, largely irrelevant. This is due, as will be explained shortly, to the fact that Palestine was later categorized as an "A"-Mandate, and as such was subject to Article 22 (4) of the Covenant of the League of Nations and the Palestine Mandate.[198]

bb) International legal status of the Balfour Declaration

This leads on to the question what status the Balfour Declaration actually has in international law. Some have argued that it represented a binding agreement between the Allies and the Zionists. In exchange for Zionist support during the First World War, it is argued, the Allies agreed to provide the Jewish people with a national home.[199] The latter contention is based on the fact that the American government approved the text of the Declaration prior to the British government issuing it, while

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[196] Schneer, *The Balfour*, 64-74; Tom Segev, "Mohammed und Herr Cohen", *Spiegel Geschichte*, 2011, Nr. 3, 82-85, 83.

[197] Chirol, "Islam", 57; he states: "The dream of a great Arab state which the Allies encouraged by their lavish promises during the war has vanished into thin air with the separate mandates which Britain and France agreed to confer upon themselves".

[198] According to Article 20 (2) of the Covenant the obligations under the Covenant took precedence over prior obligations contrary to its provisions. Member states were to extricate themselves from such obligations. It should also be pointed out that there are doubts as to Britain's right to dispose of territory it had not even yet occupied, and as to Hussein's right to represent the Arabs. In that sense the McMahon-Hussein Correspondence suffers from similar defects as the Balfour Declaration (which will be explained shortly).

[199] Murlakov, *Das Recht*, 59-61; Mallison, "The Zionist", 1002-1005 (although he limits the obligation to Great Britain).

the French and Italian government issued supportive statements in February and May 1918.[200]

There can, however, be no doubt that the Declaration in itself did not have any status in international law.[201]

The Allies may have generally approved the text of the Declaration. As the text, however, makes clear it is only "His Majesty's Government" making any pledges - whatever their content may be. Furthermore, the British were making pledges regarding a territory they had not even occupied at the time. [202] Palestine was still Ottoman-ruled, and the outcome of the First World War was as yet uncertain. [203]

It is also obvious that public international law obligations on the part of states are not created in what was formally a letter to an individual, even if that person was in a prominent position within the Zionist movement.[204] It must also be remembered that the Zionists at that time did not form anything approaching a majority among the Jews worldwide. Their right to represent the Jews in general must therefore be disputed.[205]

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[200] *Palestine Royal Commission Report*, July 1937, Cmd. 5479, 22, Chapter II, para. 14; http://domino.un.org/pdfs/Cmd5479.pdf; last accessed 22/07/2011; Stein, "The Jews", 420; Strawson, *Partitioning*, 45; Owen, *Tempestuous*, 428; Keay, *Sowing*, 79.

[201] Dunsky, "Israel", 167; Frankfurter, "The Palestine", 414 ("The Mandate explicitly recited the Balfour Declaration...Thus was the Balfour Declaration made part of the law of nations"); Allain, *International*, 73, 78; Shabtai Rosenne, "Directions for a Middle East Settlement- Some Underlying Legal Problems", Law & Contemp. Probs., Vol. 33, 1968, 44-67, 48, ("legal status...may be open to discussion"); Gendell and Stark, "Israel", 217; they seem to disagree.

[202] Muhammad H. El-Farra, "The Role of the United Nations vis-à-vis the Palestine Question", Law & Contemp. Probs., Vol. 33, 1968, 68-77, 68; Mallison, "Zionist", 1002; Linowitz, "Analysis", 522; Kattan, *From Coexistence*, 44; Strawson, *Partitioning*, 35; Shlaim, *Israel*, 4, 8.

[203] El-Alami, *The Palestine*, 144; Kattan, *From Coexistence*, 44.

[204] Strawson, *Partitioning*, 35; Kattan, *From Coexistence*, 58-59. Even if the Declaration were construed to be an agreement between the British and the Zionists it would not be governed by public international law. Its status would be similar to that of a concession granted by a state to a private company. The Zionist organization -certainly at that time- had no status in public international law. Regarding concessions, also see ICJ, *Anglo-Iranian Oil Co. Case (Jurisdiction)*, United Kingdom v. Iran, Judgement, 22/07/1952, I.C.J. Rep. 1952, 93, 111-113. The ICJ declined its jurisdiction also on the basis that the Concession granted to the Anglo-Iranian Oil Co. by Iran did not create any rights as far as the United Kingdom was concerned.

[205] Mallison, "Zionist", 1004 (also quoting Weizmann, who acknowledged that fact); Anis F. Kassim, "The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law", Denv. J.

The only conclusion can therefore be that the Balfour Declaration is "not a legal document, and has no standing in international law." [206]

cc) Interpretation of the text

Due to its vagueness the interpretation of the Balfour Declaration has always been extremely controversial. Although the Declaration itself never had any "standing in international law", the fact that it was later included in the Mandate for Palestine, which was approved by the League of Nations, does make it necessary to have a closer look at what was actually meant by the phrases that "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people" and "it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine".[207]

It has been claimed that the wording of the Declaration can only mean that Palestine in its entirety (including what is nowadays Jordan) was to become *the* Jewish National Home, resulting in the creation of a "Jewish Commonwealth" there.[208] The so-called

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Int'l L. & Pol'y, Vol. 9, 1980, 1-33, 13-14; he rightly points out that the Zionist Organization was first internationally recognized as a public body in the Mandate which established the Jewish Agency.

[206] Dunsky, "Israel", 167; Mallison, "The Zionist", 1030; Mallison disagrees. He argues that the Balfour Declaration has become part of customary international law. This position can hardly be reconciled with his own interpretation of the Declaration (he concludes that it contained only a "political promise clause").

[207] The Balfour Declaration"; available at: http://news.bbc.co.uk/1/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682961.stm; last accessed 22/07/2011.

[208] Howard Grief, "Legal Rights and Title of Sovereignty of the Jewish People to the Land of Israel and Palestine under International Law", NATIV Online, Vol. 2, 2004, http://www.acpr.org.il/English-Nativ/02-issue/grief-2.htm; last accessed 22/07/2011; 1-12, 1, 2; Dunsky, "Israel", 170; Dunsky makes a related argument; he claims that the mandates system meant that the international community had made "an explicit decision" that the Jews "were to achieve self-determination" in that part of Palestine that was not Trans-Jordan. This is a somewhat contradictory statement, given the fact that Dunsky in the sentence before makes the point that self-determination at the time was "purely political ...and not binding".

"Safeguard Clause" dealing with the non-Jewish communities is seen as obviously envisaging their future minority status within the new Jewish entity.[209]

This interpretation was -in general terms- supported by the then Prime Minister, Lloyd George. Before the "Peel Commission" in 1937 Lloyd George declared when giving evidence:

> *The idea was, and this was the interpretation put upon it at the time, that a Jewish State was not to be set up immediately by the Peace Treaty without reference to the wishes of the majority of the inhabitants. On the other hand, it was contemplated that when the time arrived for according representative institutions to Palestine, if the Jews had meanwhile responded to the opportunity afforded them by the idea of a national home and had become a definite majority of the inhabitants, then Palestine would thus become a Jewish Commonwealth.* [210]

On the other hand, in his White Paper of 1922, Winston Churchill, the Colonial Secretary, had declared:

> *Unauthorized statements have been made to the effect that the purpose in view is to create a wholly Jewish Palestine. Phrases have been used such as that Palestine is to become "as Jewish as England is English." HMG regard any such expectation as impracticable and have no such aim in view. Nor have they at any time contemplated, as appears to be feared by the Arab Delegation, the disappearance or the subordination of the Arabic population, language or culture in Palestine. They would draw attention to the fact that the terms of the Declaration referred to do not contemplate that Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded in Palestine.*[211]

Later, when the troubles in Palestine were threatening to overwhelm Britain, the British government sought to distance itself even further from the view that the Balfour Declaration had created any definite obligations:

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[209] Linowitz, "Analysis", 523.
[210] Lloyd George, quoted in *Palestine Royal Commission Report*, July 1937, Cmd. 5479, 24, Chapter II, para. 20; available at: http://domino.un.org/pdfs/Cmd5479.pdf; last accessed 22/07/2011; Shlaim, *Israel*, 14.
[211] Winston Churchill, "*The British White Paper*", 03/06/1922; available at: http://avalon.law.yale.edu/20th_century/brwh1922.asp; accessed 22/07/2011.

> *The Balfour Declaration, in itself a compromise document, was not expressed in definitive political terms. It was a gesture, the expression of a hope then existing that the Jews and Arabs would compose their differences and eventually coalesce into a single commonwealth united in Palestinian citizenship. That evolution had not taken place...*[212]

Simply reading the text of the "Declaration", it would seem that Winston Churchill's interpretation -as described in his White Paper of 1922- is correct.[213] Neither is a "Jewish state" mentioned in the "Declaration", nor is Palestine described as "the" Jewish National Home. [214] As both Shlaim and Strawson point out, the term "national home" -in contrast to the word "state"- at that time had no defined political or legal meaning whatsoever.[215] When, on the other hand, assessing Lloyd George's interpretation it is necessary to bear his strong pro-Zionist bias in mind.

Certainly, Lord Curzon, also a member of the Cabinet at the time the Declaration was passed, and by now Foreign Secretary, took a different view from that of the Prime Minister. When presented with a draft of the Palestine Mandate which included the phrase "will secure the establishment of a Jewish National Home and a self-governing Commonwealth", Curzon responded by commenting:

> *'development of a self-governing Commonwealth'. Surely most dangerous. It is a euphemism for a Jewish State, the very thing they accepted and that we disallow.*[216]

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[212] William Ormsby-Gore, Secretary of State for the Colonies, before the *Permanent Mandates Commission* in 1937; Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th-August 18th, 1937, 22nd meeting, available at: http://unispal.un.org/UNISPAL.NSF/0/FD05535118AEF0DE052565ED0065DDF7; accessed 16/07/2011.

[213] Kattan, *From Coexistence*, 5; without offering any explanation, Dunsky, however, views this interpretation as "unlikely" ("Israel", 173).

[214] Collins, "Self-Determination", 157; Kattan, *From Coexistence*, 59-63; Strawson, *Partitioning*, 36; Shlaim, *Israel*, 14, 23.

[215] Shlaim, *Israel*, 14 ("never clearly defined and...no precedent in international law"); Strawson, *Partioning*, 36 ("...it [the term 'national home'] was unknown in international law" and "in political discourse"); Kattan, *From Coexistence*, 61-62; he agrees, and goes on to argue that the Zionist drafters of the first version of the Balfour Declaration deliberately avoided the term "state", because they realized that any such undertaking would be rejected by the British government.

[216] Comment by Lord Curzon on a draft of the Palestine Mandate, March 1920; reprinted in Ingrams, *Palestine*, 94 (PRO. FO. 371/5199); Eric Forbes Adam (Diplomatic Service) responded to this comment on March 18, 1920, by stating that "the use of the phrase did not, to our mind, imply any acceptance in the mandate of the

In the ensuing discussion Curzon went on to point out that the creation of a Jewish State, if included in the Palestine Mandate, was "contrary to every principle upon which we have hitherto stood, I at any rate cannot accept it."[217]

Further illumination is provided when the draft "Declarations" *not* adopted by the British government before the Balfour Declaration was issued are examined. Four drafts had already been rejected before the British cabinet approved the Balfour Declaration on October 31, 1917.[218]

The first draft (July 1917), prepared by Zionists, was comparatively straight forward. It provided that the British government "accepts the principle that Palestine should be reconstituted as the National Home of the Jewish people".[219] No safeguard clause was included. The second draft (August 1917), prepared by Balfour, was more or less identical to the Zionist draft. The third draft (August 1917), prepared by Milner, already included a much weaker statement which declared that the British government "accepts the principle that every opportunity should be afforded for the establishment of a home for the Jewish people in Palestine". However, a safeguard clause was still not included.

By the time the fourth draft (the "Milner-Amery Draft") was presented on October 4, 1917, the original, Zionist proposal had been "watered down" considerably.[220] In it the British government only "viewed with favour the establishment in Palestine of a

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Jewish idea that the Palestinian state set up by the mandate would ever become a Jewish state"; reprinted in Ingrams, *Palestine*, 94-95 (PRO. FO. 371/5199).

[217] Response by Lord Curzon to minutes prepared by Eric Forbes Adam, March 19, 1920; reprinted in Ingrams, *Palestine*, 95 (PRO. FO. 371/5199).

[218] For the text of all four drafts see "Genesis of Britain's 1917 'Balfour Declaration': Zionist Jews' Sanction to Populate Palestine", http://www.semp.us/publications/biot_printview.php?BiotID=394; last accessed 22/07/2011 (reprint of the documents included in Leonard Stein's "The Balfour Declaration", Simon and Schuster 1961, 664); for evidence of the discussions within the British Cabinet, also see: Ingrams, *Palestine*, 7-18; Kattan, *From Coexistence*, 59-63; Strawson, *Partitioning*, 29-30; Schneer, *The Balfour*, 334-336, 339-341.

[219] Ingrams, *Palestine*, 9.

[220] Mallison, "The Zionist", 1014; Kattan, *From Coexistence*, 62-63.

national home for the Jewish race". For the first time a safeguard clause protecting the "non-Jewish communities'" rights was included.[221] With two amendments not relevant here, this fourth draft was to become the Balfour Declaration.

It is therefore understandable that Dr. Weizmann described the fourth draft, which is more or less identical to the Declaration, as a "painful recession";[222] a comment which cannot be easily reconciled with the arguments put forward by those who claim that the Balfour Declaration had clearly promised the Zionists the creation of a Jewish state. The British government only "favoured" the establishment of "a" national home for the Jews. Any "reconstitution" of such a home that might have implied acknowledgement of ancient Jewish rights was not mentioned, and, finally, the safeguard clause in favour of the "non-Jewish communities" was included.[223]

Considering this evolution of the Balfour Declaration it becomes clear that the British cabinet in its totality -no matter what Lloyd George's and Balfour's intentions had been- was at pains to avoid any precise legal obligation, and certainly did not want to guarantee the establishment of a Jewish state or Commonwealth in Palestine in the future.[224] The British government also would not have wished to antagonize the local

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[221] Ingrams, *Palestine*, 12-13 (PRO. CAB. 23/4).

[222] Dr. Chaim Weizmann, as quoted by W.T. Mallison Jr., "The Zionist-Israel Juridical Claims", 1013; and Kattan, *From Coexistence*, 61; Fromkin, *A Peace*, 297; Fromkin describes the final version as a "much diluted" version and claims Weizmann was unhappy with the result.

[223] Strawson, *Partitioning*, 36.

[224] Allain, *International*, 79; Owen, *Tempestuous*, 427, 428; he (a "George Lloyd" Liberal MP in 1929 and biographer of Lloyd George) points out that "rifts" developed in the War Cabinet as far as the Balfour Declaration was concerned which were to continue for a long time afterwards; a consequence being that the Declaration did not answer the question what British policy actually was; Norman Bentwich, "The Mandate for Palestine", BYIL, Vol. 10. 1929, 137-143, 139; he states: "A national home connotes a territory in which a people, without receiving the rights of political sovereignty, has, nevertheless a recognized legal position..."; this statement by Bentwich is quoted by Frankfurter (President of the American Zionist Organization), and described as the comment of a "leading authority" ("The Palestinian", 417); Omar M. Dajani, "Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period", Denv. J. Int'l L. & Pol'y, Vol. 26, 1997-1998, 27-53, 36-37; Mallison, "The Zionist", 1018; Mallison describes the Declaration as "having a very restricted political meaning"; Grief, "Legal Rights", 2; Grief disagrees. Without providing any evidence, he argues that the British Cabinet had meant a "state" which was supposed to extend to the whole of Palestine when it used the term "Jewish National Home". There are, however, not many who share Grief's extreme

inhabitants unnecessarily at a time when the planning for a British invasion of Palestine was in its last stages. [225]

Schneer points out that towards the end of the First World War leading British politicians were in fact even willing to drop the pledges contained in the Balfour Declaration. In an effort to persuade Turkey to desert the Central Powers, negotiations with individual Turkish politicians ensued in early 1918, during which Lloyd George seemed willing to grant Turkey at least nominal sovereignty over Palestine.[226] Nothing came of these negotiations, but the episode certainly does demonstrate that leading British politicians at that time were not too worried about any commitments enshrined in the Balfour Declaration, which is why Schneer has concluded that Palestine was actually promised "four times".[227]

The conclusion must therefore be that the Balfour Declaration did not include the promise of the creation of a Jewish state in Palestine. [228] Its content was more in line with the original Foreign Office sentiment which was the establishment, in Palestine, of "a sanctuary for Jewish victims of persecution".[229] This view was also shared within the U.S. State Department. In a memorandum of September 22, 1947, Loy Henderson wrote to the Secretary of State:

> *We are under no obligation towards the Jews to set up a Jewish State. The Balfour Declaration and the Mandate provide not for a Jewish State but for a Jewish*

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interpretation. Rather, the fact that the Holy Sites were situated in what was then Palestine makes it highly unlikely that the British Cabinet would have agreed to a Jewish state being created that was identical to Palestine (This assertion does, however, not necessarily preclude the argument -opposed here- that some kind of Jewish state was envisaged in Palestine, see above).

[225] Mallison, "The Zionist", 1014; Kattan, *From Coexistence*, 255.

[226] Schneer, *The Balfour*, 347-361.

[227] Schneer, *The Balfour*, 368.

[228] This is further evidenced by Frankfurter's (President of the American Zionist Organization) comment in 1930 in "The Palestine" (at 415): "But authoritative Jewish demand is not for a Jewish state; it does not ask to govern others."; Macmillan, *Peacemakers*, 427-428; she points out that the British government "insisted repeatedly" that a national home "did not mean a state".

[229] Mallison, "The Zionist", 1012.

> *national home. Neither the United States nor the British Government has ever interpreted the term "Jewish national home" to be a Jewish national state.*[230]

Nevertheless, a promise to allow Jewish immigration into Palestine in the case of British occupation of the area was undoubtedly intended.

How the British government wanted to reconcile the creation of a Jewish national home with the wish not to prejudice the existing "non-Jewish communities'" rights remains open to question. All indications are that the possible consequences were not analysed in detail, and that the Balfour Declaration was a politicians' compromise -as vague as possible in order to superficially please as many as possible. Accordingly, Kermit Roosevelt, a Middle East expert who worked for the CIA, described the Declaration's content as being "of the poetical obscurity of the Delphic Oracle" due to its many "deliberate ambiguities".[231] Certainly, detailed concepts of how to proceed in Palestine after the war are nowhere to be found which, in turn, by 1939, had led to eleven commissions having been sent to Palestine in order to figure out how to reconcile the conflicting aims of the Balfour Declaration.[232] In the end Britain could only acknowledge its failure to do so. Lord Cecil was to be proved right in his prediction, made during a discussion on who should administer Palestine, that "whoever goes there will have a poor time."[233]

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[230] *The Director of the Office of Near Eastern and African Affairs (Henderson) to the Secretary of State*, September 22, 1947; United States Department of State, FRUS, 1947, The Near East and Africa, 1947, 1153-1158, 1157; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 19/07/2011.
[231] Kermit Roosevelt, quoted in Keay, *Sowing*, 80.
[232] Kattan, *From Coexistence*, 44; Shlaim, *Israel*, 17-19.
[233] Lord Robert Cecil, Assistant Secretary of State, at a meeting of the "Eastern Committee" (previously the Middle Eastern Committee) on December 5, 1918; Minutes of the meeting reprinted in Ingrams, *Palestine*, 48-50, 50 (PRO. CAB. 27/24).

2. British Occupation of Palestine (1917-1923)

By Christmas 1917 the British had occupied Jerusalem. General Sir Edmund Allenby placed the area under military administration. Military rule in the "Occupied Enemy Territory" endured until June 30, 1920. [234] Regarding Jewish immigration into Palestine, an embargo was in place which had been imposed by the Ottoman rulers.[235] However, Hebrew immediately became one of the official languages of Palestine, which led to an influx of Jews into the local civil service.[236] In Britain, meanwhile, the "Zionist Commission" was set up, with the task of advising the British administration in Palestine.[237] It soon became an "Administration within an Administration."[238]

A Civil Administration took over as a result of a Resolution passed at the San Remo Conference [239] on April 25, 1920,[240] which stated that Britain should be the mandatory power for Palestine. While the Resolution included the provisions of the Balfour Declaration, it also noted that the terms of the mandate were to be approved by the Council of the League of Nations. Such approval was granted on July 24, 1922, and the Mandate for Palestine came into effect on September 29, 1923. Nevertheless,

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[234] Norman Bentwich, "Mandated Territories: Palestine and Mesopotamia (Iraq)", BYIL, Vol. 2, 1921-1922, 48-56, 50; and in "The Legal Administration of Palestine Under the British Military Occupation", BYIL, Vol. 1, 1920-1921, 139-148.

[235] A law from 1882 prohibited all foreign Jews from visiting Palestine, except as pilgrims. The sale of land to foreign Jewish settlers was prohibited in 1883, and in 1892 the Department of Land Registration prohibited the sale of any land to any Jews. The laws stayed in force until the end of the Ottoman Empire. They were, however, not very successfully enforced. For more details, see: Mim Kermal Öke, "The Ottoman Empire, Zionism, And The Question of Palestine (1880-1908)", Int. J. Middle East Stud., Vol. 14, 1982, 329-341.

[236] Storrs, *Orientations*, 302, 354.

[237] "Plans Zionist Commission, England will aid Repatriation of Jews and Restoration"; *The New York Times*, 13/02/1918; available at: http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9807EED7103FE433A25750C1A9649C946996D6CF&oref=slogin; accessed 06/12/2011.

[238] Letter by General Bols, Chief Administrator in Palestine, to the Foreign Office (1920); reprinted in Ingrams, *Palestine*, 85-86 (PRO. FO. 371/5119).

[239] The San Remo Conference was a meeting of the Allied Supreme Council (Britain, France, Italy, and Japan). The USA insisted on not being referred to as an "ally", but instead preferred the term "Associated Power". It should be noted that the USA never declared war on the Ottoman Empire, so that it was also not represented in San Remo.

[240] The text of the San Remo Resolution is available at: http://www.cfr.org/israel/san-remo-resolution/p15248; accessed 22/07/2011.

based on the Resolution of April 25, 1920, the Ottoman embargo on Jewish immigration was lifted a few weeks after the Civil Administration under High Commissioner Sir Herbert Samuel took over.

The decision to introduce an Immigration Law,[241] and to simplify land transfer[242] in Palestine "in anticipation of the definite granting of the Mandate" was not only "imperfect in its legal foundation" -as the Legal Secretary of the Government of Palestine (later Attorney-General), Bentwich, admitted in 1922-[243] but contravened Article 43 of the 1907 Hague Regulations[244] which requires the occupier of "the territory of the hostile state" to respect "unless absolutely prevented the laws in force of the country". These Ottoman laws included a ban on Jewish immigration and on transfers of land to foreign Jews.[245] In 1920 the Chief Administrator in Palestine, General Bols, acknowledged the legal difficulties:

> *This Administration has loyally carried out the wishes of His Majesty's Government, and has exceeded in doing so the strict adherence to the laws governing the conduct of Military Occupant of Enemy Territory, but this has not satisfied the Zionists...*[246]

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[241] *Immigration Ordinance* (1920).
[242] *Land Transfer Ordinance* (1920), *Mahlul Land Ordinance* (1920) and *Mawet Land Ordinance (*1921).
[243] Bentwich, "Mandated Territories", 50, 52; Berriedale Keith, "Mandates", Comp. Legis. & Int'l L., Vol. 4, 3rd ser., 1922, 71-83, 72-73; he describes the legal situation in the "A"-Mandates in 1922 as "anomalous" due to the lack of a peace treaty with Turkey. He goes on to describe that despite the British "lack of title", they were "exercising large powers of government" although British and French rights on Turkish territory only "rest on the fact of occupation and conquest"; E. Lauterpacht, "The Contemporary Practice of the United Kingdom in the Field of International Law- Survey and Comment, IV, State Territory", ICLQ, Vol. 6, 1957, 513-516, 514; Malcolm M. Lewis, "Mandated Territories, Their International Status", L.Q. Rev., Vol. 39, 1923, 458-475, 460 ("somewhat anomalous").
[244] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18/10/1907)*; ratified by the United Kingdom on 27/11/1909.
[245] A law from 1882 prohibited all foreign Jews from visiting Palestine, except as pilgrims. The sale of land to foreign Jewish settlers was prohibited in 1883, and in 1892 the Department of Land Registration prohibited the sale of any land to any Jews. The laws stayed in force until the end of the Ottoman Empire. They were, however, not very successfully enforced. For more details, see: Mim Kermal Öke, "The Ottoman Empire, Zionism, And The Question of Palestine (1880-1908)", Int. J. Middle East Stud., Vol. 14, 1982, 329-341.
[246] Letter by General Bols, Chief Administrator in Palestine, to the Foreign Office (1920); reprinted in Ingrams, *Palestine*, 85-86 (PRO. FO. 371/5119).

In his subsequent recollections of his time in Palestine, the Military Governor there as of 1917, Roland Storrs,[247] was even more forthright as to the "admitted departure from the Laws and Usages of War":[248]

> *The Military Administration notably contravened the Status quo, in the matter of Zionism...For these deliberate and vital infractions of military practice O.E.T.A.* [Occupied Enemy Territory Administration] *was criticized both within and without Palestine.*[249]

Furthermore, the *Treaty of Sèvres* of August 10, 1920, the original peace treaty with Turkey as successor to the Ottoman Empire, was never ratified by Turkey. The final peace treaty, the *Treaty of Lausanne*, was only concluded on July 24, 1923. Therefore Palestine, at the time of the enactment of the new immigration and land transfer laws, was still "territory of the hostile state". The British government subsequently acknowledged that only ratification of the *Treaty of Lausanne* in August 1924 "regularized the international status of Palestine as a territory detached from Turkey and administered under a Mandate entrusted to His Majesty's Government."[250]

That there was no "absolute" necessity to act[251] in fulfilment of the Balfour Declaration before the envisaged Mandate had been approved by the League of Nations and come into effect is self-evident. British measures to enable the

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[247] Ronald Storrs was Military Governor of Jerusalem between 1917 and 1920, and then Civil Governor between 1920 and 1926.
[248] Storrs, *Orientations*, 354.
[249] Storrs, *Orientations*, 301; Storrs goes on to point out that the British Administration in Palestine was supposed to act as a "Military Government and not as Civil Reorganizers", and would consequently have been obliged to "administer the territory as if it had been Egypt."
[250] *Report of His Britannic Majesty's Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section I; for full text also see: http://www.ismi.emory.edu/PrimarySource/Report%20to%20L%20of%20N%20Pal%201924.pdf; accessed 22/07/2011.
[251] Article 43 of the 1907 Hague Regulations.

implementation of the Balfour Declaration, undertaken before the ratification of the *Treaty of Lausanne*, were therefore inconsistent with international law.[252]

Although perhaps only a side show in the context of the developments in the Middle East after the First World War, these moves on the part of the British Administration already foreshadowed the unfortunate attitude of the major powers to international law and its application in the Middle East. Clear, but unnecessary violations of international law were of no consequence -besides providing "imperfect legal foundations"- if committed in the greater good as seen by the European powers that had carved up the area between themselves.[253]

3. The Palestine Mandate

a) The mandates system

The introduction of the mandates system in the aftermath of the First World War was a legal novelty,[254] usually attributed to the South African General Smuts, member of the Imperial War Cabinet.[255] Although similar to a Protectorate in some respects, the

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[252] Allain, *International*, 80-81; Macmillan, *Peacemakers*, 435; referring to the difficulties in concluding a peace treaty with "Ottoman Turkey", she continues: "The British simply carried on as though Palestine was officially theirs."

[253] P. E. Corbett, "What is the League of Nations?", BYIL, Vol. 5, 1924, 119-148, 129; he obviously recognizes the legal problems and tries to justify Allied actions in former Ottoman areas before the Lausanne Treaty was ratified by Turkey on the basis that ratification showed Turkish willingness to accept Allied actions. This fails to convince as the *Treaty of Sèvres*, basis for many Allied actions, was never ratified, demonstrating Turkish opposition; Stein, "The Jews", 422; Stein argues the San Remo "agreement" put an end to the occupation regime. He, however, fails to explain his reasoning.

[254] Grief, "Legal Rights", 1; H. Goudy, "On Mandatory Government in the Law of Nations", J. Comp. Legis. & Int'l L., Vol. 1, 3rd ser., 1919, 175-182, 175; Keith, "Mandates", 72; Donald S. Leeper, "International Law-Trusteeship Compared with Mandate", Mich. L. Rev., Vol. 49, 1950-1951, 1199-1210, 1199; Lewis, "Mandated", 458; Mark Carter Mills, "The Mandatory System", AJIL, Vol. 17, 1923, 52-64, 50-52.

[255] Based on his "Practical Suggestion" of December 1918; Anghie, *Imperialism*, 119-120; Quigely, *The Statehood*, 20-22; Strawson, *Partitioning*, 37-39; Owen, *Tempestuous*, 549.

mandate had unique implications as far as the mandatory power was concerned, as specific obligations towards the League of Nations were imposed.[256]

From the outset the mandates system was very controversial. Many, especially in the USA, viewed the system as nothing more than a "cloak for annexation" by the European powers.[257] That was one of the reasons -besides isolationism- why the USA refused to take on the Palestine Mandate, as some had suggested, and also refused the mandate for Armenia.[258]

aa) Self-determination and President Wilson

In 1916 Wilson had outlined his vision of national self-determination when he declared in an address to the *League to Enforce Peace* "that every people has a right to choose the sovereignty under which they shall live." He emphasized his beliefs when he added that "no peace can last or ought to last which does not accept the principle that governments derive all their just powers from the consent of the governed", and that "no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."[259]

In his address to a Joint Session of Congress in January 1918 President Wilson then announced his famous "Fourteen Points", which he deemed to be the "only possible

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[256] Corbett, "What?", 130; Lewis, "Mandated", 459, 474.
[257] Mills, "The Mandatory", 54; he claims that the US Secretary of State Lansing shared that view; Watrin, *Machtwechsel*, 61; Keith, "Mandates", 74; Keith claims that many mandatory powers' governments assumed that the "C"-Mandates allowed "virtual annexation", and agrees with that assessment (at 76); 75 (American attitude); Bassiouni, 34; he describes the mandate system in Palestine as a "colonial regime"; Corbett, "What?", 133; Corbett cites M. Rolin (later to be a judge at the *Permanent Court of International Justice*, 1931-1936) as stating that the mandates system was a disguise for annexation; Goudy, "On Mandatory", 175; Philby, "The Arabs", 158; Philby argues that the "system of Mandates" differed "only in theory from annexation"; Tolin, "The Palestinian", 328 ("colonial device"); Hadawi, *Palestinian*, 19 ("a form of colonization").
[258] Mills, "The Mandatory", 57.
[259] President Wilson, "Civil War and Imperialism", http://www.americanforeignrelations.com/O-W/Self-Determination-Civil-war-and-imperialism.html; last accessed 22/07/2011.

program" for the "world's peace".[260] In six of the fourteen points Wilson dealt with aspects of self-determination. In particular, regarding "colonial claims", he insisted that "the interests of the populations concerned must have equal weight with the equitable claims of the government",[261] and as far as the non-Turkish parts of the Ottoman Empire were concerned, they were to enjoy "an absolutely unmolested opportunity of autonomous development".[262] The principle upon which his "Fourteen Points" were based was described by Wilson as "the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak".[263]

Despite seeming groundbreaking in the attitude towards colonized peoples it is noticeable that self-determination, as envisaged in the "Fourteen Points", already seems more limited than in previous statements made by President Wilson. The seemingly hierarchical distinction made between "assuring sovereignty" -with regard to Belgium or Turkey-, "assuring autonomous development", as outlined in the case of non-Turkish parts of the Ottoman Empire, and the mode for settling "colonial claims" by giving "equal weight" to "the interests of the populations concerned" as far as other areas are concerned, is conspicuous.[264]

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[260] "President Wilson's Fourteen Points", World War I Document Archive, 1-5; available at: http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points; accessed 22/07/2011; Quigley, *The Statehood,* 16-17; Kattan, *From Coexistence*, 48-49; Gresh, *De quoi*, 64.
[261] Point V.
[262] Point XII.
[263] "President Wilson's Fourteen Points", World War I Document Archive, 4; available at: http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points; accessed 22/07/2011.
[264] Points VII and XII (Belgium and Turkey); Point XII (non-Turkish parts of the Ottoman Empire); Point V (colonial claims); Green, "Self-Determination", 41-42; Quigley, *The Statehood*, 17.

Mention must also be made of Soviet attitudes to self-determination.[265] Lenin's *Decree on Peace* of October 26, 1917, was much more far-reaching as far as the concept of self-determination is concerned:

> *The Russian Government proposes to all warring peoples that this kind of peace be concluded at once; it also expresses its readiness to take immediately, without the least delay, all decisive steps pending the final confirmation of all the terms of such a peace by the plenipotentiary assemblies of all countries and all nations.*
>
> *By annexation or seizure of foreign territory the government, in accordance with the legal concepts of democracy in general and of the working class in particular, understands any incorporation of a small and weak nationality by a large and powerful state without a clear, definite and voluntary expression of agreement and desire by the weak nationality, regardless of the time when such forcible incorporation took place, regardless also of how developed or how backward is the nation forcibly attached or forcibly detained within the frontiers of the [larger] state, and, finally, regardless of whether or not this large nation is located in Europe or in distant lands beyond the seas...*
>
> *The government considers that to continue this war simply to decide how to divide the weak nationalities among the powerful and rich nations which had seized them would be the greatest crime against humanity, and it solemnly announces its readiness to sign at once the terms of peace which will end this war on the indicated conditions, equally just for all nationalities without exception.*[266]

At this stage, Soviet influence on the development of international law was, however, weak. Not only was the Soviet Union not amongst the victors of WW I, its new socialist regime was not recognized by states such as the USA and the UK until much later. The Soviet Union consequently joined the League of Nations only on September 18, 1934, from which it was expelled on December 14, 1939 after its attack on Finland. Nevertheless, it seems likely that worries about the attractiveness of the

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[265] For more details, see: Bowring, *The Degradation*, 13-20; Quigley, *The Statehood*, 15-16; Kattan, *From* Coexistence, 118-119; Anghie, *Imperialism*, 139.

[266] *Decree on Peace*; delivered at the *Second All-Russia Congress of Soviets of Workers' and Soldiers' Deputies, 26 October 1917,* and published by *Izvestiya, 27 October 1917;* this decree can be found at: http://www.historyguide.org/europe/decree.html; and http://www.firstworldwar.com/source/decreeonpeace.htm; last accessed 22/07/2011 (emphases added by author); excerpts also quoted in Bowring, *The Degradation*, 18-19.

Bolshevist programme, helped persuade European powers to be more receptive to Wilson's more limited version of self-determination.[267]

bb) Covenant of the League of Nations

With President Wilson, the only true supporter of the principle among the victorious First World War victors, toning down his rhetoric on self-determination, it was inevitable that -due to the complete lack of enthusiasm for the concept on the part of the victorious European powers- it would be further watered down and only applied selectively, once peace was negotiated.[268]

The end result was indeed that the concept of self-determination was, in reality, for the foreseeable future only going to be applied in Europe. Conveniently, in Europe, self-determination had the decisive advantage that it could often be realized by dismembering the Central Powers that had lost the war.[269]

Non-European areas formerly dominated by the Central Powers, on the other hand, were deemed to require "tutelage" of varying degrees on the part of the "advanced nations" which were, of course, generally believed to be synonymous with the victors.[270] Regarding allied or other colonial possessions no adjustments were deemed necessary.[271]

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[267] Kattan, *From Coexistence*, 118-119; Anghie, *Imperialism*, 139.
[268] Collins, "Self-Determination", 140; he warns against "blithely accepting" Wilson's and the Allied statements on self-determination; Huntington Gilchrist, "V. Colonial Questions at the San Francisco Conference", *The American Political Science Review*, Vol. 39, 1945, 982-992, 989; he points out that even in 1945 "certain imperial powers maintained that many colonial peoples preferred dependence"; Anghie, *Imperialism*, 119-120, 139-140.
[269] L.C. Green, "Self-Determination and Settlement of the Arab-Israeli Conflict", Am. Soc'y Int'l L. Proc., Vol. 65, 1971, 40-48, 41; Gresh, *De quoi*, 36, 48-49.
[270] Article 22 (2) Covenant of the League of Nations.
[271] Green, "Self-Determination", 42; he points out that the United States made it plain that it "would never concede to the local inhabitants the right of deciding upon the proposed transfer" when the Danish West Indies became American. The Danish West Indies were sold to the United States by way of a treaty in 1916

(i) Article 22

These considerations are reflected in the *Covenant of the League of Nations*, signed at the Paris Peace Conference on June 28, 1919. Its Article 22 contains the mandates system's "constitution". "On behalf of the League" the mandatory powers were to "exercise" their "tutelage" of "peoples not yet able to stand by themselves under the strenuous conditions of the modern world".[272] Based on the different "stages" of "development" the peoples concerned had reached, three categories of mandates were established.[273]

The "A-Mandates", outlined in Article 22 (4) of the Covenant, were applicable to "certain communities" formerly under Ottoman rule. Their "existence as independent nations" was "provisionally" recognized. They were to receive only "advice and assistance" until they could "stand alone".

The "B-Mandates", outlined in Article 22 (5) of the Covenant, were to apply especially to "peoples of Central Africa". They envisaged "administration" by the mandatory power.

Finally, the "C-Mandates", outlined in Article 22 (6) of the Covenant, were applicable to South-West-Africa and "certain South Pacific Islands". These areas were to be "administered under the laws" of the mandatory powers as "integral part" of their "territory".

Article 22 of the Covenant further required the mandatory powers to file annual reports on the mandated territories, established the *Permanent Mandates Commission,*

(*Convention between the United States and Denmark, Cession of the Danish West Indies,* August 4, 1916). The islands are now referred to as the US Virgin Islands.

[272] Article 22 (1) and (2) Covenant of the League of Nations.

[273] Article 22 (3) Covenant of the League of Nations.

and set out the Council of the League's responsibility for drafting the mandate's precise terms where these had not already been agreed upon by the League of Nations.[274]

(ii) Sovereignty[275]

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[274] Article 22 (7)-(9) Covenant of the League of Nations.

[275] The precise meaning and scope of the term "sovereignty" in international law need not be examined in this context. It should, however, be pointed out that the concept of "sovereignty" is a much contested one. Antony Anghie (*Imperialism*) has adopted an "historical approach" (at 6) to sovereignty doctrine. By tracing the development of sovereignty doctrine from Francisco de Vitoria's times (13-31) via the positivist époque of international law (32-114), the era of the League of Nations (115-195), and the post-colonial state (196-244) through to modern times, Anghie attempts to show how the doctrine has been instrumentalized in order to exclude non-European states and tribes from the "society" of sovereign states: non-European entities were either denied sovereignty altogether or granted only a partial legal status. The mandate system of 1919 finally did envisage non-European entities becoming fully sovereign states, but at the cost of self-denial. The price to pay for admittance to full legal status in international law was close cultural alignment to the European, "civilized" standard. He goes on to demonstrate how, even after decolonization, the newly independent states, while certainly achieving formal sovereignty and equality, nevertheless remained materially unequal. Their sovereignty was from the outset burdened by obligations, concessions, and contracts entered into by the former colonial masters -rights the newly developing "transnational law" helped secure. Lastly, Anghie points out that globalization and the era of the "war on terror" are in danger of recreating the old order based on a gradation of sovereignty. Many developing states are accused of human rights abuses or of being "rogue states"- both alleged to justify outside intervention-, while the principles of globalization imply that conducting an independent economic policy is impossible. These developments lead Anghie to the conclusion that once again some states' sovereignty seems to be viewed as of a lesser kind.
In the context of his work on state succession, Matthew C. R. Craven (*The Decolonization of International Law: State Succession and the Law of Treaties*, Oxford: Oxford University Press, 2007, esp. 7-92) has also examined the historical development of the concept of sovereignty in international law. He outlines how early discussions on sovereignty centred on the rights of a Prince who was governing a territory, but how the subsequent emergence of a distinction between the state and its government then enabled the development of a new concept of territorial sovereignty. Craven also shows how colonial acquisitions and treaty relationships with non-European states were partly justified on the basis of assuming different kinds of sovereignty, thus enabling a distinction between "civilized" and "uncivilized", i.e. non-European, parts of the world. Furthermore, he demonstrates how the acceptance, in the European context, of the doctrine of "acquired rights" in state succession, which basically meant that there were only changes in "public administration and external affairs", but not in the economic sphere dominated by capitalist free-market thinking, in effect meant that any change in sovereignty was of a more "superficial character" (at 43-45). In respect of colonial acquisitions and annexations (at 45-50), however, a completely different attitude was adopted: here the "clean slate" doctrine was preferred. After all, it could not be expected that an advanced nation helping out a backward people would respect obligations entered into by the former, "barbarous" rulers (at 50). However, as Craven also points out, there has never been a consensus on what the consequences of assuming a territorially-bound concept of sovereignty actually are. This has led to the development of three distinct notions of territorial sovereignty which, he argues, still find recognition today (at 61-64). Craven therefore concludes that the "meaning and significance of territorial change" have remained "open and contested" (at 64). In more recent times this has led international lawyers, for example, the *International Law Commission*, to avoid the term "sovereignty" altogether when dealing with state succession -a phenomenon, Craven argues, that has led to further problems of interpretation (at 57-60). Craven also points out that the avoidance of the term "sovereignty" by the ILC was also specifically due to the controversial location of sovereignty over mandated territories, as the ILC wanted to avoid any discussion of this particular topic when dealing with the succession of the newly independent states to obligations undertaken by the mandatory powers (at 58).
Karen Knop (*Diversity and Self-Determination in International Law*, Cambridge: Cambridge University Press, 2002, esp. 109-211) describes the difficulty in applying a concept such as "sovereignty", developed by

One of the most hotly debated issues surrounding the mandates system, and one which has remained controversial, is where sovereignty over the mandated territories was to reside.[276] The Covenant does not provide an explicit answer,[277] which has led

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European powers in the European context, to non-European societies. By focussing mainly on the *Western Sahara* Case (ICJ, Advisory Opinion, I.C.J. Rep. 1975, 12), the *East Timor* Case (ICJ, Judgement of June 30, 1995, Portugal v. Australia, I.C.J. Rep. 1995, 90), and the 1981 *Dubai/Sharjah Boundary Arbitration* (*International Law Reports*, Vol. 91, 1993, 543), and outlining the arguments made by the different parties in regard to sovereignty, she manages to impressively demonstrate how judges and lawyers have attempted to grapple with diverse concepts of "sovereignty". She shows that it is not only difficult to apply the European, territorially-bound concept of sovereignty to disputes originating in non-European societies and cultures, which often had a completely different attitude to sovereignty, but that the lapse of time had made "the unknowability of the Other" (at 141) even more pronounced. Despite the jurists' attempts at establishing an "authenticity of ... interpretation of sovereignty for the communities involved" (at 156), the results have, nevertheless, not always been entirely satisfactory. Knop has concluded (at 210): "In each of the cases, judges were confronted with the partial perspective of international law: its European norm of sovereignty and legality, its individualistic viewpoint, its ladder of development with Europe at the top, and so on. In each of the cases, traditional international law had rendered invisible, insignificant or inferior some dimension of identity important to the marginalized communities involved. Similarly, in each judgment, we find the response of judges in the creative use of some intermediate legal construct -between sovereignty and nothingness- to capture this dimension of identity and thereby help to equalize cultures in international law."
In keeping with his general attitude to international law, Koskenniemi views the term "sovereignty" in international law as being wholly indeterminate (*From Apology*, 224-272). He believes there are two approaches to sovereignty, which he refers to as the "legal approach" and the "pure fact approach" (*From Apology*, 224-233). According to the "legal approach" sovereignty is "determined within the law" and "allocated to certain entities by international law". In contrast, the "pure fact approach" assumes that statehood and sovereignty are questions "of fact which the law can only recognize but cannot control". Furthermore, he contrasts two views on the "extent" of sovereignty: one, usually associated with the "legal" approach, which seeks to limit its extent as far as possible; the other, usually associated with the "pure fact" approach, which stresses "the State's freedom" (*From Apology*, 234). The existence of this spectrum of views, which can appear in varied combinations, means, according to Koskenniemi, that sovereignty "lacks fixed, determinate content" and "entails no determinate amount of freedom or constraint" (*From Apology*, 246).

[276] Mills, "The Mandatory", 54; Mills points out that, during the peace negotiations, US Secretary of State Lansing repeatedly (and unsuccessfully) tried to bring to President Wilson's attention the fact that it was not clear where sovereignty would reside as far as the mandated territories were concerned; E. Lauterpacht, "State", 514; Leeper, "Trusteeship", 1204; Arnold D. McNair, "Mandates", Cambridge L. J., Vol. 3, 1927-1928, 149-160, 158-159; T.J. Lawrence, *The Principles of International Law*, 7th ed. (rev.), Boston: D.C. Heath & Co., 1923, 80-82; William Edward Hall, *A Treatise on International Law*, 8th ed., Oxford: The Clarendon Press, 1924, 162-163; Quigley, *The Statehood*, 66-75; Kattan, *From Coexistence*, 56-58; Anghie, *Imperialism*, 125-127, 133, 147-156.

[277] The fact that the issue of where sovereignty resided was not explicitly regulated in the Covenant should, perhaps, not be surprising. Many contemporary scholars and international lawyers would not have been unduly perturbed by this. As Craven has explained, as early as in the 19th century any definition of the term "state" necessitated the explanation of a vast array of different arrangements: "sovereign" and "semi-sovereign" states, vassals, unions, protectorates, etc.; by the middle of the century a minimum of eleven different categories of states was recognized. This situation became even more complicated at the turn of the century, as treaties with non-European states and tribes seemed to require further differentiation based on a gradation of sovereignty. While non-European states could not be completely denied sovereignty without rendering the treaties European states had concluded with them invalid, it was inconceivable to attribute to those states the kind of sovereignty European states enjoyed. Only when such non-European states had "demonstrated their 'civilized' credentials" was the "badge of imperfect membership" in the international community of sovereign states removed. As Craven has therefore concluded, the mandates system thus merely gave this belief "institutional form", based as it was on the "tutelage" of the peoples in the mandates by the "advanced nations" until they "were able to stand by themselves" (Matthew Craven, "Statehood, Self-Determination, and Recognition" in *International Law*, Malcolm D. Evans (ed.), 3rd. ed., 2010, Ch. 8, 203-251, 210-214).

to a proliferation of theories on the topic,[278] further complicated by the different categories of mandate.

There were those who concluded that the old-fashioned concept of sovereignty was ill-suited to the legal novelty of the mandates system. They maintained that the question could not be answered or that sovereignty was "in abeyance". [279] Others argued that sovereignty lay with the mandatory power as evidenced, for example, by that power's control of the mandated territories' foreign relations.[280] It was also argued that the League of Nations retained sovereignty and the mandatory was simply acting on its behalf, as evidenced by the League's supervisory role.[281] Another school of thought adhered to the notion that sovereignty rested in the inhabitants of the mandated territories, albeit temporarily exercised by others. [282]

Many others argued that assuming shared sovereignty (in various combinations) was the correct solution, and others again argued that the answer to the question where sovereignty rested was dependent on the category of mandate concerned.[283] The

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[278] Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", Isr. L. Rev., Vol. 3, 1968, 279-301, 282; Lawrence, *The Principles,* 80-82 (he believed there should be a case-by-case evaluation of where sovereignty resides based on the texts of the mandate); Hall, *A Treatise,* 162-163 (he believed sovereignty over the mandates to be divided between the mandatory power and the League of Nations); Quigley, *The Statehood*, 66-75; Anghie, *Imperialism*, 147-156.

[279] Blum, "The Missing", 282; Leeper, "Trusteeship", 1208 ("best solution"); ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, Separate Opinion Judge Sir Arnold McNair, I.C.J. Rep. 1950, 150.

[280] Lord Balfour, Statement, 18th Session of the Council, 1922, League of Nations O.J., Vol. 3, 1922, 547.

[281] Bentwich, "Mandated Territories", 48; he seems to be inclined to agree with this view, when he states that the "League of Nations becomes the general guardian of three infant nations" who "delegates the care of the minor to a Power who is termed the Mandatory". In later articles he seems more doubtful, especially regarding Palestine: he repeatedly points out that the "Mandatory exercises full power of legislation and administration"; Norman Bentwich, "Nationality in Mandated Territories Detached from Turkey", BYIL, Vol. 7, 1926, 97-109, 100.

[282] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21/06/1971, Separate Opinion Vice-President Ammoun, I.C.J. Rep. 1971, 69; Judge Ammoun refers to Stoyanovsky's view "of virtual sovereignty residing in a people deprived of its exercise by domination or tutelage" as the "more accurate view"; Anghie, *Imperialism*, 179-180; Corbett, "What?", 129-130 (Corbett, however, limits this assumption to "A" mandates).

[283] McNair, "Mandates", 159-160; he, writing in 1927/1928, argues that sovereignty was divided between the League and the mandatory, the distribution dependent on the category of mandate. Later, when he was a Judge at the ICJ, he seems to have changed his mind (ICJ, *International Status of South-West Africa*, Advisory

International Court of Justice, when later dealing with mandated territories, avoided making an unequivocal statement on the issue.[284]

Assessment

Assuming sovereignty of the mandatory powers is incompatible with the Covenant of the League of Nations. [285]Although there is no doubt that the mandatory powers exercised many sovereign functions for the mandated territory, especially in the case of the "C"-Mandates, it is widely assumed that the mandatory power did not have any unilateral right of annexation or territorial adjustment.[286] Furthermore, it is sometimes argued that the League of Nations was, at least theoretically, empowered to withdraw the mandate in the case of persistent violations of the mandate's terms on the part of

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Opinion, 11/07/1950, Separate Opinion Judge Sir Arnold McNair, I.C.J. Rep. 1950, 150); Corbett, "What?", 129, 134 ("A"-Mandates: sovereignty inhabitants, some powers divided between Mandatory and League; "B" and "C" Mandates: sovereignty divided between Mandatory and League; Palestine as a special case); Charles Henry Alexander, "Israel in Fieri", Int'l L. Q., Vol. 4, 1951, 423-430, 423-426; Alexander offers another explanation, which, however, fails to convince. He argues that sovereignty with regard to the mandated territories lay with the Principal Allied and Associated Powers. He bases that on Article 118 of the *Treaty of Versailles*. This theory is fraught with difficulties. The Allied Powers never claimed sovereignty in regard of the mandated territories. Also, referring to the problem of the dissolution of the Supreme Council which made the administration of any shared sovereignty impossible, he claims that this made no difference to the legal situation. Lastly, in order to justify his post-WW II conclusions, he implies that the "powerful nations" -and therefore presumably the states that shared sovereignty- changed with the times. This view seems extremely far-fetched; Leeper, "Trusteeship", 1204-1205; he points out that only the USA ever claimed that sovereignty "resided in the Allied and Associated Powers"- a view that was so overwhelmingly rejected at the time that the USA dropped this position.

[284] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* [Advisory Opinion, 21/06/1971, I.C.J. Rep. 1971, 28-30] the ICJ explicitly rejected the notion that sovereignty resided in the mandatory powers. An implicit rejection by the ICJ (*International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 132) of the idea that the League of Nations retained sovereignty over the mandated territories could be in seen in the court's statement, after having rejected the notion that the League of Nations' function amounted to that of a "mandatory": "It [the League of Nations] had only assumed an international function of supervision and control." The ICJ, however, avoided making a statement on where it believed sovereignty actually did reside.

[285] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21/06/1971, I.C.J. Rep. 1971, 28-30 (the ICJ rejected the notion even in the case of "C"-mandates); E. Lauterpacht, "State", 514; Lewis, "Mandated", 469, 470; McNair, "Mandates", 151; Quincy Wright, "Sovereignty of the Mandates", AJIL, Vol. 17, 1923, 691-703, 695-696; Kattan, *From Coexistence,* 134-135.

[286] Corbett, "What?", 134-135; Goudy, "On Mandatory", 180; Quigley, *The Statehood*, 66-68.

the mandatory power.[287] This cannot easily be reconciled with assuming the mandatory power's sovereignty.

The obligation of the mandatory powers to provide annual reports to the League of Nation, the role of the *Permanent Mandates Commission* in supervising the mandatory power, the compulsory role of the *Permanent Court of International Justice*, the *League of Nations' Council's* -at least theoretical- role in drafting the mandates, and the fact that it was accepted that even inhabitants of the "C"-Mandates did not become nationals/subjects of the mandatory power are further indications that sovereignty over mandated territories did not rest in the mandatory.[288] Regarding "A"-Mandates -whose "existence as independent nations" was "provisionally recognized" and where the mandatory's role was reduced to "advice and assistance"- the notion that sovereignty resided in the mandatory becomes untenable. [289]

This is also confirmed by discussions during the Paris Peace Conference. President Wilson, rejecting a French proposal that differed from the mandatory system, declared that the French proposal "implied definite sovereignty, exercised in the same spirit and under the same conditions as might be imposed upon a mandatory", while the

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[287] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21/06/1971, I.C.J. Rep. 1971, 47-50; Goudy, "On Mandatory", 180; Wright, "Sovereignty", 702-703; Kattan, *From Coexistence*, 144-145; Corbett, "What?", 135; he disagrees, and argues there was no right of "revocation" on the part of the League; McNair, "Mandates", 157-158, fn. 7; he acknowledges that the issue is "controversial".

[288] Norman Bentwich, "Palestine Nationality and the Mandate", J. Comp. Legis. Int'l L., Vol. 21, 3d ser., 1939, 230-232, 230; when dealing with the issue of nationality, Bentwich argues that Palestine citizens were not British subjects precisely because Palestine had "not been transferred" to Britain. He points out that Palestinians do not "owe allegiance to the Crown". This is confirmed by the fact that the issue of Palestine nationality was dealt with in an *Order in Council,* dated July 24, 1925, under the *Foreign Jurisdiction Act*; Bentwich, "Nationality in Mandated Territories", 100; Leeper, "Trusteeship", 1206; Lewis, "Mandated", 469-470; Wright, "Sovereignty", 695; Quigley, *The Statehood*, 66-68; Kattan, From Coexistence, 136; Anghie, *Imperialism*, 151-153, 182-186 (he describes in some detail how intrusive the questionnaires were, which the *Permanent Mandates Commission* sent out to the mandatory powers annually).

[289] ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 132; Quigley, *The Statehood*, 66-68.

mandatory system presumed "trusteeship on the part of the League of Nations".[290] Lloyd George described the mandates system as a "general trusteeship".[291] Accordingly, the ICJ has, even in the case of "C"- Mandates, rejected the assumption that sovereignty was "transferred" to the mandatory. With the exception of South Africa, no mandatory power ever claimed sovereignty over the mandated territories.[292]

The League of Nations' role regarding the mandated territories was certainly significant.[293] It is, however, questionable whether that role amounted to sovereignty over the mandated territories.[294] The mandatory powers were to provide their "tutelage" to the mandated territories "on behalf of the League", and the League was to perform considerable supervisory functions as already outlined. The *Permanent Mandates Commission* certainly took its supervisory tasks very seriously and adopted "the widest possible interpretation" of its rights. The importance of these supervisory functions has also repeatedly been stressed by the *International Court of Justice*.[295]

Nevertheless, given the official goal of the mandates system, which envisaged all mandated territories becoming independent states at some point in the future, and the fact that the question of who should become mandatory power had already been decided by the Allies prior to the League taking up its functions, as well as the fact

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[290] President Wilson, US Department of State, Papers relating to the Foreign Relations of the United States, The *Paris Peace Conference*, 1919, Volume 3, 765; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[291] Lloyd George, US Department of State, Papers relating to the Foreign Relations of the United States, The *Paris Peace Conference*, 1919, Volume 3, 770; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[292] Leeper, "Trusteeship", 1207.

[293] E. Lauterpacht, "State", 514; Lewis, "Mandated", 474.

[294] An implicit rejection by the ICJ of the idea that the League of Nations retained sovereignty over the mandated territories (*International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 132) could be in seen in the court's statement, after having rejected the notion that the League of Nations' function amounted to that of a "mandatory": "It [the League of Nations] had only assumed an international function of supervision and control"; this was affirmed by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21/06/1971, I.C.J. Rep. 1971, 29; Leeper, "Trusteeship", 1205; he points out that the League never claimed sovereignty; Wright, "Sovereignty", 697.

[295] ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 136.

that the mandatory power, as far as the "A"-Mandates were concerned, was only to provide administrative assistance on the behalf of the League, makes the argument that sovereignty over the mandated territories rested in the League difficult to sustain.[296] When Iraq's future independence (the former Mandate for Mesopotamia/Iraq) was discussed in 1931, the question of a transfer of sovereignty from the League -for example by way of a treaty- was never discussed.[297]

The correct view of the mandates system would seem to be that sovereignty already rested in the nations under mandate but that that sovereignty was exercised on behalf of these nations by the mandatory power under the League of Nations' supervision.

Early statements made by officials in the Foreign Office regarding Britain's aims confirm this. In December 1918 a future member of the delegation to the Peace Conference in Versailles described it as the "foundation" of British policy regarding Palestine that there should be "a Palestinian State with Palestinian citizenship for all inhabitants, whether Jewish or non-Jewish."[298] Accordingly, citizens of "A"-Mandates, including Palestine, not only had a nationality separate from that of the mandatory, but actually had their own nationality.[299]

Furthermore, once the mandates were in place, the mandatory powers and third states tended to treat the mandated territories as future states, even though the governmental

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[296] E. Lauterpacht, "State", 514-515; Wright, "Sovereignty", 697; Quigley, *The Statehood*, 66.
[297] The *Permanent Mandates Commission*, in September 1931, enumerated the general prerequisites regarding the termination of a mandate (which it examined in connection with Iraq's prospective independence). These principles were subsequently approved by the *Council of the League of Nations*; a transfer of sovereignty was not among the requirements; League of Nations O.J., Vol. 12, 1931, 2044-2057.
[298] Arnold Toynbee (Political Intelligence Department of the British Foreign Office); Minutes of December 2, 1918; reprinted in Ingrams, *Palestine*, 43 (PRO. FO. 371/3398); furthermore, Article 30 of the *Treaty of Lausanne* with Turkey (concluded after the *Covenant of the League of Nations* had come into force) stated: "Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by local law, nationals of the State to which such territory is transferred."
[299] Quigley, *The Statehood*, 54-58; Kattan, *From Coexistence*, 137.

functions may have been exercised by the mandatory. Among other things, the mandatory powers concluded treaties with third states for the mandated territories.[300] In the case of Palestine, even the United Kingdom itself concluded a bilateral treaty with the mandated territory in 1922.[301]

Third states took a similar view of the relationship between the mandatory power and the mandate. In 1932 the British government sought to grant Palestine trade concessions, and enquired of states it was bound to in Conventions of Commerce as to their response to such a move.[302] Spain disapproved and declared that, as far as Palestine was concerned, "the territory in question could in no way be considered as imperial territory, but solely as a foreign country ...From this point of view, it was in a situation with regard to the mandatory power analogous to other sovereign states."[303] In their responses the United States and Italy also both insisted that Palestine was a "foreign country" in relation to the United Kingdom, and went on to point out that this, in their view, also applied to all the other territories under British mandate.[304]

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[300] Quigley, *The Statehood*, 53-54 (listing many examples, mainly of treaties concluded between Palestine and Egypt).

[301] *The Agreement between the Post Office of the United Kingdom of Great Britain and Northern Ireland and the Post Office of Palestine for the Exchange of Money Orders*; the treaty was signed in London on January 10, 1922, and in Jerusalem on January 23, 1922; it was also registered at the League of Nations and published in the League of Nations Treaty Series; Quigley, *The Statehood*, 54.

[302] Quigley, *The Statehood*, 61-64.

[303] *The Ambassador in Spain (Laughlin) to the Secretary of State*, October 28, 1932; United States Department of State, FRUS, Diplomatic Papers,1932, The British Commonwealth, Europe, Near East and Africa, 36-37; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html, accessed 09/07/2011.

[304] *The Secretary of State to the British Chargé (Osborne),* August 27, 1932; *The Chargé in Italy (Kirk) to the Secretary of State*, October 22, 1932; United States Department of State, FRUS, Diplomatic Papers, 1932, The British Commonwealth, Europe, Near East and Africa, 32, 35-36; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html, accessed 09/07/2011.

These reactions can also be easily reconciled with the *Permanent Mandates Commission's* view, expressed in 1937, that the "Palestinians formed a nation, and that Palestine was a state, though provisionally under guardianship."[305]

This understanding of the mandates system only seems compatible with the notion that sovereignty already rested in the inhabitants of the mandated territory. Their exercise of that sovereignty was, however, suspended to a varying degree according to the class of mandate until such a time as the peoples concerned "were able to stand by themselves".[306] During this interim period the functions of sovereignty were to be exercised by the mandatory power under the supervision of the League of Nations.

As far as the "A"-Mandates described in Article 22 (4) of the Covenant are concerned any other interpretation is not tenable. After all, these peoples were already explicitly "provisionally" recognized as "independent nations" and their wishes were to be the

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[305] League of Nations, Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th-August 18th, 1937, Tenth Meeting; available at: http://unispal.un.org/UNISPAL.NSF/0/FD05535118AEF0DE052565ED0065DDF7; accessed 13/07/2011.

[306] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21/06/1971, Separate Opinion Vice-President Ammoun, I.C.J. Rep. 1971, 69; Gainsborough, *The Arab-Israeli*, 14; very similar to this line of argument, as far as "A"-Mandates, and especially Syria and Mesopotamia, are concerned: Corbett, "What?", 129-130. He argues that sovereignty was "vested" in Syria and Mesopotamia themselves, except for certain "powers" that were divided between the Mandatory and the League of Nations; Leeper, "Trusteeship", 1206; he concurs as far as "A"-Mandates are concerned, but not as far as "B"- and "C"- Mandates are concerned; Grief, "Legal Rights", 6; referring specifically to Palestine. He, however, implausibly argues that sovereignty was vested only in the Jewish people; Wright, "Sovereignty", 696; his position is somewhat unclear; after having rejected the notion that sovereignty resided in the "mandated communities" he goes on to state that "communities under 'A' mandates doubtless approach very close to sovereignty"; Mansfield, *A History*, 183 (he refers to the "A"-Mandates as "five new states"); Lewis, "Mandated", 464; he disagrees (he refers to the "A"-Mandates as "caricatures of independent states"); Alexander also disagrees ("Israel", 425). He bases his argument on the principles of the English concept of trusts. He, however, overlooks the fact that there is widespread agreement that the mandates system was not based on the English concept of trusts, but only included elements of it. Since Italy, France, and Japan -all civil law countries- were among the victorious allies anything else would also be surprising (see also: ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 132; Goudy, "On Mandatory", 177-182; Goudy argues persuasively that the mandates system was "derived from" Roman law -hence the name- and that there were "numerous differences between the English law on trusts and the mandates system; a point also made by Keith, "Mandates", 75).

"principal consideration" when choosing the mandatory.[307] But even as far as the "B"- and "C"- Mandates are concerned, the fact that these peoples were only "entrusted" to the mandatory power until they were able to stand on their own implies that sovereignty resided in them. Because these peoples were viewed as not yet able to properly exercise their sovereignty, it must be assumed that during the period of the mandate sovereignty and the full exercise of its functions fell apart.

This interpretation has the further advantage of providing an identical answer to the question of where sovereignty resided for all three types of mandate -a state of affairs which would normally be a treaty drafter's goal when drafting one single article such as Article 22 of the Covenant.

The way Article 22 (4)-(6) of the Covenant were phrased makes it, nevertheless, obvious that -contrary to all the rhetoric- only the "A"-Mandates were ever thought to be worthy of true independence in the foreseeable future.[308] It can be safely assumed that nobody drafting or ratifying the *Covenant of the League of Nations* truly envisaged the "C"-Mandates ever being more than completely dependent territories.[309] Their inhabitants' sovereignty was very likely going to be "suspended" forever.

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[307] Amos S. Hershey, *The Essentials of International Public Law and Organization*, 2nd ed., New York: The Macmillan Company, 1927, 187-191, especially at 189, fn. 34; Hershey views mandated territories of the "A"-Class as comparable to the "most liberal" kind of "protectorate" and believes their status to be similar to that of Cuba. As far as Cuba (at 168, fn. 33) is concerned, Hershey states that the US-Cuba treaty of 1903-1904 imposes "legal limitations upon sovereignty", and that US-Cuban relations are therefore best described as being those of a "Protectorate". It should be noted that Cuba was at that time already a member of the League of Nations (at 169, fn. 33 cont'd.). Nevertheless, according to Hershey, it is not a "fully sovereign state". His comparison allows the conclusion that Hershey believed the "A"-mandates to be states, although not yet "fully sovereign"; a view shared by Quigley, *The Statehood*, 26-31, 70-79.

[308] Dajani, "Stalled", 34; he argues that "A"-Mandates were recognized as already existing "nations", which "B"- and "C"-Mandates were not; Strawson, *Partitioning*, 40-41.

[309] Strawson, *Partitioning*, 40-41; Anghie, *Imperialism*, 121.

cc) President Wilson's concept of self-determination and the Covenant

For non-European peoples caught up in the First World War its results were a grave disappointment. What had become of the principles outlined by President Wilson in 1916 and 1918? The mandates system was more like a continuation of old European imperial ambitions on, at least in the case of the "A-Mandates", slightly more agreeable terms.[310]

With the -as will be shown only theoretical- exception of the "A"- Mandates, the peoples concerned were not asked whether they "consented" to being ruled by one European power or the other;[311] they were "handed from sovereignty to sovereignty as if they were property" as evidenced by the secret British-French Agreements and, later, the agreements with the Italians;[312] there was no question of them living on "equal terms" with the more powerful nations. As regards the "B-" and "C-" Mandates, no path forward on the way to independence was mapped out, despite that being the goal implied by the mandates system.[313]

For the peoples subjugated to the mandates system self-determination therefore proved to be a rather hollow promise. During the League's existence only Iraq (formerly Mesopotamia) managed, in 1932, to become an independent state, albeit tied politically to the UK. The French made an attempt to grant Syria independence in

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[310] Bassiouni, "Self-Determination", 34 (referring to the system in Palestine as a "colonial regime"); Mansfield, *A History*, 174; Bentwich, "Mandated Territories", 49; he states that "cynics" -with whom he, of course, disagrees- believe that "England and France have simply extended their Empires by a new device of statecraft"; David Hunter Miller, "The Origin of the Mandates System", Foreign Aff., Vol. 6, 1927-1928, 277-289, 281; Miller lists the "important factors" for the British, all strategic in nature, as far as the former Turkish territories are concerned.

[311] Article 22 (4) Covenant of the League of Nations; in "A"-Mandates "the wishes of the communities must be principle consideration in the selection of the Mandatory". However, there is no evidence that the local wishes were considered at the San Remo Conference in April 1920, when the Allies assigned the territories to the prospective mandatory powers.

[312] Parsons, *From Cold War*, 4.

[313] Strawson, *Partitioning*, 40-41; Anghie, *Imperialism*, 121; Gresh, *De quoi*, 65.

1936. The treaty was, however, never ratified by the French parliament, so that Syria only became independent in 1946. Under considerable -war-time- pressure the French agreed to grant Lebanon independence in 1941, although the process was only to be completed "in stages".

By devising a complicated novel legal system of governing "backward" territories Europe had managed to cling on to the "Fertile Crescent".[314] Old European ideas about other nations had quite obviously triumphed in Paris. [315] This is also evidenced by the way territories were placed into different categories of mandates.

Based on their "stages of development" there was no objective reason for granting the Arabs in what is now Saudi Arabia independence, while insisting on an "A"-Mandate for Mesopotamia, Palestine, Syria, and Lebanon.[316] There was also no reason to place the Palestinian Arabs -who, when Jewish colonizing efforts are praised- are invariably described as "backward", and formed the vast majority of the population in Palestine- in the "A"-Mandate category, while denying that category to the whole of Africa.

These completely arbitrary categorizations only served to mask European strategic goals and racial prejudice. The mandates system reflected the racial hierarchy as seen in Europe at the time.[317] As Anghie has commented, the only difference was that

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[314] Philby, "The Arabs", 158; Strawson, *Partitioning*, 40-41.

[315] Dankwart A. Rustow, "Defense of the Near East", Foreign Aff., Vol. 34, 1955-1956, 271-286, 286; writing in 1955, he states: "The West must rid itself of the habit...of thinking of Near Eastern countries as wayward or compliant children rather than as free agents in international politics"; Strawson, *Partitioning*, 40-41; Anghie, *Imperialism*, 137-139; Mansfield, *A History*, 174.

[316] Hirst, *The Gun*, 160; Hirst makes the point that "the most backward parts of the Arab world" were to become independent states, while the more "mature and advanced were to come under 'direct or indirect' rule"; Mansfield, *A History*, 183-184, 188; he makes a similar point in respect of Yemen which became independent in 1918- a country he describes as "remote" and "backward".

[317] Examples of such views are to be found in Lewis, "Mandated", 459 ("a formula for dealing with the tribes of Africa who enjoyed not a different civilization, but no civilization"); and in Miller, "The Origin", 277 ("...it involved the principle that the control of uncivilized people ought to mean a trusteeship or wardship..."). Miller (at 281) also quotes General Smuts, credited with having invented the mandates system, as saying that it was not meant to apply to the "barbarians of Africa"; Anghie, *Imperialism*, 168-178, 189-190; Mansfield, *A History*, 174.

nations and cultures were officially no longer divided between the "civilized" and the "uncivilized", but instead between the "advanced" and the "backward".[318] This is confirmed by Lloyd George's contribution to the discussion on the mandates system during the Paris Peace Conference, when he declared that the system for areas where "the population was civilized but not yet organized" had to be different from "cannibal colonies where people were eating each other."[319]

Differences in treatment of the same "race", notably the varied treatment of the Arabs, were due to strategic concerns.[320] Oil-rich and strategically situated Mesopotamia was not to become independent before securely tied to Britain, and both Syria and Lebanon were always viewed as part of the French sphere of influence; the French were frequently intervening in the area under the guise of protecting the relatively high number of Christians in Lebanon. Palestine, of course, required "tutelage" due to the holy sites in Jerusalem, its strategic location and, last but not least, the Balfour Declaration.

The way Palestine was dealt with would -in the coming decades- provide clear evidence for the thesis that imperialism, not the rights of peoples had triumphed at Versailles: although far removed from any concept of self-determination, colonization of the territory by European, and therefore alien, white settlers was deemed compatible with the mandates system. Balfour admitted as much in 1919: "In the case

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[318] Anghie, *Imperialism*, 189; Gresh, *De quoi*, 64; he makes a similar point by arguing that European imperialism could no longer be justified on the basis of a "divine right" and was therefore now justified as "tutelage".

[319] Lloyd George, US Department of State, Papers relating to the Foreign Relations of the United States, The *Paris Peace Conference*, 1919, Volume 3, 786; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; last accessed 16/07/2011; a similar view is reflected in Bentwich's article "Mandated Territories", 48. In it he refers to the mandated territories as "infant nations" requiring a "guardian" and compares the mandates system to a "tutor/ward" relationship. He also describes these territories' status as similar to that of "minors".

[320] Miller, "Mandates", 281; Philby, "The Arabs", 158; Mansfield, *A History*, 174; he describes the European view of the Arabs at the time as them being a "subject race" rather than a "governing race".

of Palestine we deliberately and rightly decline to accept the principle of self-determination." [321]

The mandates system therefore did not truly reflect the principle of self-determination, it reflected the compromises the Europeans deemed necessary in order to appease the Americans. [322] The novel idea of creating a supportive system that helped peoples towards independence, while acknowledging their sovereignty -albeit suspended- is in some ways easier to reconcile with old imperialist attitudes than with the modern concept of self-determination.[323]

The "A"-Mandates were possibly to be granted independence, once European goals had been achieved in the "Fertile Crescent", and the "B"- and "C"- Mandates were never going to "stand by themselves".[324] Owen rightly concluded that, as far as non-European areas were concerned, the "conflicts between the claims of race and language, the desires of the populations concerned, and the requirements of strategy,

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[321] Letter from British Foreign Secretary Balfour to the British Prime Minister Lloyd George of February 19, 1919; reprinted in Ingrams, *Palestine*, 61-62 (PRO. FO. 371/4179); Strawson, *Partitioning*, 40-41; Gresh, *De quoi*, 36, 48-49; he explains how the treatment of the actual inhabitants of Palestine was typical of imperialism. They and their culture were virtually invisible and therefore non-existent.

[322] Wright, "Sovereignty", 691.

[323] Mansfield, *A History*, 174, 180 (he describes the mandate system as a "thinly disguised form of colonial administration"); Owen, *Tempestuous*, 550; he describes how President Wilson was at one time so frustrated during the discussions on the mandates system that he threatened to leave the peace conference. Nevertheless, some were happy to use almost poetic language in order to describe the virtues of the mandates system: Bentwich, in "Mandated Territories", (at 56) states: "It is the very basis of the new world order which is realised by the League of Nations, that the attention of the world is focused directly and systematically on the tutelary government of the younger and less advanced nations;...not that international law will be enforced by new physical sanction, but that it will be based upon a firmer and more systematic moral foundation;...".

[324] Quincy Wright, "The Proposed Termination of the Iraq Mandate", AJIL, Vol. 25, 1931, 436-446, 446; when examining the League of Nations' procedure regarding Iraqi independence in 1929-1932, Wright comes to the conclusion that "the requirements for statehood may be somewhat higher than those actually achieved by some states now members of the League"; Gilchrist, "Colonial", 987; he points out that even when the WW II Allies were discussing the novel trusteeship system in 1945 "independence was not mentioned as a goal" in the UN Charter "for the single reason that no colonial power except the United States" looked "upon it as a normal and natural outcome of colonial status".

economics and national politics produced results which were neither admirable, nor, as it turned out, even workable."[325]

The mandates system and its imperialist motives were to be one of the reasons that led Congress to reject the Versailles Peace Treaty, including the League of Nations Covenant. Subsequently, the USA only extended recognition to those mandates it had explicitly accepted.[326]

b) The Palestine Mandate in detail

aa) First decisions are made

Palestine, as a former part of the Turkish Empire, was classified as an "A"-Mandate. At their conference in San Remo in April 1920 the Allies decided that Great Britain should be the mandatory.[327]

How that was to be reconciled with Article 22 (4) Covenant of the League of Nations, which by then had already come into force, [328] and which stated that the "wishes of the communities must be a principle consideration in the selection of the Mandatory", remained a hotly debated issue. Certainly there is no evidence of the inhabitants of Palestine having been consulted by the Allies on whether they wanted Britain to become the mandatory. Balfour always opposed consulting the Palestinians as he made clear in a memorandum to Lord Curzon:

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[325] Owen, *Tempestuous,* 554.
[326] Keith, "Mandates", 72.
[327] San Remo Resolution, 25/04/1920, para. (c). The full text is available at: http://www.cfr.org/israel/san-remo-resolution/p15248; accessed 22/07/2011. France was to "get" Syria; Britain was to be the mandatory power for Mesopotamia.
[328] January 10, 1920.

> *Whatever deference should be paid to the views of those living there, the Powers, in their selection of a mandatory do not propose, as I understand the matter, to consult them.*[329]

The Americans,[330] on the other hand, did try to determine what local feeling was. In March 1919 the Americans had proposed that a commission be sent to Syria (which at that time included Palestine) in order to investigate how best to administer the area in future. The French, however, refused to participate, and the British withdrew.[331] Realizing that the European powers had probably made secret deals regarding the area, the Americans decided to nevertheless send their own fact-finding mission, the "King-Crane-Commission".[332]

The Commission came to the conclusion that 60 % of the petitions received were in favour of an American mandate. No other power had received more than 15 % support, and there was least support for a French mandate. [333]

During the next few decades, when numerous British commissions were sent to Palestine in order to deal with the fragile situation there, the Palestinian Arabs were to repeatedly reject the legitimacy of the British mandate on the grounds that Article 22 (4) Covenant of the League of Nations had been violated, when Britain was chosen as the mandatory power for Palestine.[334] It must, however, be noted that Britain *did* emerge as the local inhabitants' second choice during the King-Crane-Commission's

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[329] British Foreign Secretary Balfour in a memorandum addressed to Lord Curzon, dated August 11, 1919; reprinted in Ingrams, *Palestine*, 73 (PRO. FO. 371/4183).
[330] As already pointed out, the Americans insisted on not being an "ally". They claimed to be an "Associate Power", also due to the fact that the USA had never declared war on the Ottoman Empire.
[331] Ingrams, *Palestine*, 70; in a letter Balfour had sent to Herbert Samuel in early 1919, he had already expressed "great hopes that Palestine will be eliminated from the scope of any Commission"; reprinted in Ingrams, *Palestine*, 66 (PRO. FO. 800/215); Mansfield, *A History*, 180; Barr, *A Line*, 81-84.
[332] Pappe, "Clusters", 8-10; Kattan, *From Coexistence*, 49.
[333] "Recommendations of the King-Crane-Commission", 28/08/1919, para. 6 (3). For the full text of the recommendations, see: http://www.jewishvirtuallibrary.org/jsource/History/crane.html; last accessed 22/07/2011; Barr, *A Line*, 84-86.
[334] Dajani, "Stalled", 35; Weiß, "Die Entstehung, Teil 1", 154; he also cites the Iraqi Foreign Secretary making a statement to this effect in 1947 (fn. 20).

investigations,[335] and that the Americans had by April 1920 made it plain they would not be taking on the mandate.

Nevertheless, the fact that the Allies ignored the wishes of the local inhabitants for Syria to stay unified, [336] and for no part of the area to be placed under French "tutelage",[337] were an early indication of the Allies' attitude towards the new international law they had just created: adherence to the new norms -despite having been designed by them- was going to be an opportunistic affair.

Furthermore, the Allies, in San Remo, agreed that the "mandatory" was going to be responsible for "putting into effect" the British declaration "in favour of the establishment in Palestine of a national home for the Jewish people". The safeguard clauses contained in the Balfour Declaration were to be respected in the process. [338]

Again this demonstrated complete disregard for the wishes of the local inhabitants, described in detail by the King-Crane-Commission in 1919:

> *5. We recommend, in the fifth place, serious modification of the extreme Zionist Program for Palestine of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish State...*
>
> *(3) The Commission recognized also that definite encouragement had been given to the Zionists by the Allies in Mr. Balfour's often quoted statement, in its approval by other representatives of the Allies. If, however, the strict terms of the Balfour Statement are adhered to- favoring "the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine"—it can hardly be doubted that the extreme Zionist Program must be greatly modified. <u>For a "national home for the Jewish people" is</u>*

[335] "Recommendations of the King-Crane-Commission", 28/08/1919, para. 6 (6).
[336] A unified Syria consisting of Syria, the Lebanon, and Palestine; "Recommendations of the King-Crane-Commission", 28/08/1919, para. 2.
[337] The Commission claimed that more than 60 % of the petitions had protested "strongly and directly" against the French taking on any role in the area; "Recommendations of the King-Crane-Commission", 28/08/1919, para. 6 (6).
[338] San Remo Resolution, 25/04/1920, para. (b).

not equivalent to making Palestine into a Jewish State; nor can the erection of such a Jewish State be accomplished without the gravest trespass upon the "civil and religious rights of existing non-Jewish communities in Palestine." The fact came out repeatedly in the Commission's conference with Jewish representatives that the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase...

In his address of July 4, 1918, President Wilson laid down the following principle as one of the four great "ends for which the associated peoples of the world were fighting": "The settlement of every question, whether of territory, of sovereignty, of economic arrangement or of political relationship upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery." If that principle is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine-nearly nine-tenths of the whole-are emphatically against the entire Zionist program. The tables show that there was no one thing upon which the population of Palestine was more agreed than upon this. To subject a people so minded to unlimited Jewish immigration, and to steady financial and social pressure to surrender the land, would be a gross violation of the principle just quoted, and of the peoples' rights, though it kept within the forms of law...

The Peace Conference should not shut its eyes to the fact that the Anti-Zionist feeling in Palestine and Syria is intense and not lightly to be flouted. No British officer, consulted by the Commissioners, believed that the Zionist program could be carried out except by force of arms. The officers generally thought a force of not less than fifty thousand soldiers would be required even to initiate the program...

In view of all these considerations, and with a deep sense of sympathy for the Jewish cause, the Commissioners feel bound to recommend that only a greatly reduced Zionist program be attempted by the Peace Conference, and even that, only very gradually initiated. This would have to mean that Jewish immigration should be definitely limited, and that the project for making Palestine distinctly a Jewish commonwealth should be given up.[339]

In many respects the King-Crane-Commission's report can be seen as a prescient prediction of Palestine's fate. Nevertheless, the report was suppressed by the Americans and the Allies.[340] The original justification for this was that nothing should be done to deter Congress from ratifying the Peace Treaty of Versailles. However,

[339] "Recommendations of the King-Crane-Commission", 28/08/1919, para. 5 (emphases by author).
[340] Pappe, "Clusters", 10; Wright, "Legal Aspects", 5; Kattan, *From Coexistence*, 49; Macmillan, *Peacemakers*, 434 (she claims that "nobody paid the slightest attention" to the commission's report).

even though the treaty had long been rejected by the Americans, it took until 1922 for the Commission's findings to be published.[341]

The disregard shown by the Allies at San Remo to the wishes and aspirations of Palestine's inhabitants again exposed the hollowness of all the promises of self-determination.[342] Local feeling is probably correctly summarized by what Ronald Storrs, Military Governor of Jerusalem, said in 1918:

> *Palestine, up to now a Moslem country, has fallen into the hands of a Christian Power which on the eve of its conquest announces that a considerable portion of its land is to be handed over for colonisation purposes to a nowhere very popular people.*[343]

Nevertheless, it also needs pointing out that the wishes of the Palestinians were not taken very seriously by many leading Arabs of the time either. Faisal, son of the Sharif of Mecca and later to become King of Iraq, repeatedly expressed his sympathy for Zionist aspirations in Palestine.[344] In the "Faisal-Weizmann-Agreement" of January 3, 1919, it was agreed that

> *In the establishment of the Constitution and Administration of Palestine all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the British Government's Declaration of the 2nd of November, 1917.*[345]

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[341] Mansfield, "A History", 181; Kattan, *From Coexistence*, 49; they both also mention strong British and French resistance to publication.

[342] McGeachy, "Is it", 241; he describes the "Jewish occupation of Palestine" as "a conquest against the will of the inhabitants -made possible and respectable by the military support of a Great Power".

[343] Ronald Storrs; quoted in Fromkin, *A Peace*, 325; longer extracts of Storrs' comments -which include the quote- on a note composed by Weizman are reprinted in Ingrams, *Palestine*, 25-26 (PRO. FO. 371/3398); Storrs makes similar comments in *Orientations*, 351-352; Dajani, "Stalled", 38; he describes Arab fears of being "placed under the rule of European immigrants"; Prince, "The Palestine", 129; he states that "the Arabs...think it unfair that they, the Moslems, should be forced by Christian powers to solve the Jewish problem which has been specially created by intolerant 'Christian' people and Jewish racialism".

[344] Samuel, "Alternatives", 143; Weizmann, "Palestine's", 335; Strawson, *Partitioning*, 43; Barr, *A Line*, 70; Macmillan, *Peacemakers*, 433.

[345] Article III of the "Faisal-Weizmann-Agreement", 03/01/1919; for the full text of the agreement, see: http://amislam.com/feisal.htm; last accessed 22/07/2011.

However, Faisal conditioned this agreement on achieving Arab independence as promised by the British. The implementation of parts of the Sykes-Picot-Agreement, of course, meant that that promise would not materialize to the extent envisaged by the Arab leaders, so that the "Faisal-Weizmann-Agreement" never came into force.[346]

Faisal, however, also wrote a letter, dated March 3, 1919, to Felix Frankfurter, President of the American Zionist Organisation, declaring that

> *The Arabs, especially the educated among us, look with the deepest sympathy on the Zionist movement. Our deputation here in Paris is fully acquainted with the proposals submitted yesterday by the Zionist Organization to the Peace Conference, and we regard them as moderate and proper. We will do our best, in so far as we are concerned, to help them through: we will wish the Jews a most hearty welcome home.*[347]

For Arab leaders, too, the advancement of their personal ambitions was much more important than trying to ascertain local feeling in Palestine.[348]

bb) Turkey

The legality of the decisions taken at San Remo, including those on Palestine, is further put into doubt by the fact that at the time there was no peace treaty with Turkey. [349]

The *Treaty of Sèvres*, concluded in 1920, dealt with Palestine in Articles 95 and 96. Article 95 specifically referred to the Palestine Mandate and the terms of the Balfour Declaration. Turkey, however, never ratified the treaty.[350]

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[346] Macmillan, *Peacemakers*, 433; Fromkin, *A Peace*, 324-325.
[347] Letter from Emir Faisal to Felix Frankfurter, 03/03/1919. For the text of the letter, see: http://amislam.com/feisal.htm; last accessed 22/07/2011. The letter is also quoted by Frankfurter himself in "The Palestine", 413-414.
[348] El-Alami, *The Palestine*, 180; Shlaim, *Israel*, 7-8.
[349] Keith, "Mandates", 72; he describes the legal situation in the "A"-Mandates in 1922 as "anomalous" due to the lack of a peace treaty with Turkey; Lewis (in 1923), "Mandated", 460; he states that "the position in respect of Palestine and Syria is somewhat anomalous...Turkey has neither ceded them formally nor recognized their independence".

When peace was finally successfully agreed in the *Treaty of Lausanne* in 1923,[351] Turkey's declaration was much vaguer.[352] In Article 16 it was agreed that

> *Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned.*

The *Treaty of Lausanne* came into force on August 6, 1924, at a time when the Palestine Mandate had already been approved and was being implemented.

Such a sequence of events can hardly be reconciled with the 1907 Hague Regulations, especially Article 43, as, formally, the British position in Palestine at that time was that of a military occupier of "hostile" territory and no more. This anomalous situation was implicitly acknowledged by the British government in its Report on the Palestine Mandate for the year 1924 in which it stated:

> *The ratification of the Treaty of Lausanne in August, 1924, finally regularised the international status of Palestine as a territory detached from Turkey and administered under a Mandate entrusted to His Majesty's Government.*[353]

cc) The Mandate's provisions

The text of the Palestine Mandate was approved by the League of Nations on July 24, 1922, and came into force on September 29, 1923.[354] The USA explicitly recognized

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[350] *The Treaty of Peace Between the Allied and Associated Powers and Turkey* (Treaty of Sèvres), 10/08/1920; for Articles 1-260, see: http://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260; last accessed 22/07/2011.

[351] *Treaty of Peace with Turkey* (Treaty of Lausanne), 24/07/1923; for full text, see: http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne; last accessed 22/07/2011.

[352] E. Lauterpacht, "State", 514.

[353] *Report of His Britannic Majesty's Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section I; for full text, also see: http://www.ismi.emory.edu/PrimarySource/Report%20to%20L%20of%20N%20Pal%201924.pdf; accessed 22/07/2011 (emphasis by author).

[354] For the full text of the Mandate, see: League of Nations O.J., Vol. 3, 1922, 1007-1012.

the Palestine Mandate and its contents in the "American-British Palestine Mandate Convention" of December 3, 1924.

Its main provisions were that the mandatory was to have "full powers of legislation and administration"[355] and be "entrusted" with Palestine's "foreign relations".[356]

Many of the articles, however, dealt with the creation of a Jewish homeland in Palestine. The Balfour Declaration was reaffirmed in the Preamble and was even somewhat extended when it stated that "recognition has...been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country." [357] That was language the British cabinet had rejected when the Balfour Declaration was being drawn up.[358]

The mandatory was to be responsible for creating the necessary conditions for a Jewish national home in Palestine;[359] Jewish immigration was to be encouraged, also by enacting a suitable nationality law and allowing "close settlement";[360] Hebrew was to be one of the official languages,[361] and the Zionist organisation was recognized as the "Jewish Agency" the mandatory was to cooperate with.[362]

However, due to a late amendment proposed by the British, they were released from their obligation to help establish a Jewish national home in the territory of Palestine

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[355] Article 1 Palestine Mandate.
[356] Article 12 Palestine Mandate.
[357] Preamble, Palestine Mandate.
[358] Allain, *International*, 83; Strawson, *Partitioning*, 46; Mallison, "The Zionist", 1033; he argues that the Palestine Mandate must nevertheless be interpreted in line with the Balfour Declaration; as does Weiß, "Die Entstehung, Teil 1", 152.
[359] Article 2 Palestine Mandate.
[360] Article 7 (nationality law), Article 6 (settlement) Palestine Mandate; regarding Article 6, the Military Governor of Palestine (1917-1920), Ronald Storrs, later commented: "The thinking Arab regarded Article 6 as Englishmen would regard instructions from a German conqueror for the settlement and development of the Duchy of Cornwall, of our Downs, commons and golf-courses, not by Germans, but by Italians "returning" as Roman legionaries..." (*Orientations*, 356).
[361] Article 22 Palestine Mandate.
[362] Article 4 Palestine Mandate.

east of the Jordan.[363] This area was later to become the state of Trans-Jordan (now the Hashemite Kingdom of Jordan).

The Palestine Mandate was thus the moment when the content of the Balfour Declaration had definitely arrived in international law.[364] From now on it could officially be claimed that any move by the British government in favour of establishing a Jewish national home in Palestine was not only in accordance with international law, but an international legal obligation. The terms of that obligation arguably went beyond what had been envisaged by the majority of the British cabinet when the Balfour Declaration was approved. Nevertheless, the British had agreed to undertake the mission and had, at least, achieved a considerable reduction of territory to which the Mandate's terms applied.

dd) The Mandate's legality

It has frequently been argued that the Palestine Mandate was illegal. While some have argued that it contravened the principle of self-determination, [365] others argue that its terms simply cannot be reconciled with Article 22 (4) of the Covenant.

Before analysing these claims it should, however, be pointed out that neither the *Permanent Court of International Justice*,[366] nor the *Permanent Mandates Commission*,[367] or the United Nations ever questioned the Mandate's legality.[368]

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[363] Article 25 Palestine Mandate; Grief, "Legal Rights", 6; he argues that this is a "false interpretation", invented by Churchill, that "sabotaged" the Mandate.
[364] Dunsky, "Israel", 167; Frankfurter, "The Palestine", 414; Allain, *International*, 78; El-Alami, *The Palestine*, 147; Strawson, *Partitioning*, 46.
[365] Keith, "Mandates", 78; Quincy Wright, "The Palestine Conflict in International Law" in *Major Middle Eastern Problems in International Law*, Majid Khadduri (ed.), Washington D. C.: American Enterprise Institute for Public Policy Research, 1972, 13-36, 26.
[366] *Permanent Court of International Justice*, *The Mavrommatis Palestine Concessions* (Greece v. United Kingdom), Judgement, 30/08/1924; *The Mavrommatis Jerusalem Concessions* (Greece v. United Kingdom),

(i) Self-determination

As has already been pointed out the concept of self-determination, certainly when applied to "backward peoples", was comparatively novel to European politicians at the end of WW I. This is reflected in the *Covenant of the League of Nations*. The American President had to compromise in order to avoid friction with former allies. The subsequent American withdrawal from multilateral engagement made a bad situation worse, by encouraging the Europeans to continue as far as possible on their well-trodden path of achieving more power and influence in vital regions.

Notwithstanding the development or not of self-determination as a political principle, however, there can be little doubt that, by 1923, it had not yet become a right recognized in international law.[369] As the *International Commission of Jurists,* reporting on the Aaland Island issue, stated in 1920:

Judgement, 26/03/1925. Arguably, the Court implicitly confirmed the Mandate's legality by not questioning the British Palestine Administration's right to make the necessary decisions regarding the concessions at stake.

[367] The *Permanent Mandates Commission* declared (when dealing with a petition from the Palestinian Arab Congress that alleged the Palestine Mandate's terms were contrary to Article 22 Covenant of the League of Nations): "...(b) Secondly the petitioners protest against the terms of the mandate itself, as established by the Council of the League of Nations on July 24th, 1922...the Commission, considering its task is confined to supervising the execution of the mandate in the terms prescribed by the Council, is of the opinion that it is not competent to discuss the matter"; *Observations by the Permanent Mandates Commission on the Petition Discussed at its Fifth Session*, League of Nations O.J., Vol. 6, 1925, 219; the *Permanent Mandates Commission's* stance was subsequently approved by the Council, *32nd Session of the Council*, League of Nations O.J., Vol. 6, 1925, 133.

[368] When the General Assembly of the United Nations attempted to find a solution to the problems in Palestine, Sub-Committee 2 of the *Ad hoc Committee on the Palestinian Question* suggested referring the question of the legality of the Palestine Mandate to the *International Court of Justice*. In a narrow vote this proposition was rejected. For the report of Sub-Committee 2, see: "Ad hoc Committee on the Palestinian Question, Report of Sub-Committee 2", UN Doc. A/AC.14/32; see http://unispal.un.org/pdfs/AAC1432.pdf; last accessed 22/07/2011.

[369] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, paras. 79, 82; the court pointed out that the right of self-determination had "evolved" only in the "second half of the twentieth century"; Bassiouni, "'Self-Determination'", 32; he describes the 1914-1945 period as one of "unfulfilled declarations on 'self-determination'"; Dunsky, "Israel", 170; Dunsky views the principle as "not part of international law" in 1919/1920, and as "a purely political factor, not binding in nature"; Collins, "Self-Determination", 140; he describes the concept of self-determination post- WW I as only "theoretically based" but "gaining acceptance"; Green, "Self-determination" , 46; writing in 1971, he argues that even then there was no right of self-determination in international law; Murlakov, *Das Recht*, 86 (no right of self-determination even in 1947); James Crawford, *The Creation of States in International Law*, Oxford: Oxford University Press, 2nd ed.,

> *Although the principle of self-determination of peoples plays an important role in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.*[370]

Although the jurists, in their subsequent examination of the principle, did allow for specific exceptions to this categorical statement,[371] the text of the *Covenant of the League of Nations* proves that the jurists' conclusion was fundamentally correct. When contrasting President Wilson's statements on self-determination outlined above with the failure to even mention "self-determination" in the Covenant, it becomes obvious that this "lofty" principle was not yet recognized by the majority of states as a legal principle. [372] Consequently, the ICJ, too, has described the right of self-determination as having "evolved" only "during the second half of the twentieth

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2006,108-112, 428, 433; he describes the developments in the inter-war period regarding self-determination as demonstrating "the political force of the principle...Nonetheless there was little general development before 1945" (at 112); Strawson, *Partitioning*, 88; Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", ICLQ, Vol. 43, 1994, 241- 269, 257; Kattan, *From Coexistence*, 120-121, 140-141; Kattan, however, wants to make an exception for "A"-Mandates under Article 22 (4) of the Covenant. He argues that these "communities" were granted the right of self-determination by the Covenant. That argument is difficult to sustain. It was, after all, not up the "communities" to decide whether they had "progressed sufficiently" to be independent, but up to the mandatory power and the League of Nations. Article 22 (4) is perhaps best seen as holding out the promise to these "communities" that they will at some point in the future, to be determined by others, be able to claim a right of self-determination.

[370] "*Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*", League of Nations O.J., Special Suppl. 3, October 1920, 5; also available at: http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf; accessed 22/07/2011.

[371] "*Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*", League of Nations O.J., Special Suppl. 3, October 1920, 5, 6; also available at: http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf; accessed 22/07/2011; Koskenniemi, "National", 246-247.

[372] Green, "Self-Determination", 42; Gainsborough, *The Arab-Israeli*, 11; he cites Feinberg as offering a completely different explanation, whereby it remains unclear whether Palestine was ever included in the "A"-Mandates category; furthermore, 22 (4) only contained "permissive, not obligatory" rules as implied by the sentence "where their existence...". This argument has no merit. It is self-evident that Palestine was an "A"-Mandate. The majority of writers at the time, Britain, and the League of Nations referred to it as such (certainly until 1939). The discussions of the war-time allies provide ample evidence that all former Turkish territories not granted independence were to be "A"-Mandates. Interpreting the language in Article 22 (4) Covenant of the League of Nations as optional is also beyond any reasonable interpretation. The text simply provides no basis for Feinberg's arguments.

century", something it describes as "one of the major developments of international law."[373]

The whole concept of the mandates system could not have been reconciled with the existence of a right to self-determination, as it was not up to the peoples in the mandated territories to decide when they could "stand alone", but up to the mandatory power and the League of Nations. For peoples "not yet able to stand on their own" self-determination was therefore limited to an aspiration for the future. [374]

It must therefore be concluded that the Palestine Mandate did not violate the Palestinians' right of self-determination, as such a right had not yet been recognized in international law at that time.[375]

(ii) Article 22 (4) Covenant of the League of Nations

It has often been claimed that the terms of the Palestine Mandate, without doubt an "A"-Mandate, cannot be reconciled with Article 22 (4) of the Covenant.[376]

Besides not having been consulted by the Allies on the choice of mandatory (as already described above), the inhabitants of Palestine were subject to a system whereby the "full powers of legislation and administration" were exercised by Britain.

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[373] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, paras. 79, 82.
[374] As Marc Weller, in "The International Responses to the Dissolution of the Socialist Federal Republic of Yugoslavia" (AJIL, Vol. 86, 1992, 569-607, 592) points out, the EC Arbitration Commission on Yugoslavia even in 1991/1992 "found that in actual practice international law did not define the precise consequences of that right or its scope of application...the commission...defined the right to self-determination not as a people's right to independence but as a human right of minorities and groups".
[375] Stone, *Israel*, 17-18; Stein argues that it is irrelevant whether there was a right of self-determination in international law at that time or not, as Arab demands for self-determination were fulfilled by gaining independence in an area 100 times greater than Palestine. That argument, however, fails to take account of the rights of the Arabs living in Palestine, then 90 % of the population, whose country, according to Stone was to be sacrificed to allow Jews to achieve self-determination there -after all, the Jews amounted to only 10 % of the population in Palestine.
[376] Dajani, "Stalled", 34.

Britain was only obliged to "encourage local autonomy so far as circumstances permit."[377] Articles 1 and 3 of the Palestine Mandate therefore violated the provisions of Article 22 (4) of the Covenant which only allowed for the "rendering of administrative advice and assistance" by the mandatory.[378]

The fact that Palestine was to have little in common with a "provisionally recognized independent nation" is further evidenced by the detailed and extensive description of the mandatory's powers and obligations: without any reference to the locals' wishes, the mandatory was to facilitate Jewish immigration, enact a nationality law, and secure the Holy sites.[379]

Article 22 (8) of the Covenant does not help reconcile the Palestine Mandate with Article 22 (4) of the Covenant either, as any decision of the Council on the "degree of authority...exercised by the Mandatory" must, of course, itself be in accordance with the type of mandate concerned. The "degree of authority" conferred to the mandatory in Palestine could only be within the limits set out in 22 (4) of the Covenant, which were not respected in the Palestine Mandate.

The special treatment of Palestine is underlined when the Palestine Mandate is compared to the Iraq Mandate,[380] approved by the League of Nations on September

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[377] Article 3 Palestine Mandate.

[378] Bentwich, "The Mandate", 140; he acknowledges the fact and explains it as a result of the "Jewish National Home" policy; Quigley, *The Statehood*, 48; Keay, *Sowing*, 193, 203-204; Gresh, *De quoi*, 69; Macmillan, *Peacemakers*, 436; she concludes: "In place of the duty of the mandatory power to develop a self-governing commonwealth, they [the British] substituted 'self-governing institutions.'"

[379] Palestine Mandate; http://www.jewishvirtuallibrary.org/jsource/History/Palestine_Mandate.html; last accessed 22/07/2011; Stein, "The Jews", 418; he, however, claims that the Palestine Mandate differed from the other "A"-mandates only in as far as the "trusteeship" was deemed "to be of indefinite duration".

[380] Bentwich, "The Mandate", 137 ("the mandate for Palestine has a distinctive character"); "Mandated Territories", 50 ("markedly different"); Keith "Mandates", 78 ("differentiate this from all other mandates"); Quigley, *The Statehood*, 48-51; Keay, *Sowing*, 203-204.

27, 1924.[381] The Iraq Mandate incorporated the Anglo-Iraqi "Treaty of Alliance", signed October 10, 1922,[382] and the "Protocol of April 30, 1923, and the Agreements subsidiary to the Treaty with King Feisal".[383]

In the "Treaty of Alliance" Britain recognized Feisal as the "constitutional King of Iraq".[384] "At the request" of Iraq's King, the British government promised to "provide the State of Iraq...advice and assistance", however without prejudice to Iraq's "national sovereignty".[385] Furthermore, Iraq was allowed to have representations abroad,[386] and both parties agreed to submit any disagreements as to the treaty's interpretation to the *Permanent Court of International Justice*.[387] The Iraq Mandate itself included the statement that Britain had recognized the Iraqi government as "independent",[388] and mentions the possibility of Iraq being admitted to the League of Nations in the future.[389]

Although the "Treaty of Alliance" also contained provisions severely restricting Iraq's ability to act on its own,[390] the language used is strikingly different from the language contained in the Palestine Mandate.[391] While it could easily be claimed that the Iraq Mandate adhered to letter and spirit of Article 22 (4) Covenant of the League of

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[381] For the text of the Iraq Mandate, and its approval by the League of Nations, see: League of Nations O. J., Vol. 5, 1924, 1346-1347.
[382] For the text of the *Treaty Between His Britannic Majesty and His Majesty The King of Iraq*, see: League of Nations O.J., Vol. 5, 1924, 1505-1509; the treaty came into force in March 1924 ("Treaty of Alliance").

[383] For the text of the "Protocol", see: League of Nations O.J., Vol. 4, 1923, 728.
[384] Preamble, "Treaty of Alliance".
[385] Article I, "Treaty of Alliance".
[386] Article V, "Treaty of Alliance".
[387] Article XVII, "Treaty of Alliance".
[388] Preamble, Iraq Mandate, League of Nations O. J., Vol. 5, 1924, 1346-1347.
[389] Article VI, Iraq Mandate, League of Nations O. J., Vol. 5, 1924, 1346-1347.
[390] The Iraqi King agreed to be "guided" in "all important matters" affecting British "financial and international interests" (Article IV, "Treaty of Alliance"), and no non-Iraqi was to be employed by the Iraqi government without prior "concurrence" on the part of the British government (Article II, "Treaty of Alliance").
[391] Quigley, *The Statehood*, 42-44; Keay, *Sowing*, 203-204.

Nations, the same could not be said of the Palestine Mandate, although both were "A"-Mandates.

The failure of Britain to comply with Article 22 (4) of the Covenant was implicitly acknowledged by the Secretary of State for the Colonies MacDonald before the *Permanent Mandates Commission* in 1939:

> *Mr. MacDonald reiterated that the Palestine mandate was different from all the others; but it was, nevertheless, a mandate and had to embody the spirit and principles of the mandate system. It was not so different that its provisions could contradict those principles. If the Arabs of Palestine, alone among all the populations of territories under mandate, were to be deprived of normal political rights, it would amount to saying that the Palestine mandate contradicted the spirit of the mandates system...*
>
> *In reply to Mlle. Dannevig's remark about the premature introduction of self-governing institutions, he would remind the Commission that the Arabs and Jews in Palestine were fairly advanced peoples. It remained true, however, that, in twenty years, no progress whatever had been made with the establishment of even the most modest form of central self-government, apart from local government bodies. Palestine was, in fact, behind some other parts of the world where the people were actually more backward...*[392]

There is therefore little doubt that the Palestine Mandate did violate Article 22 (4) of the Covenant.[393] Although Palestine was categorized as an "A"-Mandate, it was treated as a "B"-Mandate at best.[394] This "special treatment" of Palestine had already been foreshadowed in the defunct *Treaty of Sèvres*. While "Syria" and "Mesopotamia" were to be "provisionally recognized as independent States",[395] there

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[392] Malcolm MacDonald before the *Permanent Mandates Commission*, Minutes of the Thirty-Sixth Session, Held at Geneva from June 8th to 29th, 1939, including the Report of the Commission to the Council, Fourteenth meeting; available at: http://www.ismi.emory.edu/PrimarySource/Palestine%20PMC%201939.pdf; accessed 23/07/2011.

[393] Allain, *International*, 87.

[394] Corbett, "What?", 131; he describes Palestine as "a regime peculiar to itself" that "for the purposes of legal definition" falls "within the same group as ... countries under mandates "B" and "C"; Dajani, "Stalled", 35.

[395] Article 94 Treaty of Sèvres; for Articles 1-260, see: http://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260; last accessed 22/07/2011.

was no such provision for Palestine, which was simply to be administered in accordance with Article 22 of the Covenant.[396]

The fact that the mandates themselves are generally viewed as international treaties in their own right -a view supported by the *International Court of Justice*-[397] makes the violation of international law no less.[398] According to Article 20 (1) of the Covenant, member states undertook not to enter into treaties "inconsistent" with the Covenant's provisions.[399]

Whether the League of Nations' approval of the Palestine Mandate can be viewed as an implicit abrogation either of Article 20 (1) or of Article 22 (4) of the Covenant is very doubtful. There is no evidence of that being a consideration at the time.

The more convincing conclusions are that the Palestine Mandate was -as Bentwich would have presumably put it-[400] "imperfect in its legal foundations", and that its terms violated Article 22 (4) of the Covenant, and therefore also Article 20 (1).[401]

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[396] Article 95 Treaty of Sèvres; for Articles 1-260, see: http://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260; last accessed 22/07/2011.

[397] ICJ, *South-West Africa Cases (Preliminary Objections)*, Ethiopia v. South Africa and Liberia v. South Africa, Judgement, 21/12/1962, I.C.J. Rep. 1962, 319, 330-331; Quigley, *The Statehood*, 37.

[398] Rosenne, "Directions", 48; Rosenne seems to disagree without giving any reasons.

[399] The Covenant came into force on January 10, 1920. The Palestine Mandate was approved by the League of Nations on July 24, 1922 (and came into force on September 29, 1923).

[400] Bentwich, "Mandated Territories", 52 (referring to the implementation of new immigration laws before the Palestine Mandate had been approved); Bentwich was Legal Secretary, then Attorney General in the Government of Palestine.

[401] This is to some extent also confirmed by discussions that took place within the American Delegation which participated in the drafting of the UN Charter and was responsible for working out the American response to suggested amendments to the *Dumbarton Oaks Proposals*. The Trusteeship system that was to be introduced in the UN Charter was to maintain the *status quo* as far as the mandates were concerned. In this connection, the US Delegation in the end decided to reject an Arab League proposal which would have explicitly included Article 22 (4) of the Covenant in the articles dealing with the Trusteeship system. As the discussions demonstrate, this rejection was due almost exclusively to the situation in Palestine. Although all the delegates agreed that the USA was in favour of retaining the *status quo* there, inclusion of Article 22 (4) of the Covenant in the UN Charter would, it was feared, be strongly opposed by the Jews. As Representative Bloom pointed out the phrase "the wishes of these communities must be a principal consideration" might actually mean "the majority wishes" and that "the Arabs were in a substantial majority". According to Bloom, the Arabs wanted inclusion of Article 22 (4) in order to "obtain something for their own protection". He concluded his assessment with the warning that incorporation of Article 22 (4) "might be equally dangerous to other territories than Palestine". On the other

It has been argued that this conclusion faces an "insuperable barrier" based on four arguments:[402] the League of Nations' approval of the terms of the Mandate had "definitive legal effect so that no other body could question its legality";[403] the apparent illegality of the Mandate had never been raised by the *Permanent Court of International Justice* or the *Permanent Mandates Commission,* despite them having the opportunity to do so;[404] all members of the League and the "interested parties" had treated the Mandate as legal,[405] and, lastly, Article 80 (1) UN Charter had "legalized" all mandates.[406]

None of these arguments is convincing. The League of Nations' approval of the Mandate as such did not automatically legalize violations of the Covenant contained therein. Because it is very doubtful that any League of Nations organ was legally competent to rule on the Mandate's adherence to the Covenant,[407] the Council's

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hand the discussions include various references by different delegates to the importance of retaining the Palestine Mandate itself, and ensuring that the "maintenance of the *status quo* be mandatory".
This seems to indicate that at least among the US delegates there was the feeling that, while the continued implementation of the Palestine Mandate would ensure the desired retention of the *status quo*, application of Article 22 (4) of the Covenant might endanger that goal; *Trusteeship,* United States Department of State, FRUS, Diplomatic papers, 1945, General: the United Nations, 1945, 950-954; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 08/07/2011.

[402] Another argument is put forward by Grief, "Legal Rights", 3; he argues that the rights contained in Article 22 Charter of the League of Nations only applied to the Jews, as far as Palestine is concerned. This is evidently not correct as all the ensuing discussions at the League of Nations and in the British Cabinet demonstrate. There was agreement that the problems in Palestine resulted from the fact that Palestinian Arabs -by having lived in the territory when the British arrived- could claim the rights under Article 22 of the Covenant and that that was difficult to reconcile with the promises made to the Zionist Jews.

[403] Crawford, *The Creation*, 429.

[404] Rosenne, "Directions", 48; Crawford, *The Creation*, 429.

[405] Green, "Self-Determination", 47; Wright, "Legal Aspects", 12; Crawford, *The Creation*, 429 ("general practice").

[406] Rosenne, "Directions", 49; Wright, "Legal Aspects", 12; Crawford, *The Creation*, 429.

[407] Lord Balfour, Statement, 18th Session of the Council, League of Nations O. J., Vol. 3, 1922, 547 (referring to the Council); implicitly: M. Hyman, Report to the 8th Session of the Council, League of Nations O.J., Vol. 1, 1920, 339 (describing the Council's difficulty in determining appropriate terms for the mandate and asking the Allies for "proposals"); also implicitly: *Letter to the Secretary of State of the United States of America, adopted by the Council on March 1st, 1921*, League of Nations O.J. 1921, Vol. 2, 142-143 (Responding to US protests against the terms of a "C" mandate awarded to Japan, the Council refers to its limited freedom of action due to the fact that the mandate had already been approved by it). The *Permanent Mandates Commission* declared (when dealing with a petition from the Palestinian Arab Congress that alleged the Palestine Mandate's terms were contrary to Article 22 Covenant of the League of Nations): "...(b) Secondly the petitioners protest against the terms of the mandate itself, as established by the Council of the League of Nations on July 24th, 1922...the Commission, considering its task is confined to supervising the execution of the mandate in the terms prescribed

approval cannot be seen as a judgement on whether the Mandate's provisions actually were in accordance with the Covenant. This lack of competency might in fact be viewed as implying some doubts on the part of the Allies as to the result of any legal analysis of the mandate's provisions by a League organ.[408] Furthermore, as all mandates were generally seen as treaties, Article 20 (1) of the Covenant barred the United Kingdom from entering into a treaty that contravened Article 22 (4), whatever the Council decided, especially as there is no indication that the Council had the competency to overrule Covenant provisions.

It is true, as argued by some, that the *Permanent Court of International Justice* and the *Permanent Mandates Commission* never questioned the legality of the Mandate. That, however, does not automatically make the Mandate's content legal. The *Permanent Court of International Justice* was never explicitly asked to rule on the conformity of the Mandate with Articles 20 (1), 22 (4) Covenant of the League of Nations.[409] The *Permanent Mandates Commission* declared an Arab request to debate the Mandate's conformity with Article 22 of the Covenant inadmissible due to its own lack of competency.[410] If it were correct that no League of Nations organ had the

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by the Council, is of the opinion that it is not competent to discuss the matter"; *Observations by the Permanent Mandates Commission on the Petition Discussed at its Fifth Session*, League of Nations O.J., Vol. 6, 1925, 219; Keith, "Mandates", 81; he, writing in 1922, argues that the PCIJ had no jurisdiction to decide whether the Mandate conformed to Article 22.

[408] Keith, "Mandates", 75; he points out that even a mandate approved by the Council could nonetheless contravene Article 22 League of Nations Charter.

[409] *Permanent Court of International Justice*, *The Mavrommatis Palestine Concessions* (Greece v. United Kingdom), Judgement, 30/08/1924; *The Mavrommatis Jerusalem Concessions* (Greece v. United Kingdom), Judgement, 26/03/1925. Arguably, the Court implicitly confirmed the Mandate's legality by not questioning the British Palestine Administration's right to make the necessary decisions regarding the concessions at stake; Keith, "Mandates", 81; Keith, however, argues that the PCIJ had no competency to decide whether the Mandate conformed to Article 22.

[410] The *Permanent Mandates Commission* declared (when dealing with a petition from the Palestinian Arab Congress that alleged the Palestine Mandate's terms were contrary to Article 22 Covenant of the League of Nations): "...(b) Secondly the petitioners protest against the terms of the mandate itself, as established by the Council of the League of Nations on July 24th, 1922...the Commission, considering its task is confined to supervising the execution of the mandate in the terms prescribed by the Council, is of the opinion that it is not competent to discuss the matter"; *Observations by the Permanent Mandates Commission on the Petition Discussed at its Fifth Session*, League of Nations O.J., Vol. 6, 1925, 219; the *Permanent Mandates*

competency to examine the Mandate's legality after approval by the Council,[411] the omission to do so on the part of the Court and the Commission is not only easily explained, but also devoid of legal consequence.

It has also been argued that, by acquiescing in the Mandate's terms and their application, the League of Nations' member states and the "interested parties" may have created customary international law in regard of Palestine.[412]

Although there is arguably some state practice in support of that proposition,[413] no corresponding *opinio juris* can be discerned, because no state ever claimed that any rules of international law that went beyond the Covenant's provisions had been created in respect of Palestine. On the rare occasions the legality of the Mandate as such was officially debated, it was simply stated that it was in accordance with Article 22 of the Covenant.[414] Britain, too, always insisted that was the case.[415] Furthermore,

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Commission's stance was subsequently approved by the Council, *32nd Session of the Council*, League of Nations O.J., Vol. 6, 1925, 133.

[411] Lord Balfour, Statement, 18th Session of the Council, League of Nations O. J., Vol. 3, 1922, 547 (referring to the Council); implicitly: M. Hyman, Report to the 8th Session of the Council, League of Nations O.J., Vol. 1, 1920, 339 (describing the Council's difficulty in determining appropriate terms of the mandate and asking the Allies for "proposals"); also implicitly: *Letter to the Secretary of State of the United States of America, adopted by the Council on March 1st, 1921*, League of Nations O.J. 1921, Vol. 2, 142-143 (Responding to US protests against the terms of a "C" mandate awarded to Japan, the Council refers to its limited freedom of action due to the fact that the mandate had already been approved by it); Keith, "Mandates", 81; he, writing in 1922, argues that the PCIJ had no jurisdiction to decide whether the Mandate conformed to Article 22.

[412] Green, "Self-Determination", 47.

[413] On at least two occasions Balfour explained the British policy of refusing to "accept the principle of self-determination", as far as Palestine was concerned by claiming that the situation in Palestine was "absolutely exceptional" or "unique"; Letter from Balfour to British Prime Minister Lloyd George; February 19, 1919; and Minutes of a conversation between Balfour and Justice Brandeis (leader of the American Zionists) in mid-1919; both reprinted in Ingrams, *Palestine*, 61-62, 71-73 (PRO. FO. 371/4179; PRO. FO. 800/217).

[414] The League of Nations Council, for example, when dealing with the mandated territories, including Palestine, declared in 1924: "Expresses itself...satisfied that the mandated territories...are in general administered in accordance with the spirit and letter of Article 22 and the terms of the mandates"; *32nd Session of the Council,* League of Nations O. J., Vol. 6, 1925, 133.

[415] Balfour officially declared that the terms of the Palestine Mandate were "in conformity with the spirit" and "in compliance with" Article 22 of the Covenant; *The Chief of the British Delegation, Council of the League of Nations (Balfour), to the Secretary General of the League of Nations (Drummond)*, December 6, 1920; available at: United States Department of State, FRUS, 1921, 105; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

before 1939,[416] no state and no organ of the League of Nations officially ever doubted that Palestine was an "A"-Mandate, to which Article 22 (4) automatically applied.[417]

Based on these facts it must be assumed that no rules of customary international law were created in order to deal with the specific case of Palestine. By avoiding the issue of legality as far as possible, and, when that was not possible, by stressing the Mandate's adherence to Article 22 (4) of the Covenant, states and the League of Nations actively prevented the development of divergent customary international law as far as Palestine was concerned.

Article 80 (1) UN Charter could and did not obviate any legal shortcomings the Mandates had. Firstly, Article 80 (1) UN Charter, even if it had attempted to legalize any previous violations of the *Covenant of the League of Nations*, cannot have any bearing on the assessment of the legal situation prior to that provision coming into force. Secondly, there are doubts as to whether Article 80 (1) really sought to change the legal situation. It is generally assumed that this provision was meant to preserve the *status quo*. This would obviously be at odds with the assumption that an illegal situation was declared legal by the article's provisions because that would necessarily

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[416] In 1939, the Chairman of the *Permanent Mandates Commission* asked the Secretary of State for the Colonies MacDonald whether he viewed Palestine as falling under Article 22 (4) of the Covenant: "It should, however, be remembered that the question whether paragraph 4 of Article 22 of the Covenant could be considered as applying to Palestine was one which had on occasion been disputed, and had given rise to differences of opinion." MacDonald replied: "Without enlarging on the point or making enquiries of lawyers who might possibly disagree, he felt it was a matter which was open to some doubt."; *Permanent Mandates Commission*, Minutes of the Thirty-Sixth Session, Held at Geneva from June 8th to 29th, 1939, including the Report of the Commission to the Council, Fourteenth meeting; available at: http://www.ismi.emory.edu/PrimarySource/Palestine%20PMC%201939.pdf; accessed 23/07/2011.

[417] In 1937, the Chairman of the *Permanent Mandates Commission* Orts declared: "For the Mandates Commission, Palestine had never ceased to constitute a separate entity. It was one of those territories which, under the Covenant, might be regarded as "provisionally independent."; League of Nations, *Permanent Mandates Commission*, Minutes of the Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th-August 18th, 1937, Tenth Meeting (available at: http://unispal.un.org/UNISPAL.NSF/0/FD05535118AEF0DE052565ED0065DDF7; accessed 13/07/2011). This statement can only be reconciled with the view that Palestine was an "A"-Mandate under Article 22 (4) of the Covenant.

imply a change in the *status quo*.[418] The explicit preservation of the "rights...of any peoples" in Article 80, which would seem to include the preservation of the right not to accept an illegal situation, provides a further bar to the contrary interpretation.[419]

The conclusion therefore must be that the Palestine Mandate's terms were contrary to international law at the time of their approval and remained so until the mandate was terminated.[420]

The Palestine Mandate in truth represented "double" hypocrisy: not only were the inhabitants of Palestine refused self-determination, but the rules set up by the Allies in order to keep self-determination in check were also flouted, because they were still too generous to allow the implementation of the Balfour Declaration.[421]

This was, of course, due to the fact that any indigenous administration in Palestine would be extremely unlikely to cooperate with the European idea of settling Jews in Palestine, and creating a national home for them there.[422] Therefore British

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[418] Gilchrist, "Colonial", 991; Gilchrist argues that Article 80 UN Charter was included because of the "fears of mandatory powers" that they might lose their "legal position in the mandated territories"; Quigley, *The Statehood*, 88.

[419] Quigley, *The Statehood*, 88; The inclusion of the term "peoples" in Article 80 UN Charter has, however, been interpreted as specifically referring to Jewish rights in Palestine (for example, Wright, in "Legal Aspects", at 13). This argument is not convincing. All of the communities living in mandated territories, especially also of the "B" and "C" categories, did not yet fulfil the criteria of statehood, but, nevertheless, had rights under the respective mandate that were preserved under Article 80. There is therefore no reason to assume that Article 80 was adopted solely to protect Jewish rights in Palestine.

[420] Even Bentwich, at the time of writing Attorney-General of the Government of Palestine, admits in "The Mandate" (at 141), that there is "scarcely any clause of the Palestine Mandate which is without its legal and practical problems"; Pitman B. Potter, "The Palestine Problem Before the United Nations", AJIL, Vol. 42, 1948, 859-861, 860; Potter goes even further, when he states: "The Arabs deny the binding force of the Mandate...and again they are probably quite correct juridically".

[421] Kattan, From *Coexistence*, 4-5; Gresh, *De quoi*, 69.

[422] Bentwich, "The Mandate", 139; he states that the "policy of the Jewish National Home" had "determined the particular character of the mandate for Palestine" and compares the mandate to British policy in Trans-Jordan in order to emphasize this point; in his article "Mandated Territories" (at 51) he reiterates that point: "the task of the Mandatory of Palestine is very much more difficult...It was clearly necessary...that the Mandatory should be able to exercise the powers inherent in the government of a sovereign state and should not have its functions limited to rendering of administrative advice and assistance."; Keith, "Mandates",77- 78; he compares the Palestine to the Iraq Mandate -where he sees Britain's role "reduced to the modest role contemplated in Article 22". He then argues that "in Palestine, on the other hand, the mandatory has and must retain sovereign power...",

administrators had to be put in place in order to enforce a concept the population was hostile to.

That does, however, not automatically lead to the further conclusion that the entire Mandate was invalid. The fact that Palestine was a mandated territory remained and was in accordance with contemporary international law as reflected in the Covenant.

(iii) Other possible violations of international law

Although the Allies had not bothered to consult the inhabitants of Palestine the fact that America -as the favoured mandatory power- dropped out of the contest leads to the conclusion that it was in accordance with Article 22 (4) Covenant of the League of Nations that Britain, the inhabitants' second choice according to the *King-Crane-Commission*, was installed as mandatory power (even if that was mere coincidence).

Obliging Palestine to accept foreign, Jewish immigrants cannot *per se* be classified as contrary to international law as it then was.[423] As already pointed out, the right of self-determination, which nowadays would very likely be seen to be violated by such an obligation, was not yet developed in international law.

It is sometimes argued that the concept of a Jewish national home as such violated Article 22 (1) of the Covenant because it could not be reconciled with the "principle that the well-being of such peoples form a sacred trust of civilization" as far as the Palestinian Arabs are concerned.[424]

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and goes on to explain the difficulties Britain will have when trying to create a Jewish national home there; Stein, "The Jews", 417 ("sui generis"); Salt, *The Unmaking*, 127; Quigley, *The Statehood*, 48-49.

[423] Kattan, *From Coexistence*, 121; he believes this to be generally true, but not for areas classified as "A"-Mandates because he believes those "communities" had been granted the right of self-determination. As has been explained earlier, that view is not convincing.

[424] Crawford, *The Creation*, 429.

There is little doubt that the way the concept of a Jewish national home was implemented in practice amounted to a clear violation of Article 22 (1) of the Covenant. Nevertheless, it does not seem justified to categorize the mere obligation to accept foreign immigrants -even if they were to be granted citizenship rights- as necessarily harmful to the indigenous population and therefore automatically illegal, especially when the safeguard clauses included in the Mandate are considered.

Based on the paternalistic, imperialist attitude evidenced by the whole mandates system it could easily be argued -as indeed it was- that the Arabs would benefit from Jewish innovation and expertise, a sort of tutelage in proxy. As outrageous as such an attitude seems today, it cannot be denied that it provided the basic justification for the whole mandates system and was therefore reflected in the Covenant *of the League of Nations* and international law in general.

Furthermore, the fact that this obligation -for practical reasons- necessitated a violation of Article 22 (4) of the Covenant by requiring the imposition of a British administration on Palestine does not make the obligation itself illegal. Although hardly enforceable it would have -at the time- been possible to impose such a legal obligation on an indigenous administration (receiving "advice" from the British), without Article 22 (4) of the Covenant being violated.[425]

[425] As already pointed out in the case of Iraq, the other mandated territories, which were much further advanced on the road to independence than Palestine, were also subject to various restrictions; Kattan, *From Coexistence*, 121; Kattan believes the argument made here to be generally correct, but not applicable to areas classified as "A"-Mandates because, he argues, those "communities" had been granted the right of self-determination. As has been explained earlier, that view is not convincing.

(iv) Brief Summary

The Palestine Mandate did not violate the Palestinian Arab's right of self-determination, as that concept had not yet developed into a legal right in international law, nor did it violate Article 22 (1) of the Covenant.

The way Palestine was to be administered according to the Palestine Mandate, and the omission of any verifiable road-map on the way to independence, however, represent violations of Articles 20 (1), 22 (4) of the Covenant.[426] This was also the view taken by Lord Islington during the debate in the House of Lords in June 1922 on his motion, which declared the Palestine Mandate "inacceptable" (and was passed by a large majority).[427]

Even the British Foreign Secretary Balfour himself concurred:

> *The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of 'independent' Palestine than in that of 'independent' Syria...What I have never been able to understand is how it can be harmonised with the declaration, the Covenant, or the instructions to the Commission of Enquiry...In short, so far as Palestine is concerned, the Powers*

[426] Kattan, *From Coexistence*, 55-56.

[427] Lord Islington declared: "The first point I desire to make in relation to my Motion is that those provisions embodied in the Palestine Mandate are in direct conflict with the fundamental principles of the mandatory system. In order to make good that point I must ask your Lordships to listen to me while I read two governing Articles in the Covenant of the League of Nations which represent what I call the fundamental principles of the mandatory system. They are in Article 22, which states that "To those colonies and territories which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them ... there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation." Paragraph 4 of Article 22 goes on to say "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory." The establishment of a Zionist Home under the Palestine Mandate, as applied to the Articles that I have explained, is directly inconsistent with the undertakings embodied in those two Articles."; Hansard, Palestine Mandate, HL Deb 21 June 1922 vol 50 cc994-1033, c997; available at: http://hansard.millbanksystems.com/lords/1922/jun/21/palestine-mandate; accessed 12/07/2011.

> *have made no statement of fact which is not admittedly wrong, and no declaration of policy which, at least in the letter, they have not always intended to violate.*[428]

Of course, notwithstanding these sentiments, Balfour officially declared that the terms of the Palestine Mandate were "in conformity with the spirit" and "in compliance with" Article 22 of the Covenant.[429]

4. Palestine 1920s-1945

The developments in what was now Palestine in the 1920s and 1930s were uneven, characterized by the difficulties of trying to implement the twin obligations of the Mandate, namely creating a Jewish national home and safeguarding the non-Jewish communities' rights.

a) "Partition" of Palestine

As had already been foreshadowed by the *Churchill White Paper* [430] and the Palestine Mandate, the Palestinian area east of the river Jordan was no longer part of this development. The Palestine Mandate -with few exceptions- allowed the British to decide which of the Mandate's provisions were to be implemented there.[431]

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[428] British Foreign Secretary Arthur Balfour in a Memorandum (11/08/1919) to Earl Curzon; extracts reprinted in Ingrams, *Palestine*, 73 (PRO. FO. 371/4183).
[429] *The Chief of the British Delegation, Council of the League of Nations (Balfour), to the Secretary General of the League of Nations (Drummond)*, December 6, 1920; available at: United States Department of State, FRUS, Papers relating to the foreign relations of the United States, 1921, Volume I, 105; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.
[430] Winston Churchill, *"The British White Paper"*, 03/06/1922; available at: http://avalon.law.yale.edu/20th_century/brwh1922.asp; accessed 22/07/2011.
[431] Article 25 Palestine Mandate; Kattan, *From Coexistence*, 53.

Shortly after the Palestine Mandate had been approved, the British government issued "*The Palestine Order in Council*".[432] In its Preamble, the *Order in Council* reiterated the obligation to fulfil the Balfour Declaration, but its Article 86 categorically stated that

> *This Order In Council Shall Not Apply To Such Parts Of The Territory Comprised In Palestine To The East Of The Jordan And The Dead Sea As Shall Be Defined By Order Of The High Commissioner. Subject To The Provisions Of Article 25 Of The Mandate, The High Commissioner May Make Such Provision For The Administration Of Any Territories So Defined As Aforesaid As With The Approval Of The Secretary Of State May be prescribed.*

The foundations of the "first partition" of Palestine had thus been laid.[433] "Eastern" Palestine, under its ruler, Emir Abdullah, another son of the Sharif of Mecca's and a British ally, was later to become independent as the Kingdom of Trans-Jordan in 1946. Already in April 1923, however, Britain recognized Emir Abdullah as the ruler of Trans-Jordan, pending the establishment of a constitutional order there and the conclusion of a treaty between Britain and Trans-Jordan.[434] That Treaty was concluded on May 15, 1923, and therein Britain recognized Trans-Jordan as a state, albeit in need of further British support on the road to independence.

Although Trans-Jordan was technically still included in the Palestine Mandate in reality it was becoming a completely separate entity. Trans-Jordan's administration was much closer to Iraq's, and thereby corresponded much more to Article 22 (4)

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[432] *The Palestine Order in Council*, 10/08/1922; full text available at: http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656; accessed 22/07/2011.

[433] This is confirmed by the Order in Council dealing with Palestinian citizenship (*Order in Council of His Majesty*, July 24, 1925). Palestinian citizenship was not to be granted to residents of Palestinian areas east of the Jordan; they became "nationals of Trans-Jordan"; Bentwich, "Nationality in Mandated Territories", 106; Kattan, *From Coexistence*, 53.

[434] *Report of His Britannic Majesty's Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, Section II, para. 2; for full text, see . http://www.ismi.emory.edu/PrimarySource/Report%20to%20L%20of%20N%20Pal%201924.pdf; accessed 22/07/2011.

Covenant of the League of Nations than the events in western Palestine, now Palestine. [435]

While the Palestine Mandate itself can hardly be reconciled with Article 22 (4) of the Covenant, its implementation in eastern Palestine, in the Emirate of Transjordan, was in accordance with that provision. The same cannot be said for (western) Palestine.

b) Developments in (western) Palestine 1920s-1945

The British government had set out its policies in the *Churchill White Paper* of 1922. In it, the British government tried to reassure the Arab population that the creation of a Jewish state in Palestine was not intended. In order to fulfil the Balfour Declaration it was, however, made clear that future Jewish immigration into Palestine would be allowed. This immigration was not to be unlimited, but based on the "economic capacity of the country".[436]

Nevertheless, shortly after the White Paper had been published, the British government suffered a reverse in the House of Lords. On June 21, 1922, the House of Lords passed the following motion:

> *That the Mandate for Palestine in its present form is inacceptable to this House, because it directly violates the pledges made by His Majesty's Government to the people of Palestine in the Declaration of October, 1915, and again in the Declaration of November, 1918, and is, as at present framed, opposed to the*

[435] This, although, according to Stein, "Eastern Palestine" was "smaller", "more backward", and could only "keep its head above water" with the help of British subsidies ("The Jews", 415-416); Mansfield, *A History*, 208; he describes Trans-Jordan as "poor, undeveloped and thinly populated"; Barr, *A Line*, 359; referring to Jordan being granted independence in 1946, Barr states: "The servile nature of Jordan's relationship with Britain was not a well-kept secret. Neither the United States nor the Soviet Union ...would initially recognise Jordan as an independent state."; Quigley, *The Statehood*, 46-48.

[436] Winston Churchill, *"The British White Paper"*, 03/06/1922; available at: http://avalon.law.yale.edu/20th_century/brwh1922.asp; accessed 22/07/2011.

> *sentiments and wishes of the great majority of the people of Palestine; that, therefore, its acceptance by the Council of the League of Nations should be postponed until such modifications have therein been effected as will comply with pledges given by His Majesty's Government.* [437]

In the debate Lord Islington, the proposer of the motion, described the Palestine Mandate as a "distortion of the mandatory system".[438]

After a heated debate the government, however, managed to reverse that decision in the House of Commons a few days later.[439] Support was also received from America. In a Joint Resolution the US Congress declared, on June 30, 1922, that

> *the United States of America favors the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of Christian and all other non-Jewish communities in Palestine, and that the Holy places and religious buildings and sites in Palestine shall be adequately protected.*[440]

This verbal support did, however, not facilitate implementation on the ground of what were essentially incompatible obligations.

The British were confronted by Arab mistrust and Jewish wishes for ever greater immigration. Periods of calm were interrupted by periods of unrest.[441] At first, most of the clashes were between Arabs and Jews. In 1929 about 250 people were killed in the "Western Wall Uprising", which was the culmination of an Arab-Jewish dispute

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[437] Hansard, Palestine Mandate, HL Deb 21 June 1922 vol 50 cc994-1033, c994; available at: http://hansard.millbanksystems.com/lords/1922/jun/21/palestine-mandate; accessed 12/07/2011; for further details: "Palestine Mandate defeated in Lords", *The New York Times*, 22/06/1922, 1,4; Collins, "Self-Determination", 157; Ingrams, *Palestine*, 169 (PRO. CO. 733/22).

[438] Hansard, Palestine Mandate, HL Deb 21 June 1922 vol 50 cc994-1033, c1000; available at: http://hansard.millbanksystems.com/lords/1922/jun/21/palestine-mandate; accessed 12/07/2011; "Palestine Mandate defeated in Lords", *The New York Times*, 22/06/1922, 1.

[439] Ingrams, *Palestine*, 170 (PRO. CO. 733/35); Kattan, *From Coexistence*, 75.

[440] Lodge-Fisher-Resolution; passed by both Houses of Congress on June 30, 1922, and signed by President Harding on September 21, 1922; also quoted by Kermit Roosevelt, "The Partition of Palestine, A Lesson in Pressure Politics", *The Middle East Journal*, Vol. 2, 1948, 1-16, 2.

[441] Frankfurter, "The Palestine", 433; he describes the period 1922-1929 as one of "substantial tranquillity".

centred on access to the "Western Wall" in Jerusalem.[442] The British reacted to this worsening situation by ever more frequently sending commissions to Palestine which, in their subsequent reports, often arrived at contradictory conclusions.

Meanwhile, Jewish immigration continued. Due to the persecution of Jews in Europe, especially in Nazi Germany, and the unwillingness of other countries to accept large numbers of Jewish refugees, pressure was mounting to allow Jews fleeing Europe into Palestine.[443]

Local hostility to the new arrivals was greatly increased by the fact that Arab absentee landlords turned out to be more than willing to sell their often fertile land to the Jewish settlers who, due to their international support, could often offer very substantial purchase prices.[444] Even amongst the local Palestinian Arab leadership there were those who sold their land to the immigrants.[445] This in turn meant that many landless local Arab workers were evicted from these lands, as it was part of the Zionist ideal that the Jewish immigrants should do the "dirty work" themselves, and not become traditional colonizers.[446] Arab unemployment also increased due to the increasingly automated production introduced by the Jewish settlers, [447] and the ban on employment of Arabs on land purchased by the Jewish National Fund.[448]

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[442] Samuel, "Alternatives", 146; El-Alami, *The Palestine*, 160-162; Mansfield, *A History*, 204-205.
[443] *Palestine Royal Commission Report* , Cmd. 5479, Chapter V, para. 45 (ii); Prince, "The Palestine", 131; Wright, "Legal Aspects", 6; Hirst, *The Gun*, 206; Mansfield, *A History*, 205.
[444] Frankfurter, "The Palestine", 424 ("handsomely paid for"); Samuel, "Alternatives", 144 ("at prices many times its previous value"); Ingrams, *Palestine*, 109-110; John Woodhead, "The Report of the Palestine Partition Commission", *International Affairs*, Vol. 18, 1939, 171-193, 179; Hirst, *The Gun*, 145, 151-152; Kenneth W. Stein, *The Land Question in Palestine, 1917-1939*, London: The University of North Carolina Press, 1984, 37, 67; Gresh, *De quoi*, 70.
[445] Fromkin, *A Peace*, 522-523; Stein, *The Land Question*, 67; Stein claims (at least) ¼ of the elected Palestinian Arab leadership could "be identified" as having sold land to Jews (personally or immediate family).
[446] Frankfurter, "The Palestine", 427; Frankfurter justifies this policy by arguing that Jews did not wish to be "entrepreneurs or the beneficiaries of those excesses of the capitalist system to which Western countries are now giving heed"; Ingrams, *Palestine*, 109-110.
[447] Frankfurter, "The Palestine", 426; Gresh, *De quoi*, 71-72.
[448] Woodhead, "The Report", 179.

These measures unsurprisingly caused bitterness amongst the Arabs who were not willing to accept the loss of land and employment foreigners were usurping, especially since it was usually the most fertile land that was being sold. Furthermore, land purchased by the Jewish National Fund could never again be re-sold to an Arab.[449] Condescending attitudes towards the Arabs on the part of some of the Jewish settlers did not help either.[450]

Zionists often claimed that local Arabs were nevertheless benefitting from Jewish immigration.[451] Modern technology was being introduced to the country, new work opportunities were being created, and, generally speaking, they argued, by the 1930s, Palestine had made much more progress than the other Arab states in the area.[452] In Britain, too, much was made of the fact that Jewish inventiveness and energy was transforming Palestine, something the "backward" Arabs would never have managed.[453] Of course, when these comparisons were made it was not mentioned that the Jewish settlers had been and were supported by vast amounts of money, donated

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[449] Woodhead, "The Report", 179; Kattan, *From Coexistence*, 36; Gresh, *De quoi*, 71.

[450] In a letter dated May 30, 1918, to the British Foreign Secretary Balfour, Chaim Weizman was frank in his attitude towards the Arabs in Palestine: "The present state of affairs would necessarily tend towards the creation of an Arab Palestine, if there were an Arab people in Palestine. It will in fact not produce that result because the fellah is at least four centuries behind the times, and the effendi...is dishonest, uneducated, greedy, and as unpatriotic as he is inefficient..."; reprinted in Ingrams, *Palestine*, 32 (PRO. FO. 371/3395); Segev, "Mohamed", 82; he provides many examples of the condescending attitude many Zionists had towards Arabs in Palestine and describes how a Jewish writer, Ascher-Ginzburg, was shocked by the way East European Jewish settlers were treating the Arabs as early as 1891; Gresh, *De quoi*, 46-47.

[451] Frankfurter, "The Palestine", 411, 418-420; he describes one of the Palestine Mandate's aims as being "the elevation of the lowly Arab" (411); Prince, "The Palestine", 126-127; Samuel, "Alternatives", 145; Stein, "The Jews", 431; the feeling of superiority often felt by the Jews towards the local Arabs is also expressed by Weizmann, "Palestine's", 333; Weizmann compares the Arabs to "natives" and therefore argues that British methods usually employed in "backward dependencies" might also be useful to the "Jew...coming to Palestine to construct a modern civilization"; 336; Hirst, *The Gun*, 145; Strawson, *Partitioning*, 31-32.

[452] Frankfurter, "The Palestine", 410 ("a new civilization has been unfolding in Palestine since 1920"), 418-419.

[453] During a meeting of the Cabinet on May 31, 1921, the Secretary of State for the Colonies, Winston Churchill, "paid a high tribute to the success of the Zionist colonies, which had created a standard of living far superior to that of the indigenous Arabs"; Minutes of the Cabinet Meeting; reprinted in Ingrams, *Palestine*, 124 (PRO. CAB. 23/24); *Palestine Royal Commission Report,* Cmd. 5479, Chapter V, 113-114; after a visit to Palestine, Prime Minister Mac Donald stated in 1928: "I must say it is impossible for anyone who saw what I saw to be too extravagant in tributes to the Jewish colonisers in Palestine" (as quoted by Frankfurter, "The Palestine", 409-410); Woolbert, "Pan Arabism", 310; Strawson, *Partitioning*, 31-32: Keay, *Sowing*, 245.

increasingly from the USA -the kind of support the local Arabs could obviously not count on.[454]

Dissatisfaction amongst the local Arab population was further increased by the fact they were forced to watch on the sidelines as other Arab areas mandated to European powers were making progress towards full independence.[455] In 1932, Iraq had already become an officially independent state, while Trans-Jordan, Syria, and Lebanon gained more local autonomy.[456] It was self-evident to the Palestinian Arabs that the lack of progress in Palestine was not due to any particular inability on their part in comparison to the other Arabs, but was due to the alien European and American desire for Jewish colonization of the area.[457]

This frustration and anger erupted in 1936. The Arab Revolt began with a general strike in April 1936, the boycott of Jewish enterprises, and the non-payment of taxes. However, the uprising quickly turned violent. The aims were an end to Jewish immigration, a ban on land transfers to Jews, and a more representative government in Palestine. The more hard-line Arabs were led by the Arab Higher Committee under the leadership of the Mufti of Jerusalem. Violence was not only directed against the Jewish communities, who reacted in kind,[458] but for the first time also against the

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[454] Frankfurter, "The Palestine", 418; he mentions the support provided by "world Jewry" and estimates Jewish investment in Palestine between 1917 and 1930 to have amounted to about $ 50 million; Samuel, "Alternatives", 144; Weizmann, "Palestine's", 331; Weizmann believes Jewish investment in Palestine had amounted to $ 500 million by 1941/1942; Eban, "Israel", 427 (referring to the post- WW II years); Hirst, *The Gun*, 145; Keay, *Sowing*, 245; Keay claims that the economic crisis that engulfed Palestine as of 1935 actually showed that the apparent progress made in Palestine was no more than a "sham".

[455] *Palestine Royal Commission Report* , Cmd. 5479, Chapter V, para. 45 (i); Rustow, "Defense", 278; Woolbert, "Pan Arabism", 315.

[456] Woolbert, "Pan Arabism", 315 (referring to the Anglo-Egyptian, the French-Syrian, and the French-Lebanese Treaties, all of 1936)

[457] Prince, "The Palestine", 124; Rustow, "Defense", 278; Samuel, "Alternatives", 145; Stein, "The Jews", 428; Writing in 1925/1926, he blames the delay in the "development of self-governing institutions" on Arab intransigence as far as the Jewish National Home is concerned.

[458] Allain, *International*, 91.

British.[459] The Jewish "self-defence organisations", Hagana and Irgun, began to play an increasingly prominent role. Hagana, the more moderate organisation, co-operated with the British Civil Administration in Palestine.[460] This increasing militarization of the Zionist groups would prove to be invaluable in the Jewish struggle for independence after 1945.

Continuing unrest[461] would lead to numerous commissions being sent out to Palestine,[462] which came to contradictory conclusions of often dubious legality.[463] In

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[459] Woolbert, "Pan Arabism", 309-310, 315 (he also points out that the outbreak of the Arab revolt might partly have been a result of diminishing British influence in the wider region, following the Italian success in Ethiopia; a point also made by Cohn-Sherbok, *The Palestine*, 18); Mansfield, *A History*, 206; Keay, *Sowing*, 246-259; Barr, *A Line*, 163-197.

[460] Ben-Gurion, *Israel*, 17 (beginning of a "regular army"); Gresh, *De quoi*, 79.

[461] To give an impression of the situation in 1938, this is a selection of headlines in *The Times* of that year: "Sabotage in Palestine" (04/01/1938, 11); "Troops in Action in Palestine" (01/02/1938, 14); "The Fighting in Palestine" (02/02/1938, 11); "More Outrages in Palestine" (20/04/1938, 9); "Reprisals in Palestine" (25/05/1938, 15); "More Shooting in Palestine" (13/06/1938, 13); "Fighting Terrorism in Palestine" (15/06/1938, 14); "A Black Day in Palestine" (05/07/1938, 14); "Paralysis in Palestine" (16/09/1938, 13); "More Murders in Palestine" (16/09/1938, 12); "Shooting in Palestine" (05/10/1938, 16); "The Palestine Problem" (25/11/1938, 14); "More Palestine Rebels Dispersed" (05/12/1938, 14); "British Casualties in Palestine" (29/12/1938, 8); see also: Barr, *A Line*, 163-197.

[462] See, for example, the following selection: The Peel Commission (1937), *Palestine Royal Commission Report*, July 1937, Cmd. 5479 (often referred to as the *Peel Commission Report*, because Earl Peel had been the commission's chairman); *Palestine, Statement of Policy by His Majesty's Government in the United Kingdom*, July 1937, Cmd. 5513. For the full text, also see: http://ufdc.ufl.edu/UF00023167/00001; accessed 22/07/2011; *Policy on Palestine, Despatch dated 23rd December 1937, from the Secretary of State for the Colonies to the High Commissioner for Palestine*; for the full text, see: http://domino.un.org/UNISPAL.NSF/0/bbbc9dd3aed1e0e2852570d20077e7de?OpenDocument; accessed 22/07/2011; The Woodhead Commission (1938), see: *Palestine Partition Commission*, Report, Cmd. 5854; The *MacDonald White Paper* (May 1939). For the full text of the White Paper (*Palestine, Statement of Policy, Cmd. 6019*), see: League of Nations O.J., Vol. 20, 1939, 363-369; also reprinted in *The Times*, "Palestine, Text of the White Paper", 18/05/1939, 9.

[463] Due to the Jew's minority status in Palestine, the Peel Commission, for example, came to the conclusion that the proposed new Jewish state would include 250,000 Jews and 225,000 Arabs, making it difficult to see how the prospective state's Jewish character was to be maintained. Therefore the commission suggested a population transfer between the Jewish and Arab states, meaning, as a last resort, the compulsory transfer of Arabs out of the Jewish state (*Palestine Royal Commission Report,* Chapter XXII, paras. 39, 43, 390 (statistics), 391; Keay, *Sowing*, 252). This proposal was clearly incompatible with Articles 2, 6, and the Preamble of the Palestine Mandate. The British White Paper of 1939, on the other hand, advocated severe restrictions as far as Jewish immigration and land transfers to Jews were concerned. This was also clearly contrary to the Palestine Mandate. Indeed, the majority on the *Permanent Mandates Commission* at the League of Nations declared the new British policy to be "not in conformity with the Mandate" (1939 *Palestine, Statement of Policy, Cmd. 6019.* "Section II, Immigration", "Section III, Land"); *The Times*, "British Policy in Palestine, Report of League Commission", 18/08/1939, 10; the article goes on to state that the Commission voted 4:3 to declare British policy as incompatible with the Mandate. For extracts from the Commission's report, see: *The Times*, "Palestine Policy", 18/08/1939, 9; Keay, *Sowing*, 261.

the end, however, there was no decisive change in Palestine's status until after the end of WW II.

5. Palestine 1945-1947

The end of the Second World War brought many changes. Britain was economically exhausted and dependent on American financial support.[464] Due to effective Zionist lobbying, American pressure on Britain regarding its Palestine policy was, at the same time, increasing. This was also due to the fact that the new US President, Harry S. Truman, was more easily swayed by domestic political and electoral concerns than his predecessor.[465]

At the same time hundreds of thousands of Jewish "displaced persons" were apparently willing to emigrate from Europe to Palestine, but being barred by the British.[466] The war-time truce in Palestine with various Jewish groups had also come to an end, and terrorist attacks were not uncommon. [467]

A new Labour government had been elected in Britain which had campaigned on an extremely pro-Zionist platform as far as Palestine was concerned.[468] On the other

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[464] R. Devereux, "Britain, the Commonwealth and the Defense of the Middle East 1948-1956", *Journal of Contemporary History,* Vol. 24, 1989, 327-345, 327; Judah L. Magnes, "Toward Peace in Palestine", Foreign Aff., Vol. 21, 1942-1943, 239-249, 242; Hirst, *The Gun*, 237; Mansfield, *A History*, 233.

[465] McGeachy, "Is it", 239, 243; Ottolenghi, "Harry", 970; Udo Ulfkotte, *Kontinuität und Wandel amerikanischer und sowjetischer Politik in Nah- und Mittelost 1967 bis 1980*, Rheinfelden: Schäuble Verlag, 1988, 24; Barr, *A Line*, 313, 326-335.

[466] Roosevelt, "The Partition", 10; Weiß, "Die Entstehung, Teil 1", 165-167; Hirst, *The Gun*, 238; Hirst points out that most of the refugees actually wanted to emigrate to America or other West European countries, but strict anti-immigration laws made that impossible.

[467] Ottolenghi, "Harry", 976; Prince, "The Palestine", 131-132; Bethell, *The Palestine*, 336-339; Gresh, *De quoi*, 81; Barr, *A Line*, 315-317, 320-325.

[468] Weiß, "Die Entstehung, Teil 1", 165-166; Hirst, *The Gun*, 236; Ben-Gurion, *Israel*, 19; Cohn-Sherbok, *The Palestine*, 49; Richard Allen, *Imperialism and Nationalism in the Fertile Crescent*, New York: Oxford University Press, 1974, 364-365; Allen points out that Labour had not only supported partition in the election

hand, in order to maintain any semblance of "great power" status, Britain was dependent on maintaining its influence in the Middle East, which meant not antagonizing the Arabs.[469] Against this backdrop the victors of the Second World War were struggling to formulate policy on Palestine. A solution to the quagmire was not in sight.

a) General Developments

The principles of any solution had already been laid down by the United Kingdom and the USA in the *Atlantic Charter* of 1941.[470] The principle of self-determination was to be paramount when deciding on a territory's future:

> *Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;*
>
> *Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;...*[471]

Negotiations regarding the establishment of another "new world order" continued in 1944 at the *Dumbarton Oaks Conference* and in February 1945 in Yalta. Finally, in April-June 1945, the UN Charter was finalized at the *San Francisco Conference* and signed on June 26, 1945, by the representatives of fifty nations.[472]

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campaign, but had even advocated the transfer of the Arab population out of the new Jewish state; Strawson, *Partitioning*, 71; Mansfield, *A History*, 233; Keay, *Sowing*, 352; Gresh, *De quoi*, 78.

[469] Devereux, "Britain", 327-328, 330-331; Gresh, *De quoi*, 82.

[470] *The Atlantic Charter*; for full text, see: http://avalon.law.yale.edu/wwii/atlantic.asp; accessed 23/07/2011.

[471] *The Atlantic Charter*; for full text, see: http://avalon.law.yale.edu/wwii/atlantic.asp; accessed 23/07/2011.

[472] The UN Charter came into force on October 24, 1945.

In contrast to the *Covenant of the League of Nations*, the principle of self-determination was explicitly mentioned in the new UN Charter. According to Article 1 (2) UN Charter one of the "purposes of the United Nations" is:

> *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*

The principle is also mentioned in Article 55. Regarding dependent territories -which included the mandated territories not yet independent-[473] an "International Trusteeship System" and a "Trusteeship Council" were established.[474] However, as will be outlined later, mandated territories did not automatically become trust territories.

Meanwhile, in March 1945, the Arab states had founded the Arab League.[475] Although frequently more pre-occupied with disputes between the various rulers, the Arab League gave the Arab states a forum to try to formulate a strategy for opposing the creation of a Jewish state in Palestine, a goal every Arab ruler -at least officially- adhered to. The League of Nations, forerunner to the United Nations, was dissolved in April 1946.

b) Developments in and regarding Palestine in 1945

Jewish terrorist organizations were mounting a campaign against the British and Arabs in Palestine, while Britain was trying to maintain cordial relations with the

[473] UN Charter, Article 77 (1a).
[474] UN Charter, Chapters XII and XIII, Articles 75-91.
[475] Weiß, "Die Entstehung, Teil 1", 167; Allen, *Imperialism*, 350-353.

Arab states in the Middle East.[476] Meanwhile, as of 1945, frictions between Britain and the USA regarding Palestine were beginning to deepen.

The British, aware of the fragile situation in Palestine, due to actually having troops stationed there, were very reluctant to allow mass Jewish immigration into Palestine from Europe as the Americans demanded who themselves were -apart from donating money- absent from the scene.[477] Between 1945 and 1947 these tensions were to become increasingly pronounced, which was also partly a result of the new Labour government's abrupt u-turn in its Palestine policy once actually in office.[478]

British-American coordination and cooperation was further undermined by discord within the Truman Administration. A rift opened up between the Department of State and the White House which became increasingly difficult to bridge.[479] The Department of State tended to be much more cautious regarding the Jewish cause in Palestine, pointing out that it was not in the American national interest to support the Jews unequivocally if that meant antagonizing the Arabs. Worries were expressed that the Soviets might exploit such a situation.[480] The White House Staff, on the other hand, seems to have been dominated by supporters of Zionist aspirations. They repeatedly pointed to the electoral advantages that could be gained by supporting the Jewish cause.

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[476] Strawson, *Partitioning*, 75; Gresh, *De quoi*, 82; Barr, *A Line*, 315-317, 320-325.
[477] Raymond Blackburn, "Bevin and His Critics", Foreign Aff., Vol. 25, 1946-1947, 239-249, 248; Magnes, "Toward", 239; McGeachy, "Is it", 239, 242; Ritchie Ovendale, *Britain, The United States, And The End of the Palestine Mandate 1942-1948*, Woodbridge: The Boydell Press, 1989, 5.
[478] Allen, *Imperialism*, 367; Cohn-Sherbok, *The Palestine*, 49; Strawson, *Partitioning*, 71; Mansfield, *A History*, 233; Keay, *Sowing*, 353.
[479] In 1946 Dean Acheson, then Undersecretary of State in the US State Department, described this rivalry as "civil war along the Potomac", as quoted by Salt, *The Unmaking*, 149; Richard Latter, *The Making of American Foreign Policy in the Middle East 1945-1948*, New York: Garland Publishing Inc., 1986, 250, 255-256.
[480] Ottolenghi, "Harry", 968.

Truman himself became heavily involved in deciding matters concerning Palestine. Besides always having had pro-Zionist leanings, he is said to have been motivated by the appalling fate of the Jews in Europe.[481] By virtually all accounts one of his main concerns was nevertheless winning elections, and the concentration of Jewish voters in a few key states was to prove extremely helpful to their cause.[482] By 1948, when the next presidential elections were due, it seemed likely that Truman would lose.

Congress, which since 1943 had been a main target of Zionist lobbying efforts,[483] remained extremely pro-Zionist. In late 1945 resolutions similar to those withdrawn in 1944 in support of creating a Jewish Commonwealth in Palestine were re-introduced.[484] They were passed in December 1945 although the references to a *Jewish* Commonwealth in Palestine had been removed. All this resulted in Truman repeatedly putting pressure on the British government to allow another 100,000 Jewish refugees into Palestine.[485]

By the autumn of 1945 the British were becoming increasingly frustrated with the Americans.[486] The British government decided to suggest an Anglo-American

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[481] Ottolenghi, "Harry", 968; Ulfkotte, *Kontinuität*, 24; Youssef Chaitani, *Dissension Among Allies, Ernest Bevin's Palestine Policy Between Whitehall and the White House*, 1945-1947, London: Saqi Books, 2002, 43, 45; Latter, *The Making*, 245; Keay, *Sowing*, 352, 368; Kinzer, *Reset*, 151-152, 153-154; Kinzer also describes the influence a former Jewish business partner, Eddie Jackson, had on Truman in the year running up to the creation of Israel.

[482] El-Farra, "The Role", 69; McGeachy, "Is it", 245; Ottolenghi, "Harry", 970; however, he also points out that Truman at times became impatient with Zionist lobbying effort. In a letter to Dr. Weizmann after the partition vote in the General Assembly in November 1947 he complained that he had "never had as much pressure and propaganda unnecessarily aimed at the White House"; Kinzer, *Reset*, 153, 154; Kinzer also points out that Truman became increasingly impatient with the Zionist lobby; Ovendale, *Britain*, 306, describes Truman as "obsessed with his domestic electoral position"; Salt, *The Unmaking*, 149; Chaitani, *Dissension*, 44; Latter, *The Making*, 238; Barr, *A Line*, 313.

[483] Roosevelt, "The Partition", 4; Ovendale, *Britain*, 14-16; Latter, *The Making*, 256.

[484] Weiß, "Die Entstehung, Teil 1", 167.

[485] Ottolenghi, "Harry", 970; Roosevelt, "The Partition", 10; Hirst, *The Gun*, 238-239; Barr, *A Line*, 313.

[486] Ovendale, *Britain*, 306; he claims Bevin and Attlee "never forgave Truman for allowing concern for the Jewish vote to lead to presidential instructions to Britain to implement an impossible policy"; Barr, *A Line*, 313-317.

inquiry.[487] This proposal was accompanied by a statement outlining British sentiments:

> *Meanwhile...it would be lacking in frankness if they [His Majesty's Government] ...did not make it clear that the approach to the problem in the United States is...most embarrassing...and is embittering relations between the two countries at a moment when we ought to be getting closer together...*[488]

On November 13, 1945, the establishment of the *Anglo-American Committee of Inquiry* was announced.

c) Anglo-American Committee of Inquiry

The *Anglo-American Committee of Inquiry* presented its unanimous report in April 1946.[489] Its recommendations included allowing 100,000 Jewish refugees into Palestine, and rescinding the 1940 Land Transfers Regulations, which had barred land transfers to Jews in almost the whole of Palestine.[490]

Regarding the future status of Palestine, the Committee's conclusions were surprising, when considering its composition and the unanimous vote. The Report declared:

> *In order to dispose, once and for all, of the exclusive claims of Jews and Arabs to Palestine, we regard it as essential that a clear statement of the following principles should be made:*
>
> *I. That Jew shall not dominate Arab and Arab shall not dominate Jew in Palestine.*

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[487] *The British Embassy to the Secretary of State*, 19/10/1945, United States Department of State, FRUS: Diplomatic Papers, 1945, The Near East and Africa, 1945, Volume VIII, 771-775; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011; Keay, *Sowing*, 350-351; Barr, *A Line*, 315.

[488] *The British Embassy to the Department of State, Informal Record of Conversation*, 19/10/1945, United States Department of State, FRUS: diplomatic papers, 1945, The Near East and Africa, 1945, Volume VIII, 775-776, 775; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[489] For full text, see: http://avalon.law.yale.edu/subject_menus/angtoc.asp; last accessed 22/07/2011.

[490] Recommendation No. 2 (Refugees) and Recommendation No. 7 (Land), *Anglo-American Committee of Inquiry*.

II. That Palestine shall be neither a Jewish state nor an Arab state.

III. That the form of government ultimately to be established, shall, under international guarantees, fully protect and preserve the interests in the Holy Land of Christendom and of the Moslem and Jewish faiths.

Thus Palestine must ultimately become a state which guards the rights and interests of Moslems, Jews and Christians alike; and accords to the inhabitants, as a whole, the fullest measure of self-government, consistent with the three paramount principles set forth above. ...[491]

We have reached the conclusion that the hostility between Jews and Arabs and, in particular, the determination of each to achieve domination, if necessary by violence, make it almost certain that, now and for some time to come, any attempt to establish either an independent Palestinian State or independent Palestinian States would result in civil strife such as might threaten the peace of the world.

We therefore recommend that, until this hostility disappears, the Government of Palestine be continued as at present under mandate pending the execution of a trusteeship agreement under the United Nations. [492]

Reactions to the Committee's report again revealed the differences between Britain and the United States when dealing with Palestine. True to form, Truman ignored the parts of the report not to his liking and emphasized the report's conclusion that 100,000 Jewish refugees should be allowed to enter Palestine immediately. [493]As far as the report's other recommendations were concerned, he refused to comment, arguing that complicated issues relating to international law would first have to be examined in more detail. References to local Arab feeling in Palestine were remarkably absent from Truman's statements.[494]

The British, on the other hand, adopted the more logical approach. Prime Minister Attlee pointed out that the report's conclusions could only be dealt with on a uniform

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[491] Recommendation No. 3, *Anglo-American Committee of Inquiry* (emphases by author).
[492] Recommendation No. 4, *Anglo-American Committee of Inquiry* (emphases by author).
[493] McGeachy, "Is it", 243; Roosevelt, "The Partition", 11; Weiß, "Die Entstehung, Teil 1", 168; Chaitani, *Dissension*, 59; Latter, *The Making*, 273-274; Keay, *Sowing*, 358.
[494] McGeachy, "Is it", 243; Roosevelt, "The Partition", 11; Weiß, "Die Entstehung, Teil 1", 168; Chaitani, *Dissension*, 60.

basis.[495] These arguments did in the end not win the day in the USA. It decided to deal with the report as it had dealt with the *King-Crane-Report* of 1919, namely by ignoring it.

d) Further developments until February 1947

In May 1946 Britain granted Trans-Jordan independence which officially ended the application of the Palestine Mandate there.

In what was now Palestine, Jewish immigration, supported by the Jewish Agency and opposed by the British, was continuing apace.[496] The security situation in Palestine was deteriorating rapidly.[497] Once again, as in 1936-1939, Britain was in danger of completely losing control. Jewish terror against the British and the Arab population was intensifying, and Arab groups tried to retaliate in kind.

The British government issued a White Paper in July 1946 describing the situation in Palestine.[498] In it the government elaborated on the cooperation of the three "Jewish illegal para-military organizations" (Irgun, Stern Gang, and Hagana, the latter, of course, having in the past collaborated with the British) in committing acts of violence and sabotage, and provided evidence for its assertions. In the White Paper the British government also aimed to demonstrate the Jewish Agency's approval of many of the

[495] Roosevelt, "The Partition", 11; Chaitani, *Dissension*, 63.
[496] McGeachy, "Is it", 239; Keay, *Sowing*, 359.
[497] McGeachy, "Is it", 239.
[498] For the text of the White Paper (Cmd. 6873), see also: *The Times*, "Sabotage and Violence in Palestine", 25/07/1946, 5-6.

terrorist acts committed in the past. Attacks on railways, oil refineries, the Palestine forces, and British officers are listed.[499]

Two days before the White Paper was issued one of the most notorious Jewish terrorist acts against the British in Palestine had been committed: the attack on the British Headquarters in the King David Hotel in Jerusalem which resulted in more than ninety deaths.[500] The patience of British politicians and the British public was wearing thin, [501] and scores of Jewish leaders were arrested, which in turn led to protests from America.[502]

Nevertheless, the British undertook another effort to find a solution for the Palestinian fiasco. On the basis of the *Anglo-American Commission of Inquiry's* findings the British presented the *Morrison-Grady Plan*.[503] Palestine was to be divided into four, substantially autonomous provinces under one central government. The central government was, as before, to be headed by the High Commissioner. In the course of time it was to be decided whether this "cantonization" would lead to partition or enable the creation of a bi-national state. As Morrison pointed out during the debate in the House of Commons, the plan's success would depend on American support.

The British again convened a conference in London with representatives of both sides. However, the Jewish Agency refused to participate, although parallel, but unofficial talks were held between British officials and Jewish Agency representatives. It soon,

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[499] *The Times*, "Sabotage and Violence in Palestine", 25/07/1946, 5-6; Bethell, *The Palestine*, 318-357.
[500] *The Times*, "39 Killed in Jerusalem Headquarters", 23/07/1946, 4; Weiß, "Die Entstehung, Teil 1", 169; Hirst, *The Gun*, 232-234; Bethell, *The Palestine*, 297-298; Keay, *Sowing*, 360-361; Gresh, *De quoi*, 82.
[501] Ovendale, *Britain*, 64, 306; Bethell, *The Palestine*, 339; he describes anti-Jewish riots in various British cities.
[502] Latter, *The Unmaking*, 285; Hirst, *The Gun*, 242-243 (describing the sympathy felt in some quarters in America for Jewish terrorist acts against the British).
[503] For Lord Morrison's speech in the House of Lords, see: Hansard, Situation in Palestine, HL Deb 31 July 1946 vol 142 cc1150-1222, cc1193-1200; available at: http://hansard.millbanksystems.com/lords/1946/jul/31/situation-in-palestine; accessed 23/07/2011; for extracts of the speech, see also: *The Times*, "Britain Accepts Plan for Palestine", 01/08/1946, 4, 6; Keay, *Sowing*, 358.

however, transpired that American support was not going to be forthcoming. Although Truman had at first signalled support for the plan, his *Yom Kippur Statement* of October 4, 1946, on the eve of that Jewish festival, shattered any British hopes of American cooperation. [504] With a keen eye on the upcoming congressional elections, Truman mentioned the *Morrison-Grady Plan* and the Jewish proposals in favour of partition and commented that the creation of a "viable Jewish state" would "command the support of public opinion in the United States".[505] Although Truman went on to vaguely describe the possibility of compromise between both proposals, the *Yom Kippur Statement* was generally seen as a watershed, as it was the first time that the USA had officially endorsed the idea of partition.

The British viewed the *Yom Kippur Statement* as a catastrophe. It was widely believed that progress had been made at the conference in London -which had been suspended until December- and that Truman's statement had destroyed any hope of compromise.[506] The British also pointed out that enforcing partition in Palestine would entail massive use of force -something Truman was obviously not willing to commit the USA to, and something Britain was neither able nor willing to do.[507]

The London conference was resumed in late January 1947. Again only the Arabs participated, with the Jewish Agency continuing to hold unofficial talks at the

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[504] Roosevelt, "The Partition", 12-13; Weiß, "Die Entstehung, Teil 1", 171; Chaitani, *Dissension*, 86-87; Keay, *Sowing*, 363-364.

[505] For the text of the Yom Kippur Statement, see: *President Truman to the British Prime Minister (Attlee)*, October 3, 1946, United States Department of State, FRUS, 1946, The Near East and Africa, 1946, 701-703; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 23/07/2011; *The Times*, "Opening U.S. to Jews", 05/10/1946, 4; Roosevelt, "The Partition", 12; Chaitani, *Dissension*, 87; Latter, *The Making*, 291, 295; Keay, *Sowing*, 363-364.

[506] For the British reaction, see: *The British Prime Minister (Attlee) to President Truman*, October 4, 1946; United States Department of State, FRUS, 1946, The Near East and Africa, 1946, 704-705; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 23/07/2011; *The Times*, "British Task Made More Difficult"; "Palestine and Mr. Truman"; both 07/10/1946, 4; Roosevelt, "The Partition", 13; Weiß, "Die Entstehung, Teil 1", 171; Allen, *Imperialism*, 377; Chaitani, *Dissension*, 87.

[507] Mc Geachy, "Is it", 239, 242; Ottolenghi, "Harry", 970; Roosevelt, "The Partition", 6.

Colonial Office. The British Foreign Secretary, Ernest Bevin, undertook one last attempt to reconcile Jewish and Arab aspirations. He proposed a five-year-plan, according to which "semi-autonomous" Jewish and Arab areas were to be created, with the further course of action being decided at the end of this period.[508] Needless to say both sides rejected the proposals.[509]

Exasperated, Britain gave up. Palestine was referred to the United Nations with Britain refusing to make any recommendations on its future status. [510] In a speech to the House of Commons British Foreign Secretary Bevin outlined the situation as follows:

> *His Majesty's Government have ... thus been faced with an irreconcilable conflict of principles. There are in Palestine about 1,200,000 Arabs and 600,000 Jews. For the Jews, the essential point of principle is the creation of a sovereign Jewish State. For the Arabs, the essential point of principle is to resist to the last the establishment of Jewish sovereignty in any part of Palestine...*
>
> *His Majesty's Government have of themselves no power under the mandate to award the country either to the Arabs or to the Jews, or even to partition it between them.*
>
> *It is in these circumstances that we have decided that we are unable either to accept the scheme put forward by the Arabs or by the Jews, or to impose by ourselves a solution of our own. We have, therefore, reached the conclusion that the only course now open to us is to submit the problem to the judgment of the United Nations.*[511]

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[508] *The Times*, "Proposals for Palestine, Effort to Save Conference", 08/02/1947, 4.
[509] *The Times*, "Proposals for Palestine, Rejection by Both Sides", 11/02/1947, 4.
[510] Dajani, "Stalled", 38; Shlaim, *Israel*, 21; Mansfield, *A History*, 234; Bethell, *The Palestine*, 300-301; Keay, *Sowing*, 365.
[511] For Ernest Bevin's speech before the House of Commons, see: Hansard, Palestine Conference (Government Policy), HC Deb 18 Feb 1947 vol 433 cc985-994, c988; available at: http://hansard.millbanksystems.com/commons/1947/feb/18/palestine-conference-government-policy; accessed 23/07/2011; extracts also reprinted in *The Times*, "Basis of British Decision on Palestine", 19/02/1947, 4.

6. Britain in Palestine 1917-1947

Nearly thirty years after the Balfour Declaration Britain thus admitted defeat. All the fabrications invented in order to maintain the veneer of international legality in Palestine had come to nought. The ill-advised and irreconcilable promises made by the British government during the First World War had cost Britain lives, money, and prestige, with nothing to show for it.[512]

The situation in Palestine had become truly insoluble. The Jews had been promised a National Home, lured to Palestine, and now made up one-third of the population there.[513] The Arabs had been promised their rights would not be prejudiced, and nevertheless had been forced to acquiesce in foreigners populating what they regarded as their land. British miscalculation is compounded, when it is considered that at every stage of the way -beginning with the *King-Crane Commission* in 1919- the British government had been warned by knowledgeable experts that the Palestine mission was "mission impossible", due to the irreconcilable nature of the obligations undertaken.[514] Nevertheless, the United Kingdom persisted in its course of action, with dire results for the country and for the Palestinian Arabs.

By 1947 Britain had managed to antagonize both Arabs and Jews.[515] After ignoring and suppressing Arab resistance, the British revoked their bargain with the Jews, who, understandably, since at the time about 600000 Jews were already living in Palestine, felt this was a betrayal.[516] Therefore British efforts at finding a solution were doomed.

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[512] Philby, "The Arabs", 160 (writing in 1937).
[513] Bassiouni, "Self-Determination", 35.
[514] Barr, *A Line*, 99-102.
[515] Shlaim, *Israel*, 23.
[516] Philby, "The Arabs", 161.

The American interventions in Palestine, beginning in earnest in the late 1930s and becoming ever more insistent after the Second World War, implied that these lessons had not been learned. Very little reference was made to the wishes of the two-thirds of the population of Palestine that was non-Jewish, or to international law when the issue was being discussed. Due mainly to electoral considerations, the USA under President Truman did not cooperate with the British although that represented the only possible avenue for a peaceful resolution.

The persecution and murder of Jews in Europe, and the many hundreds of thousands of Jewish refugees further escalated the Palestinian situation.[517] Jewish groups demanded that the refugees should be allowed into Palestine. Britain realized that this was not possible without major conflict erupting there. The Jewish refugees naturally evoked worldwide sympathy. However, it was not entirely cynical when British officials declared that American demands for Britain to allow Jewish refugees into Palestine were mainly due to electoral considerations, and to the wish not to let these refugees enter the USA.[518] Certainly, the Americans were at no point prepared to enforce their words with deeds by, for example, sending their own troops to Palestine.

Meanwhile, one former part of Palestine had been freed from the Mandate. Trans-Jordan became independent, even though the United States refused to recognize it as such for a few years.

As far as Palestine was concerned, it therefore did not seem likely that the much heralded post- WW II order would be more promising than the much heralded post-WW I order. Once the UN had taken over, such pessimistic predictions were soon to

[517] McGeachy, "Is it", 242; Keay, *Sowing*, 261, 352.
[518] Keay, *Sowing*, 354.

be borne out. Britain, having repeatedly violated both the *Covenant of the League of Nations*, as well as the provisions of the Palestine Mandate in order to further its national interest, ended up empty-handed.[519] Nicholas Bethell has summarized the British failure in Palestine as follows:

> *But in terms of national morale and world prestige, it left Britain deeply wounded. The disintegration of her rule in Palestine was a dismal and well-publicized drama revealing the shaky foundations of a seemingly impregnable empire and indicating to national leaders in other colonies how vulnerable the British lion really was,...*[520]

B. The UN in Palestine

1. The United Nations take over; the State of Israel is created

a) UNSCOP

On April 28, 1947, a special session of the General Assembly was held. There was only one item on the agenda, the British proposal of "constituting and instructing a special committee to prepare for consideration of the question of Palestine at the second regular session". An Arab proposal to add "the termination of the mandate over Palestine and the declaration of its independence" was rejected by a majority in the General Assembly.[521]

The General Assembly decided to establish the *United Nations Special Committee on Palestine (UNSCOP)* which was meant to investigate the situation on the ground and

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[519] Bethell, *The Palestine*, 358-360; Woollacott, *After Suez*, 11.
[520] Bethell, *The Palestine*, 358.
[521] Nabil Elaraby, "Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements", Law & Contemp. Probs., Vol. 33, 1968, 97-109, 99; Potter, "The Palestine", 859; Potter describes the Arab position as having "much to be said for it from a strictly logical or legalistic point of view" but "obviously such a position contributes little to the handling of a practical situation".

suggest a solution for Palestine in time for the "second regular session" of the General Assembly, to be held in September 1947.[522] Eleven member states were invited to nominate representatives for UNSCOP.

Although the members of UNSCOP did travel to Palestine and the surrounding Arab states, their efforts at trying to hear all sides during their investigation were severely hampered by the Palestinian Arabs' decision to boycott the Committee.[523] The Palestinian Arabs were obviously unwilling to recognize that a boycott of the proceedings was detrimental to their position. It seemed the Arab leadership was incapable of learning from past experiences, when boycotts and refusals to negotiate had regularly resulted in even worse results for the Palestinian Arabs than might otherwise have been expected. [524] UNSCOP was nevertheless to some extent able to take Arab views into account, as the Arab leaders in neighbouring states did cooperate with UNSCOP, and there was also some unofficial contact between committee members and the Palestinian Arab leadership.[525]

It must, however, be pointed out that, generally speaking, the views of Jews and Arabs were already known. The Jews were by now adamant in wanting to create a Jewish state in Palestine, and the Arabs were adamant in opposing just that. UNSCOP was merely able to confirm these diverging views. Nevertheless, the fact that the Palestinian Arabs did not personally appear before the committee in order to explain their situation was a disservice to their cause.

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[522] Elaraby, "Some", 100; he argues -with some merit- that UNSCOP's "broad" powers already "prejudiced the fate of the Arabs". He points out that UNSCOP was not only authorized to talk to the Palestinians -whether Jewish or Arab- on the spot, but also to "organizations and individuals as it may deem necessary", which was seen as referring to the "displaced persons" in Europe. By establishing a connection between these two problems, his argument goes, it became difficult to arrive at a just solution; Günther Weiß, "Die Entstehung des Staates Israel, (Teil 2)", ZaöRV, 1950-1951, 787-807, 789.

[523] Rosenne, "Directions", 49, fn. 15; Weiß, "Die Entstehung, Teil 2", 788; Kattan, *From Coexistence*, 147; Strawson, *Partitioning*, 81.

[524] Parsons, *From Cold War*, 6; Strawson, *Partitioning*, 81.

[525] Weiß, "Die Entstehung, Teil 2", 788.

Just in time for the regular session of the General Assembly UNSCOP presented its report. The committee's members had not been able to agree on the future status of Palestine. While some recommendations were adopted unanimously, the decisive question of whether Palestine should be partitioned was dealt with in a majority and a minority proposal. Australia did not sign up to either report.

The main, unanimously taken decisions of the Committee were that the Mandate was to be terminated, Palestine should become independent, the power responsible for administering the area in the short interim period was to be responsible to the UN, and Palestine should remain economically united.[526]

The majority report (supported by Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden, and Uruguay) recommended partition. Palestine was to be divided into three entities: a Jewish state, an Arab state, and the City of Jerusalem, which was to be subject to an international regime (under the Trusteeship system). The Jewish and Arab states were to conclude a treaty providing for an economic union and to become otherwise fully independent after a "transitional period of two years" as of September 1, 1947. During this transitional period the United Kingdom was to continue administering the area.[527]

The minority report (supported by Iran, India, and Yugoslavia) rejected partition, and proposed that Palestine should become an "independent federal state". Palestine was to consist of a Jewish federal state and an Arab federal state, with Jerusalem as capital

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[526] *UN Special Committee on Palestine: Summary Report (August 31, 1947)*; for text, see: http://www.geocities.com/savepalestinenow/miscdocuments/fulltext/unscopsummaryreport.htm; last accessed 22/07/2011; see also: *The Question of Palestine and the United Nations (New York, 2008)*, Chapter 1, 4-6; available at: http://domino.un.org/pdfs/DPI2499.pdf; last accessed 22/07/2011.

[527] *UN Special Committee on Palestine: Summary Report (August 31, 1947)*; for text, see: http://www.geocities.com/savepalestinenow/miscdocuments/fulltext/unscopsummaryreport.htm; last accessed 022/07/2011; see also: *The Question of Palestine and the United Nations (New York, 2008)*, Chapter 1, 4-6; available at: http://domino.un.org/pdfs/DPI2499.pdf; last accessed 22/07/2011.

of Palestine. There were to be various safeguards imposed on the new state in order to ensure minority rights. Independence was to be granted after a "transitional period not exceeding three years". During this time the area was to be administered by a power determined by the General Assembly.[528]

Although disagreeing with some aspects of the majority report, the Jewish Agency generally agreed to the recommendations included in it.[529] The status of Jerusalem was the main obstacle to full Jewish acceptance, as it was felt that a part of Jerusalem should be included in the Jewish state. Officially, the proposals were nevertheless accepted.[530]

The Arab Higher Committee reacted in characteristic fashion. Not only did it -as was to be expected- reject the majority report, it also rejected the minority report, claiming it provided for a partition in disguise.[531] This view was shared by the Arab states represented in the General Assembly. This intransigence -although partly understandable- was based on a strict refusal to acknowledge the changes that had occurred in Palestine and the world in the last thirty years. It was also not recognized by the Arab leadership that its refusal to cooperate with UNSCOP may have contributed to these disadvantageous results. As was soon to be demonstrated, and had already been frequently demonstrated in the past, this was again to lead to catastrophe for the Palestinian Arabs.

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[528] *UN Special Committee on Palestine: Summary Report (August 31, 1947)*; for text, see: http://www.geocities.com/savepalestinenow/miscdocuments/fulltext/unscopsummaryreport.htm; last accessed 22/07/2011; see also: *The Question of Palestine and the United Nations (New York, 2008)*, Chapter 1, 4-6; available at: http://domino.un.org/pdfs/DPI2499.pdf; last accessed 22/07/2011.
[529] Weiß, "Die Entstehung, Teil 2", 792; Simha Flapan, *The Birth of Israel, Myths and Realities*, New York: Pantheon Books, 1987, 30.
[530] Weiner, "Israel", 234; Flapan, *The Birth*, 30.
[531] Weiner, "Israel", 234; Weiß, "Die Entstehung, Teil 2", 792; Flapan, *The Birth*, 30.

b) General Assembly

aa) *Ad hoc* Committee

The General Assembly decided to set up an *Ad hoc* Committee, in which all member states were represented, in order to analyse the reports and make further recommendations. Two sub-committees were established.[532]

Britain used this opportunity to make quite clear it would not implement any UN decision. While supporting the earliest possible termination of the mandate and the granting of independence to Palestine, its representative went on to state:

> *If the Assembly recommend a policy which is not acceptable to the Jews and the Arabs, the United Kingdom Government would not feel able to implement it. Then it would be necessary to provide for some alternative authority to implement it...*
>
> *His Majesty's Government are not themselves prepared to undertake the task of imposing a policy in Palestine by force of arms. Likewise, in considering any proposal to the effect that His Majesty's Government should participate with others in the enforcement of a settlement, they must take into account both the inherent justice of the settlement and the extent to which force would be required to give effect to it.*[533]

Since it was highly unlikely a consensual solution would be found that in effect meant that Britain was definitely and finally retreating from Palestine.

Support for the majority report and the partition of Palestine was much more likely once it became evident that both the United States and the Soviet Union endorsed such a solution. In mid-October the US representative, Herschel Johnson, declared the

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[532] Elaraby, "Some", 101; he points out that these sub-committees were completely unbalanced as far as their membership was concerned; sub-committee 1 consisted of "pro-partition delegates" while sub-committee 2 consisted of the "Arab delegates plus Colombia and Pakistan" which made it "impossible" to "reconcile" their recommendations.

[533] Speech of Secretary of State for the Colonies, Creech-Jones, before the *Ad hoc* Committee on Palestine; reprinted in *The Times*, "British Statement to U.N. on Palestine", 27/09/1947, 4.

US supported partition.[534] This was followed a few days later by a similar Soviet statement which described the "creation" of a "Jewish State" in Palestine as "urgent".[535]

Despite British statements, the Americans at this point still believed the British would carry on the administration of Palestine for a transitional period. They voiced doubts as to whether the UK could legally unilaterally withdraw from Palestine.[536] These hopes were dashed, when the British declared that they were going to "wind up" the mandate and "withdraw".[537] On November 13, 1947, the British informed the sub-committee on partition that British troops would not implement the UN plans and be withdrawn by August 1, 1948.[538]

The report of sub-committee 2 to the *Ad hoc* Committee recommended that the validity of the Balfour Declaration, of the Palestine Mandate, and the right of the inhabitants of Palestine to self-determination be examined by the *International Court of Justice*. The sub-committee pointed out that UNSCOP had, in its report, failed to examine many of these legal issues surrounding the issue of Palestine.[539] In a 20:21:13 vote this recommendation was rejected.

After some US-Soviet wrangling, the *Ad hoc* Committee finally recommended the plan of partition on November 25, 1947, in a 25:13:17 vote.

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[534] *The Times*, "U.S. Support for Partition of Palestine", 13/10/1947, 4.
[535] *The Times*, "U.S.S.R. and Partition of Palestine", 14/10/1947, 4.
[536] *The Times*, "A Problem for U.S., Concern over British Decision", 27/09/1947, 4; "U.S. Support for Partition of Palestine, 13/10/1947, 4;"British Withdrawal in Palestine, U.S. Charge Lack of Cooperation", 24/11/1947, 3.
[537] *The Times*, "British Statement to U.N. on Palestine, Need to Lay Down Mandate", 27/09/1947, 4; "Britain and Palestine, Firm Statement to U.N.", 17/10/1947, 4.
[538] *The Times*, "Britain and Palestine, Withdrawal by August 1, 1948", 14/11/1947, 4.
[539] For full text of Report, see: "Ad hoc Committee on the Palestinian Question, Report of Sub-Committee 2", UN Doc. A/AC.14/32; see http://unispal.un.org/pdfs/AAC1432.pdf; last accessed 22/07/2011; Elaraby, "Some", 101; El-Farra, "The Role", 69; Wright, "Legal Aspects", 13; Kattan, *From Coexistence*, 149-151.

bb) Resolution 181 (II)

The matter then passed on to the General Assembly. Although partition had received a majority of votes in the committee, the vote had revealed that the proposal was short of the desired 2/3 majority in the Assembly. According to Article 18 (2) UN Charter all "decisions of the General Assembly on important questions" require such a qualified majority.

Matters were further complicated when Lebanon suddenly presented a compromise proposal which was similar to the UNSCOP minority plan. This late Arab initiative - undertaken in the face of likely defeat in the General Assembly- turned out to be too little, too late.[540]

It is still highly controversial, whether the USA exerted pressure on weaker countries before the vote was taken in the General Assembly.[541] No documents proving this have so far become public. However, it is very likely that individual politicians did make their influence felt in countries such as Haiti, even if there was no direct government intervention.[542] It is certainly remarkable that quite a number of countries changed their minds between the vote in the *Ad hoc* Committee, and the vote in the

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[540] Allen, *Imperialism,* 384.

[541] Potter, "The Palestine", 861; Potter claims the USA "came close to exercising undue influence to get the partition plan accepted"; Roosevelt, "The Partition", 13-14; he claims the USA originally wanted other countries "to make up their own minds" but "modified" that principle "when it became apparent...the partition plan would be defeated."; Weiß, "Die Entstehung, Teil 2", 794; Allen, *Imperialism*, 383; Kattan, *From Coexistence*, 153; Barr, *A Line*, 354-357.

[542] In a *Memorandum by the Policy Planning Staff* of February 11, 1948, it was acknowledged that "unauthorized pressure groups, including Members of Congress, sought to impose U.S. views on foreign delegations" during the voting procedure; any government involvement was, however, denied in the memo; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 619- 625, 621; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011; Roosevelt, "The Palestine", 14-15; Roosevelt describes this process in some detail, especially as far as Haiti and Liberia are concerned; Hadawi, *Palestinian*, 79; he quotes Forrestal, the US Defence Secretary as follows: "the methods that had been used by people outside the executive branch of the government to bring coercion and duress on other nations of the General Assembly bordered closely onto scandal"; Barr, *A Line*, 354-357; Barr explains in some detail how pressure was successfully exerted on France to change its vote, based on France's dependence on US aid after WW II; Salt, *The Unmaking*, 136-137; Kattan, *From Coexistence*, 153; Kinzer, *Reset*, 152; Keay, *Sowing,* 369.

General Assembly which, after all, took place only four days later. On November 29, 1947, Resolution 181 (II) was passed in a 33:13:10 vote, thus achieving a 2/3 majority.[543]

Except for minor changes in the envisaged borders of the three entities, Resolution 181 (II) more or less confirmed the UNSCOP majority plan. The majority plan, however, had to be adapted to the British withdrawal plans, so that the "transitional period" before full independence was granted had to be shortened considerably. By August 1, 1948, at the latest, the Palestine Mandate was to be terminated, and the British troop withdrawal was to be completed. By October 1, 1948, at the latest, the Jewish and the Arab states were to be granted full independence. During the short transition period a Commission, consisting of representatives of five member states, was to be responsible for the "administration of Palestine".

The idea of creating a Jewish state had now been officially endorsed by the General Assembly of the United Nations. The Arab position on the other hand had been delivered a knock-out blow.

cc) Assessment

By adopting Resolution 181 (II) the United Nations proved very early on that it was not a body that could necessarily be relied to solve complex factual and legal problems satisfactorily. Loy Henderson of the US Department of State summarized his assessment of UNSCOP's proposals as follows:

> *The proposals contained in the UNSCOP plan are not only not based on any principles of an international character, the maintenance of which would be in the*

[543] For the full text of the Resolution 181 (II), see: http://domino.un.org/unispal.nsf/0/7f0af2bd897689b785256c330061d253; accessed 23/07/2011.

> *interests of the United States, but they are in definite contravention to various principles laid down in the Charter as well as to principles on which American concepts of government are based.* [544]

The resolution was indeed fatally flawed. Virtually all the states chosen to recommend a solution had no intimate knowledge of the area. Although probably an attempt to demonstrate impartiality on the part of the UN, this fact undermined the committee's authority, while very likely contributing to the unworkable solutions arrived at by it.[545]

Nobody knew how the Resolution was going to be enforced.[546] It was well-known that Britain would not implement the UN settlement proposal, and it seemed extremely unlikely that the USA, after all one of the main advocates of partition, would actually do anything about enforcing it on the ground. [547]

This left the General Assembly with nothing, but directing an appeal to the Security Council. Accordingly it "requested that"

> *The Security Council take the necessary measures as provided for in the plan for its implementation;*
>
> *The Security Council consider, if circumstances during the transitional period require such consideration, whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, and in order to maintain international peace and security, the Security Council should supplement the authorization of the General Assembly by taking measures, under Articles 39 and 41 of the Charter, to empower the United Nations Commission, as provided in this resolution, to exercise in Palestine the functions which are assigned to it by this resolution;*

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[544] *The Director of the Office of Near Eastern and African Affairs (Henderson) to the Secretary of State*, September 22, 1947; United States Department of State, FRUS, 1947, The Near East and Africa, 1947, 1153-1158, 1157; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 19/07/2011.
[545] Parsons, *From Cold War*, 6; he also quotes from a letter written by the Committee's Secretary, Ralph Bunche, about the UNSCOP members: "just about the worst group I have ever had to work with. If they do a good job, it will be a real miracle."
[546] Roosevelt, "The Partition", 15; Ben-Gurion, *Israel*, 29.
[547] McGeachy, "Is it", 239, 245-246; Wright, "Legal Aspects", 14.

The Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution;..."

If the American attitude expressed before the vote was a pointer to what the Security Council would actually do -no American troops, but no international troops either, because Soviet involvement was not desired-[548] the sentiments expressed in this resolution seem fanciful.[549] Furthermore, it remained unclear how the General Assembly envisaged the proposed economic union between the Arab and the Jewish states to work in practice, given the civil-war-like situation in Palestine, and the mutual hatred of the different groups of population.

As far as the Arab state and the Jewish state were concerned, the solution and boundaries suggested were impractical and unfair.[550] The Arabs, though constituting 2/3 of the population,[551] were to receive 43 % of the territory- not exactly a prerequisite for making the solution acceptable to them. [552]

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[548] *Report by the Policy Planning Staff on Position of the United States With Respect to Palestine*, January 19, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 546-554, 550-551; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011; in the report the dangers of US participation in an international force are stressed ("would result in deep-seated antagonism for the U.S. in many sections of the Moslem world"), while even greater risks are outlined if Soviet participation were allowed ("Communist agents would have an excellent base from which to extend their subversive activities"); Ovendale, *Britain*, 253; Kattan, *From Coexistence*, 159.

[549] John W. Halderman, "Some International Constitutional Aspects of the Palestine Case", Law & Contemp. Probs., Vol. 33, 1968, 78-96, 81; he points out that the Americans at all times made it plain that the Security Council would decide independently whether to intervene.

[550] Sir Alexander Cadogan, Permanent Under-Secretary for Foreign Affairs at the British Foreign Office and later UK Representative at the UN, said of the UNSCOP majority plan, which more or less became Resolution 181 (II): "It was so manifestly unjust to the Arabs it was difficult to see how we could reconcile it with our conscience"; as quoted by Ovendale, *Britain*, 214-215; Hadawi, *Palestinian*, 79-80; Hadawi also points out that the Jews only owned 9 % of the land within the prospective Jewish State and less than 1 % of the land in the prospective Arab State; Kattan, *From Coexistence*, 151-153.

[551] Dunsky, "Israel", 168 (65 %); Elaraby, "Some", 99, ("over 2/3"); Prince, "The Palestine", 125; Weiner, "Israel", 234; Kattan, *From Coexistence*, 152.

[552] Bassiouni, "Self-Determination", 38; Collins, "Self-Determination", 159; Kattan, *From Coexistence*, 151-152; Segev, "Mohammed", 84. It has also been argued that GA Resolution 181 (II) was "an illegal abrogation of Jewish rights and title of sovereignty to the whole of Palestine" (see: Grief, "Legal Rights", 2). This is a conclusion that can only be reached by ignoring the developments between 1917 and 1947 already outlined, or

And the Jewish entity envisaged was not viable as a stable state if -as the authors of the UNSCOP Report maintained- there was to be no population transfer (except on a voluntary basis) between the two states. Even on the basis of UN statistics (disputed by the British who reckoned that the Arab population was higher),[553] the Jewish state was to have 498000 Jewish citizens and 407000 Arab citizens.[554] Given the mutual distrust and even hatred of Arabs and Jews, this was hardly a basis for successful statehood. [555] Many also claimed that the borders of the Jewish state were indefensible.[556]

Another remarkable aspect of the General Assembly decision was the absence of any detailed discussion of, and reference to, international law. As the events in sub-committee 2 had already demonstrated, these issues were brushed aside. The refusal by the majority of states to refer complicated legal issues to the *International Court of Justice* (or even deal with them at any length) further undermined any claim to legitimacy on the part of the UN when dealing with Palestine.[557]

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deliberately misinterpreting them. The claim is also contrary to the Israeli "Declaration of Independence", which explicitly referred to Resolution 181 (II).

[553] Kattan, *From Coexistence*, 152, 164; Strawson, *Partitioning*, 100.

[554] *The Question of Palestine and the United Nations (New York, 2008)*, Chapter 1, 5 (Statistics); available at: http://domino.un.org/pdfs/DPI2499.pdf; last accessed 22/07/2011; Kattan, *From Coexistence*, 151, 164; Strawson, *Partitioning*, 99-101.

[555] J.B. Glubb, "Violence on the Jordan-Israel Border, A Jordanian View", Foreign Aff., Vol. 32, 1953-1954, 532-562, 552; Parsons, *From Cold War*, 7; Salt, *The Unmaking*, 141; Gresh, *De quoi*, 83.

[556] Ben-Gurion, *Israel*, 29; Gresh, *De quoi*, 83; Dajani, "Stalled", 38; he quotes a British scholar's (George Kirk) comment on the UNSCOP plans for dividing the territory of Palestine as follows: "two fighting serpents entwined in an inimical embrace".

[557] El-Farra, "The Role", 70; he argues that the ICJ was not involved because the powers concerned knew their actions were illegal; Potter, "The Palestine", 859-860; Potter, on the other hand calls the move to involve the ICJ "obstructionist" while at the same time admitting that the Arab legal position was "probably quite correct juridically" which proves El-Farra's point; Wright, "Legal Aspects", 14 ("the Palestinian Arabs seem to have had a good legal case").

c) Palestine

Reactions in Palestine to the Resolution offered no great surprises. Although dissatisfied with the size of the territory allocated to the prospective Jewish State, most Jews rejoiced, while the Arabs completely rejected the General Assembly Resolution.[558] As expected the Arab states declared they were not bound by Resolution 181 (II) and -at least officially- started preparing for war.[559]

The situation in Palestine deteriorated further. Fighting broke out everywhere, and new acts of terrorism were committed. On December 11, 1947, the British government announced it would terminate the Mandate on May 15, 1948, while British troops would be withdrawn by August 1, 1948. In the announcement the government pointed out that, due to the "irreconcilable nature of the interests involved" in Palestine, the Mandate had become "unworkable", and a Trusteeship agreement could not be concluded to cover the interim period.[560] The British also made it plain they were not going to cooperate with the Commission which was supposed to take over Palestine's administration once the Mandate had been terminated.[561] The Commission's members would be allowed to enter Palestine only two weeks before the end of the Mandate.

By early 1948 there was no doubt that Palestine had descended into chaos. [562] Atrocities were committed on a daily basis. In its "*First Special Report to the Security Council: The Problem of Security in Palestine*" the *United Nations Palestine Commission* stated that in the period 30/11/1947-01/02/1948, 869 people had been

[558] Dajani, "Stalled", 39; Rosenne, "Directions", 49; Weiß, "Die Entstehung, Teil 2", 797-798; Shlaim, *Israel*, 58-59; Segev, "Mohammed", 84.
[559] Weiß, "Die Entstehung, Teil 2", 797; Flapan, *The Birth*, 30, 33.
[560] *The Times*, "Termination of Palestine Mandate", 12/12/1947, 4.
[561] Weiß, "Die Entstehung, Teil 2", 801.
[562] Ottolenghi, "Harry", 979; Wright, "Legal Aspects", 14; Weiß, "Die Entstehung, Teil 2", 802.

killed and 1909 wounded. It described the situation in Palestine as one of "extreme gravity" which was "more likely to worsen than improve". The Commission pointed out it could only implement the General Assembly Resolution with the help of "armed force", and asked the Security Council to provide it.[563]

In the ensuing debate in the Security Council the US Representative pointed out in respect of Resolution 181 (II) that it was not within the Security Council's remit to impose a political solution in Palestine.[564] The text of the Resolution had to be interpreted within the context of the Charter. When the General Assembly had requested Security Council implementation that had been

> *subject to the limitation that armed force cannot be used for implementation of the plan because the Charter limits the use of the United Nations force expressly to threats to and breaches of the peace and aggression affecting international peace.*

The US interpretation was that General Assembly requests did not diminish the Security Council's obligation to determine on its own whether it deemed intervention necessary.[565] These statements confirmed American unwillingness to get involved or to let the Soviets get involved militarily.[566]

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[563] *First Special Report to the Security Council: The Problem of Security in Palestine*, 16/02/1948, U.N. Doc. A/AC.21/9; for full text, see: http://unispal.un.org/UNISPAL.NSF/0/FDF734EB76C39D6385256C4C004CDBA7; accessed 23/07/2011.
[564] Weiß, "Die Entstehung, Teil 2", 803.
[565] Halderman, "Some", 82-83; Weiß, "Die Entstehung, Teil 2", 803.
[566] *Report by the Policy Planning Staff on Position of the United States With Respect to Palestine*, January 19, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 546-554, 550-551; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011; in the report the dangers of US participation in an international force are stressed ("would result in deep-seated antagonism for the U.S. in many sections of the Moslem world") while even greater risks are outlined if Soviet participation were allowed ("Communist agents would have an excellent base from which to extend their subversive activities").

Nevertheless, on March 5, 1948, the Security Council asked its permanent members to consult with each other, and to offer the UN Palestine Commission "guidance" on how to proceed.[567]

Confronted with the catastrophic situation in Palestine, the USA suddenly appeared to change track.[568] On March 19, 1948, the US Ambassador to the UN declared:

> *The Security Council now has before it clear evidence that the Jews and Arabs of Palestine and the mandatory power cannot agree to implement the General Assembly plan of partition through peaceful means. The announced determination of the mandatory power to terminate the mandate on 15 May 1948, if carried out by the United Kingdom, would result, in the light of information now available, in chaos, heavy fighting and much loss of life in Palestine. The United Nations cannot permit such a result. The loss of life in the Holy Land must be brought to an immediate end. The maintenance of international peace is at stake.*[569]

This dire assessment of the situation resulted in a new American proposal: a "temporary trusteeship for Palestine" was to be established, and all efforts at implementing partition were to be "suspended".[570]

Zionist supporters were appalled by this apparent reversal of American policy, while many Arabs viewed this as a first step on the way to averting partition.[571] However, it was not long before Truman qualified this new proposal. On March 25, 1948, he declared that the USA still supported partition, and that trusteeship was only meant to be a temporary measure.[572]

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[567] UN Security Council Resolution 42 (March 5, 1948).
[568] Pappe, "Clusters", 11; Allen, *Imperialism*, 386-387; Keay, *Sowing*, 374-375.
[569] *Statement by Ambassador Warren R. Austin*, United States Representative in the Security Council, March 19, 1948; for excerpts, see: http://avalon.law.yale.edu/20th_century/decad166.asp; last accessed 22/07/2011.
[570] Statement by Ambassador Warren R. Austin, United States Representative in the Security Council, March 19, 1948; for excerpts, see: http://avalon.law.yale.edu/20th_century/decad166.asp; last accessed 22/07/2011; Weiß, "Die Entstehung, Teil 2", 804; Salt, *The Unmaking*, 151-152.
[571] Weiß, "Die Entstehung, Teil 2", 804.
[572] *Statement by President Truman*, March 25, 1948; for text, see: http://avalon.law.yale.edu/20th_century/decad167.asp; last accessed 22/07/2011.

While the United Nations spent April and early May trying to find an acceptable solution, and was discussing the American proposals, war was raging in Palestine. The Jews were trying to secure the territory which was allotted to them according to Resolution 181 (II) as a minimum goal. The Arabs were intent on cutting off the lines of communication.

Outrageous acts like the *Deir Yassin* massacre were committed: in that village the Jewish terrorist organization Irgun killed more than 100 Arab civilians.[573] Arabs fled into neighbouring countries, many claim as a result of such barbaric acts.[574] It has also been claimed that the Arab leadership asked the civilian population to flee in order to gain western support. However, no convincing evidence for this assertion has ever been provided.[575] That the surrounding Arab states would intervene in Palestine once the British (who had warned them not to do so before that date) had left was extremely likely.

Against this backdrop Israel, on May 14, 1948, declared its independence. In the Declaration, the history of the Jewish people, including the Balfour Declaration and the Palestine Mandate, was outlined. Regarding General Assembly Resolution 181 (II) the Declaration stated:

> *On the 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.*

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[573] Glubb, "Violence", 552; Pappe, "Clusters", 11; Hirst, *The Gun*, 248-254; Kattan, *From Coexistence*, 168; Bethell, *The Palestine*, 355.
[574] Glubb, "Violence", 552; Pappe, "Clusters", 11; Pappe claims the "Zionist movement" was engaged in "ethnic cleansing" in Palestine; Parsons, *From Cold War*, 8; Hadawi, *Palestinian*, 80; Salt, *The Unmaking*, 137; Salt argues that the Zionists were engaged in "clearing Palestine of its indigenous population".
[575] Collins, "Self-Determination", 162.

> *This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State.* [576]

On May 14, 1948, eleven minutes after the Declaration of Independence had been read out in Tel Aviv, President Truman issued the following statement:

> *This Government has been informed that a Jewish state has been proclaimed in Palestine, and recognition has been requested by the provisional government thereof.*
>
> *The United States recognizes the provisional government as de facto authority of the new State of Israel.*[577]

On May 17, 1948, the USSR issued an even more forthright statement. Foreign Secretary Molotov declared:

> *The Soviet Government hopes that the creation by the Jewish people of its sovereign state will serve the cause of strengthening peace and security in Palestine and the Near East, and expresses its confidence in the successful development of friendly relations between the U.S.S.R. and the State of Israel.*[578]

Britain, on the other hand, did not follow the American-Soviet example. The official British reason was that the new entity did not fulfil the "basic criteria of an independent state". [579] It only recognized Israel *de jure* in 1950. Meanwhile, Israel was admitted to the United Nations on May 11, 1949.[580]

What had started off as a vaguely phrased letter by the British Foreign Secretary in 1917 had ended in the creation of a Jewish state in Palestine just over thirty years later. In Palestine facts had been created on the ground by the Great Powers, without

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[576] *The Declaration of the Establishment of the State of Israel*; for full text, see: http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm; last accessed 22/07/2011.

[577] For a copy of the original document, see: http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/index.php?documentdate=1948-05-14&documentid=48&studycollectionid=ROI&pagenumber=1; last accessed 22/07/2011.

[578] For the text, see: *The Times*, "Russian Recognition of Israel", 18/05/1948, 4.

[579] Brown, "The Recognition", 620 (quote); "British Caution", *The Times*, 18/05/1948, 4; "Britain is aloof to the New State", *The New York Times*, 15/05/1948, 2.

[580] General Assembly Resolution 273 (III); the United Kingdom abstained. An earlier application by Israel had been rejected in November 1948 (by the Security Council).

much reference to international law or the wishes of the local inhabitants. New world orders governed by legality had been promised by the victors in two World Wars, but there had certainly not been a change for the better for the Arabs.

Whether the recognition of Israel by the USA and the Soviet Union in mid-May 1948 can be reconciled with international law will now be examined.

2. Legality of the Recognition of the State of Israel in May 1948

In order to examine the legality of the American and Soviet acts of recognition there are two main issues that need to be discussed: first, are there any rules in international law regarding the recognition of states, and, if so, what were these rules in 1948, and, second, based on the situation in Palestine on May 14, 1948, was recognition justified.

a) Recognition of States

It has always been and still is controversial whether the act of recognizing another state as such is governed by legal rules, or is solely at the discretion of the recognizing state, meaning that only political considerations are relevant to the decision.[581] This

[581] This is illustrated by the different approaches taken in the late 1940s: Hersch Lauterpacht in his *Recognition in International Law* (Cambridge: The University Press, 1947, at V) states: "There are only few branches of international law which are of greater, or more persistent, interest and significance for the law of nations than the question of Recognition of States...Yet there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven". At about the same time Philip Marshall Brown, in his 1948 article "The Recognition", argued (at 621) that "In spite of the comments and theories of the writers on the subject of recognition the simple truth is that it is governed by no rules whatever...the act of recognition is political in nature". Even in 1999 Grant in his *Recognition of States, Law and Practice in Debate and Evolution* (Westport: Praeger Publishers, 1999, at 168) makes the point that "whether recognition is a subject of law or of politics is indeed one of the centers of debate over recognition today"; regarding Yugoslavia, Hurst Hannum (in "Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?", Transnat'l L. & Contemp. Probs, Vol. 3, 1993, 57-69, at 60) comments as follows: "It was abundantly

controversy is due to the fact that generally applicable rules as to when a state is to be recognized have not been codified. Attempts at doing so have failed. Further confusion is caused by the non-existence of any central organ that decides whether a state is to be recognized, which in turn means that every state can act individually.[582] The ICJ, in its recent Advisory Opinion on Kosovo, avoided dealing with the recognition of states.[583]

The lack of written rules and judgements by authoritative decision-making bodies relating to the recognition of states does, however, not necessarily mean that states have not nevertheless adopted legal rules by way of customary international law based on *opinio juris* and state practice.

It will be shown that such rules of international law have indeed been created.[584] Although state practice is not entirely consistent, the views expressed by governments

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clear that all of the parties considered recognition of the independence of Slovenia and Croatia to be a political question, not one whose response was dictated by international law."; Weller in "The International" agrees (at 587); in his view recognition was used as a "political tool"; P. R. Kumaraswamy, "India's Recognition of Israel, September 1950", *Middle Eastern Studies*, Vol. 31, 1995, 124-138, 132; he describes the Indian debate on this topic.

[582] Quigley, *The Statehood*, 226-227.

[583] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, para. 51; the ICJ declared it had not been asked "whether or not Kosovo has achieved statehood", nor had it been asked "about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent state."

[584] For an approach to the recognition of states different from the one adopted here, see, for example: Koskenniemi, *From Apology*, 272-282. He claims both the declaratory and the constitutive theories are indefensible and do not "provide a satisfactory interpretation of state practice". According to Koskenniemi, state practice supports both views (at 280) and the criteria of statehood "are not and never have been" uncontroversial (at 279). In his view, furthermore, the declaratory view is "apologist" as it over-emphasizes the importance of the entity's "self-assessment" (at 273) and is over-reliant on the objectivity of "facts" (at 275). It therefore "fails to draw the line between force and law" (at 282). The constitutive theory, on the other hand, fails to protect "the initial liberty and equality of the new entity, its right of self-determination" (at 278). It therefore serves to "legitimate the imperialism of existing states" (at 282). Assuming a duty to recognize within the constitutive theory, in order to avoid such an outcome, would simply replicate the problems associated with the declaratory theory (at 279). Matthew Craven, too, views both the declaratory and the constitutive theories as "untenable" ("Statehood", 240-248, 247 (quote). Craven asserts that it was originally seen as "necessary to maintain" the "ambivalent relationship between recognition and statehood" created by these contradictory theories in order to respond to the rapidly developing relations between European and non-European entities in the 19th century. While wanting to exclude non-European entities from the "society of civilized sovereigns", it was necessary to somehow include these alien entities in the legal order in order to "rationalize the treaty relations upon which colonization depended" (at 241, 247). He argues that even nowadays, although "many profess to prefer the 'declaratory' approach...", "doctrine on recognition remains fundamentally ambivalent". He views the granting

and the many cases where like cases have been treated alike evidence that states do feel bound by certain criteria when recognizing another state, even if they will in some cases deviate from them.[585]

Before attempting to find out what these customary international law rules governing the act of recognition are, it is necessary to examine what effect recognition of another state has, because this will determine the content of the legal rules on recognition.

aa) Constitutive or declaratory theory

There are two main theories as far as the effects of recognition on the recognized entity are concerned: the constitutive and the declaratory theory.[586]

The older constitutive theory is based on the notion that a state only comes into being by obtaining recognition from already existing states. This concept was originally based on 19th century notions prevalent in Europe.[587] The rulers of the European "family of nations" wanted it to be solely at their discretion whether they would accept and welcome a new member into that family or not.[588] An entity that was not

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of recognition in practice as closely aligned to giving "political approval" (at 243) due to the fact that neither theory accepts a "duty to recognize" which, in turn, leads to contradictory results in practice.

[585] Certainly the USA viewed the recognition of states as governed by the "law of nations" as far as the recognition of Israel is concerned. In a memo of May 13, 1948, written by the Legal Advisor to the Under Secretary of State the Legal Advisor states: "The present memorandum is limited to the legal question, and does not deal with the political question whether the existence of a new state ought to be recognized"; *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, May 13, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 960-965, 960; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011; Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", EJIL, Vol. 4, 1993, 36-65, 55; Rich argues that a "certain degree of consistency" in state practice developed in the 20th century; J.J. Lador-Lederer, "Recognition- A Historical Stocktaking, (Part I)", Nordisk Tidsskrift Int'l Ret., Vol. 27, 1957, 64-92, 80; he quotes a British Government note to the United Nations of August 24, 1948: "...the recognition or non-recognition of States is a matter of legal duty and not of policy".

[586] For a detailed examination of the debate (and, in particular, of its relationship to the principle of non-recognition), see: Stefan Talmon, "The Constitutive versus the Declaratory Theory of Recognition: *Tertium Non Datur*?", BYIL, Vol. 75, 2004, 101-181.

[587] Lador-Lederer, "Recognition, Part I", 65, 67, 68-76 ("concurrence of imperialism and constitutive theory"); Crawford, *The Creation*, 14-16; Talmon, "The Constitutive", 102.

[588] Lador-Lederer, "Recognition, Part I", 77-78; Crawford, *The Creation*, 14-16.

welcome could therefore not possibly be a state. On the other hand, even the most absurd arrangement could be accepted as a state if it suited the recognizing ruler.[589]

The constitutive theory still has adherents, who argue that an entity not recognized by other states simply cannot function properly in international law, and that the ability to act as a legal personality is obtained by recognition.[590] Modern proponents of the constitutive theory, have, however, modified the original concept by laying down certain conditions entities must fulfil before they can be recognized as states, and by imposing a duty on other states to recognize the entity as a state once these conditions have been met.[591]

In the course of the 20th century the declaratory theory has, however, become the dominant view regarding the effect of recognition.[592] The act of recognition is seen as mere acknowledgement of an already existing state of affairs. Recognition therefore has no direct bearing on the question whether an entity is a state or not; it simply establishes the fact that the recognizing state is prepared to conduct its relations with

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[589] Crawford, *The Creation*, 14-16; Lador-Lederer, "Recognition, Part I", 72; Lador-Lederer cites the recognitions of the "Republic of Cracow" in 1815, the creation of the "State of the Ionian Islands" in 1815, and the creation of the "State of Albania" in 1913 as examples.

[590] Christian Hillgruber, "The Admission of New States to the International Community", EJIL, Vol. 9, 1998, 491-508, 491-494; H. Lauterpacht, *Recognition*, 5-7.

[591] H. Lauterpacht, *Recognition*, 5-7; Talmon, "The Constitutive", 103 (describing these views).

[592] Herbert W. Briggs, "Recognition of States: Some Reflections on Doctrine and Practice", AJIL, Vol. 43, 1949, 113-121, 117; José Maria Ruda, "Recognition of States and Governments" in *International Law: Achievements and Prospects*, Mohammed Bedjaoui (ed.), Paris: UNESCO, 1991, Ch. 12, 449-465, 454; John O'Brien, *International Law*, London: Cavendish Publishing Limited, 2001, 172; Hilary Charlesworth and Christine Chinkin, *The boundaries of international law, A feminist analysis*, Manchester: Manchester University Press, 2000, 140; Jorri Duursma, *Fragmentation and the international relations of Micro-States*, Cambridge: Cambridge University Press, 1996, 115; Stephanie Baer, *Der Zerfall Jugoslawiens im Lichte des Völkerrechts*, Frankfurt am Main: Peter Lang GmbH, 1995, 323-324; Grant, "Territorial", 325; Kassim, "The Palestine", 9 (referring to "territorial public bodies"); Lador-Lederer, "Recognition, Part I"; he describes the years 1914-1920 as the "great epoch" of the declaratory theory. He believes the declaratory theory dates back to a statement by US President Monroe in 1823 regarding former European colonies (at 78); Wright, "Some Thoughts", 557; Crawford, *The Creation*, 22-26; Quigley, *The Statehood*, 226; Talmon, "The Constitutive", 105-107.

the recognized state on a state-to-state basis. Hershey, writing in 1927, simply states that "the State exists independently of its recognition." [593]

The declaratory theory's success is due to the fact that is more consistent in its application. The constitutive theory has many inherent weaknesses which are difficult to overcome. It is, for example, unclear what the status of an entity is that is recognized by some states, but not by others -is it a state only in relation to the recognizing states? [594] Furthermore, the constitutive theory poses the risk that realities are ignored. What is to become of a state-like entity that is simply not recognized by other states? Do international law rules apply to its conduct or to the conduct of other states toward it? There are no convincing and easy answers to these questions. [595]

The attempt by the modern proponents of the constitutive theory to solve these problems by imposing a duty on other states to recognize is simply not borne out by state practice.[596] States have always and consistently insisted that they are the sole judge of whether an entity is to be recognized or not.[597] In addition to these weaknesses, there is also little support for the constitutive theory on recognition in state practice and, especially, in *opinio juris*.

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[593] Amos S. Hershey, *Essentials of International Public Law and Organization*, 2nd ed., New York: The Macmillan Company, 1927, 199; Hall, *A Treatise* (1924), 19-20.

[594] Herbert W. Briggs, "Community Interest in the Emergence of New States: The Problem of Recognition", Am. Soc'y Int'l L. Proc., Vol. 44, 1950, 169-180, 172 ("chaotic"); Crawford, *The Creation*, 20-21; Talmon, "The Constitutive", 102.

[595] O'Brien, *International Law*, 170-171; Crawford, *The Creation*, 20-21; Talmon, "The Constitutive", 102-103.

[596] Quincy Wright, "Some Thoughts about Recognition", AJIL, Vol. 44, 1950, 548-559, 548-549,; Wright quotes from a confidential UN Secretariat memorandum sent by the UN General Secretary to the President of the Security Council (March 8, 1950): "the practice of states shows that the act of recognition is...decision which each State decides in accordance with its own free appreciation of the situation"; Briggs, "Community", 171; Ruda, "Recognition", 451; Duursma, *Fragmentation,* 115; Briggs, "Recognition", 119; Kumaraswany, "India's", 128; Allain, *International*, 99; Crawford, *The Creation*, 22; Talmon, "The Constitutive", 103.

[597] Responding to Syrian criticism of the US recognition of Israel, the US Ambassador to the UN, Austin, declared in May 1948: "I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a State. Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justices or of any other kind, anywhere, that can pass judgment upon the legality or validity of that act of my country."; as quoted by Briggs, "Community", 180; and by Brown, "The Recognition", 621.

As far as the recognition of states is mentioned in treaties only the declaratory theory finds any support.[598] For example, Article 3 of the 1933 *Convention on Rights and Duties of States (Montevideo Convention)* states:

The political existence of the state is independent of recognition by other states.[599]

This statement was repeated in Article 9 of the 1948 *Charter of the Organisation of American States.*[600]

On the rare occasions that states or organizations explain how they view the act of recognition, the expressed *opinio juris* has been in favour of the declaratory theory.[601] In 1991, for example, the EC Arbitration Commission on Yugoslavia stated in its Opinion No. 1:

> *...the answer to this question should be based on the principles of public international law...the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory.*[602]

As early as shortly after the First World War, commissions, tribunals, and courts expressed support for the declaratory theory.[603]

In 1920 the *International Committee of Jurists*, when dealing with the Aaland question for the League of Nations, declared regarding Finland that, despite it being

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[598] Talmon, "The Constitutive", 106.

[599] Article 3 *Convention on Rights and Duties of States* (1933), US Treaty Series 881.

[600] Article 9 *Charter of the Organisation of American States* (1948), 119 UNTS 47; (now Article 13 of the OAS Charter following the latest amendments of 1993; available at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf; accessed 31/07/2012).

[601] Lador-Lederer, "Recognition, Part I", 80; he quotes from a British government note to the United Nations (dated August 24, 1948): "...the existence of a State should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions which create a duty for recognition" (the British view expressed here seems to be a mix between the declaratory theory and Lauterpacht's assumption of a duty to recognize); Talmon, "The Constitutive", 106 (with further examples, especially in fn. 34).

[602] Opinion No. 1, Arbitration Commission, EC Conference on Yugoslavia, 29/11/2001; for text, see: http://tu-dresden.de/die_tu_dresden/fakultaeten/juristische_fakultaet/jfoeffl3/voelkerrecht_1/skript-vr-b3.pdf; last accessed 23/07/2011; for more details on the Badinter Commission's views, see: Talmon, "The Constitutive", 106-107.

[603] Talmon, "The Constitutive", 105-106; he also cites the *Institut de Droit International*'s "Brussels Resolutions Concerning the Recognition of New States and New Governments" of 1936 (at 105-106 and fn. 30).

recognized by many other states as a state, this did not "suffice to prove that Finland, from this time onwards, became a sovereign state".[604] This amounted to an implicit rejection of the constitutive theory. In 1929 the German-Polish Mixed Arbitral Tribunal in *Deutsche Continental Gas-Gesellschaft v. Poland* stated:

> *...the recognition of a state is not constitutive but merely declaratory. The state exits by itself and the recognition is nothing else than a declaration of this existence...*[605]

Although dealing with the recognition of governments, the decision in the *Tinoco Arbitration* is also frequently cited as evidencing the prevalence of the declaratory theory.[606] Taft CJ stated:

> *Such non-recognition for any reason...cannot outweigh the evidence disclosed...as to the de facto character of Tinoco's government, according to the standard set by international law.*[607]

State practice, on the other hand, has never been entirely consistent. There have clearly been cases in the past where the act of recognition has had constitutive, rather than declaratory effects. Nevertheless, even in these cases, such "constitutive" recognitions have been very often accompanied by statements describing the act of recognition as "declaratory",[608] which in turn implies that states felt the necessity to conform to a rule they believed was binding.

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[604] *"Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question"*, League of Nations O.J., Special Suppl. 3, October 1920, 8; Lador-Lederer, "Recognition, Part I", 81; Lador-Lederer also mentions the support for the declaratory theory expressed by the *International Commission of American Jurists* in 1927.
[605] *Deutsche Continental Gas-Gesellschaft v. Poland*, 5 Ann. Dig. ILC, 11, 15.
[606] O'Brien, *International Law*, 171.
[607] *Tinoco Arbitration* (United Kingdom v. Costa Rica; Chief Justice Taft was the sole arbitrator), AJIL, Vol. 18, 1924, 147-174, 154.
[608] A prime example is the recognition of Bosnia and Herzegovina on April 7, 1992, by EC member states. It is generally agreed that this recognition was constitutive as that country's government had no control over its territory, at times not even of the capital city. On April 11, 1992, President Izetbegovic had to ask for outside help. Nevertheless, the EC maintained that the recognition of states was "declaratory" in nature, as outlined in Opinion No. 1 of the EC Arbitration Commission.

If it can therefore be concluded that in customary international law the recognition of a state is merely declaratory of the fact that an entity is already a state -and this was certainly the case in 1948- the next task is to establish the criteria that make an entity into a state. This issue must also be dealt with by those proponents of the constitutive theory who assume a duty to recognize.

(bb) Criteria of Statehood

Article 1 of the 1933 *Convention on Rights and Duties of States (Montevideo Convention)*, enumerated these criteria as follows: 1) "permanent population", 2) "defined territory", 3) "government", and 4.) "capacity to enter into relations with other states".

These so-called "Montevideo-criteria" were a reflection of state practice and *opinio juris* regarding statehood when the *Montevideo Convention* was concluded in 1933, notwithstanding the fact that the convention only ever applied in the Americas.[609] Already in 1874 Woolsey had defined statehood as follows:

> *A state is a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice under self-imposed law*[610]*...It must have an exclusive right to impose laws within its territory*[611]*,...For the purposes of international law that state can only be regarded as sovereign, which has retained its power to enter into all relations with foreign states...*[612]

In 1929 the German-Polish Mixed Arbitral Tribunal in *Deutsche Continental Gas-Gesellschaft v. Poland* declared that a state

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[609] Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", *Columbia Journal of Transnational Law*, Vol. 37, 1998-1999, 403-457, 414-418.
[610] Theodore D. Woolsey, *Introduction to the Study of International Law, Designed as an Aid to Teaching, And in Historical Studies*, 4th ed., New Haven: Scribner, Armstrong & Co., 1874, 49 (§ 36).
[611] Woolsey, *Introduction*, 50 (§ 37).
[612] Woolsey, *Introduction*, 52 (§ 37).

> *...does not exist unless it fulfils the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory.*[613]

This definition is more or less identical to Jelinek's "Drei-Elementen-Lehre", which he had developed and publicized by 1900.[614] The difference to "Montevideo" is simply that its proponents argue that the "capacity to enter into relations with other states" is an element of the third criteria, "government".[615]

By the 1930s and 1940s there was also widespread academic support for the "Montevideo criteria".[616] The *Permanent Mandates Commission* applied similar criteria, which were subsequently approved by the Council, when deciding whether Iraq had truly become independent by 1931.[617]

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[613] *Deutsche Continental Gas-Gesellschaft v. Poland*, 5 Ann. Dig. ILC, 11.

[614] Talmon, "The Constitutive", 109-110.

[615] Baer, *Der Zerfall Jugoslawiens*, 50-51; Peter Hilpold, "Völkerrechtsprobleme um Makedonien", ROW, 1998, 117-127, 121; for a different view, see: Talmon, "The Constitutive", 116-117; Talmon is a supporter of Jelinek's *Drei-Elementen-Lehre*. However, he believes the criterion of "capacity to enter into relations with other states" is a criterion of recognition, not of statehood, notwithstanding "some" states' declarations to the contrary.

[616] Lawrence, *The Principles,* 85; writing in 1923 he states: "The community thus recognized must, of course, possess a fixed territory, within which an organized government rules in civilized fashion, commanding the obedience of its citizens and speaking with authority on their behalf in its dealings with other states." ; Hall, *The Treatise*, 19-20; writing in 1924, he defines states as follows: "The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in the conformity with the dictates of international law, and finally that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law." In 1927, Hershey (*Essentials*, 158-159) enumerated the "essential characteristics of a State" as follows: "(1) A people permanently organized for political purposes...(2) A definite territory ...(3) A certain degree of sovereignty...and a government that is habitually obeyed."; Briggs, "Community", 171; Grant, "Defining", 414-418; Brown, "The Recognition", 620-621; he cites the *Institut de Droit International*'s 1936 resolution: "The recognition of a new state is the free act by which one or several states take note of the existence of a human society, politically organized on a fixed territory, independent of any other existing state, capable of observing the prescriptions of international law and thus indicating their intention to consider it a member of the international community".

[617] The *Permanent Mandates Commission*, in September 1931, enumerated the following prerequisites regarding the termination of a mandate (it examined the issue in connection with Iraq's prospective independence): (a) "settled government and an administration capable of maintaining the regular operation of essential government services"; (b) "capable of maintaining its territorial integrity and political independence"; (c) "able to maintain the public peace throughout its territory"; (d) "adequate financial resources"; and (e) "laws and a judicial organization"; these principles were subsequently approved by the *Council of the League of Nations*; League of Nations O.J., Vol. 12, 1931, 2044-2057, 2057.

In the 1970s and 1980s the US and British[618] governments were still officially basing their decisions on recognition on the "Montevideo" criteria. In 1976 the US Department of State issued the following statement:

> *...it is a matter of judgment of each state whether the entity merits recognition as a state. In reaching this judgment, the United States has traditionally looked to the establishment of certain facts. These facts include effective control over clearly defined territory and population; and organised governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfil international obligations. The United States has also taken into account whether the entity in question has attracted the recognition of the international community of states.*[619]

In response to a possible unilateral declaration of independence by the Palestinians after May 4, 1999, the Israeli Ministry of Foreign Affairs declared:

> *International law has established a number of criteria for the existence of a state: effective and independent governmental control, possession of defined territory; the capacity to freely engage in foreign relations; and control over a permanent population.*[620]

Even nowadays it is still widely held that these criteria reflect the core criteria of statehood, even if some view them as not exhaustive.[621] In recent years the widespread recognitions of Bosnia and Herzegovina, East Timor, and Kosovo seem to indicate a less stringent application of the Montevideo criteria, as these states were,

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[618] The UK Minister of State at the Foreign Office declared in 1986: "The normal criteria which the Government apply for recognition as a State are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant"; as quoted by O'Brien, *International Law*, 173; Colin Warbrick in "Recognition of States", ICLQ, Vol. 41, 1992, 473-482, 473; he makes the point that British practice has mostly adhered to these guidelines.

[619] AJIL, Vol. 72, 1978, 337; Alison K. Eggers, in "When is a State a State? The Case for the Recognition of Somaliland", B.C. Int'l & Comp. L. Rev., Vol. 30, 2007, 211-222, 214; she contends that US practice has been "fairly consistent" in that respect.

[620] "May 4, 1999- Some frequently asked questions", Israeli Ministry of Foreign Affairs; available at: http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/4/May+4-+1999+-+Some+Frequently+Asked+Questions+-+19.htm; accessed 13/07/2011.

[621] Allain, *International*, 99-100; Bengt Broms, "States" in *International Law: Achievements and Prospects*, Mohammed Bedjaoui (ed.), Paris: UNESCO, 1991, Ch. 1, 41-65, 43-44; Charlesworth, Chinkin, *The boundaries*, 125-126; Rich, "Recognition", 55; Duursma, *Fragmentation*, 112; Crawford, *The Creation*, 45-46 (although he does argue for some variation); Talmon, "The Constitutive", 109-111, 125.

and to some extent are, viable only thanks to massive international involvement in their administrations.[622]

Despite these developments, states have nevertheless demonstrated a great reluctance to depart from the Montevideo criteria of statehood. Although, as the ICJ pointed out, not directly relevant to the advisory opinion requested, Japan,[623] Germany,[624] Norway,[625] and the USA[626] -all supporters of Kosovo's independence- used the opportunity to confirm the applicability of the traditional criteria of statehood in their written statements to the court of 2009. As far as Kosovo is concerned, it must also be noted that many states have so far been reluctant to follow the European and US lead in recognizing the territory as a new state.[627] Furthermore, even those states immediately extending recognition often went out of their way to emphasize the *sui generis* situation in Kosovo.[628]

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[622] Quigley, *The Statehood*, 237-238 (referring specifically to Bosnia); Koskenniemi, "National", 268 (referring to Bosnia and Croatia).

[623] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, Written Statement by the Government of Japan (April 17, 2009), 2: "For the formation of a State, international law generally requires that an entity shall meet the conditions of statehood, namely an entity holds an effective government which governs a permanent population within a defined territory [sic]."

[624] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, Written Statement by the Federal Republic of Germany (April 2009), 31: "Thus, international law sets certain conditions that must be present before a newly self-declared state may be recognized by other states, viz., the three elements of statehood: a territory, a people and effective government."

[625] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, Written Statement of the Kingdom of Norway (April 16, 2009), 4: "Nevertheless, as regards international law, the existence of statehood is a question of fact relying on an assessment of constitutive elements including a defined territory, permanent population, effective government and legal capacity to enter into relations with the other states."

[626] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, Written Statement of the United States of America (April 17, 2009), 34: "Second, based on its assessment of Kosovo's development during the period of UNMIK administration, the United States was satisfied that Kosovo's viability as a state was not in doubt and that it met the criteria of statehood outlined in Article 1 of the 1933 Montevideo Convention:... Consideration of these criteria had likewise been a cornerstone of U.S. recognition of other states seeking independence in the former Yugoslavia in the early 1990s."

[627] Kosovo declared its independence on February 17, 2008. As of June 2011, 77 states had granted Kosovo recognition (there are currently 192 member states of the UN).

[628] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, Written Statement by the

Generally, there is agreement, as far as the content of the four criteria of statehood are concerned:

"***Permanent population***" refers to an undefined number of people living permanently in a specific area. In existing states nationality makes the relevant group of people easily identifiable. However, nationals need not even form the majority within the population. There is no minimum number required, and the group of people living in the entity do not necessarily have to be bound to each other by race, religion, or culture. The population must, however, be a stable community.[629]

"***Defined territory***" requires a specific area in which the entity can exercise what is commonly regarded as the functions of state to the exclusion of others. Based on state practice it is assumed that border disputes do not usually impair an entity's recognition as a state, but that an undisputed core of territory is required.[630]

"***Government***" is generally assumed to mean "effective government". It is widely seen as the most important and most contentious criterion. The entity's leadership must be able to enforce law and order, and guarantee a certain degree of stability within a given area. Within that territory the entity's state organs must be able to govern effectively, without having to resort to third parties, if possible on the basis of some organizational structure.[631]

Government of Japan (April 17, 2009),Written Statement by the Federal Republic of Germany (April 2009), 26-27; Written Statement of the Kingdom of Norway (April 16, 2009), 6-7 (paras. 18, 23); ICJ, Written Statement of the United Kingdom (April 17, 2009), 9-15.

[629] Duursma, *Fragmentation*, 117; Charlesworth, Chinkin, *The boundaries*, 126-128; Broms "States", 44; Crawford, *The Creation*, 52-55.

[630] Duursma, *Fragmentation*, 116-117; Charlesworth, Chinkin, *The boundaries*, 128-132; Broms, "States", 44; Hilpold, "Völkerrechtsprobleme", 121; Crawford, *The Creation*, 46-52.

[631] Duursma, *Fragmentation*, 118-120; Charlesworth, Chinkin, *The boundaries*, 132-133; Baer, *Der Zerfall Jugoslawiens*, 49-50; Broms, "States", 44-45; Hilpold, "Völkerrechtsprobleme", 121; Danilo Türk, "The Dangers of Failed States And a Failed Peace in the Post Cold War World", N.Y.U. J. Int'l L. & Pol., Vol. 27, 1994-1995, 625-630, 625-626; Crawford, *The Creation*, 55-62; Talmon, "The Constitutive", 110-111.

"***Capacity to enter into relations with other states***" mainly requires the entity to be able to conduct its foreign relations independently, without having to take recourse to another state. State practice implies that formal independence (independence in the legal sense) is sufficient. "Real" independence, meaning economic or military independence, is not necessary.[632] As already pointed out, proponents of Jelinek's theory argue that a government is only "effective", if it can conduct its foreign affairs independently, so this is not a criterion which is examined separately.

Needless to say these criteria have been heavily criticized over the years. Some have argued that the fourth criterion is contradictory, as that capacity is a consequence, not a prerequisite of being a state.[633] This is not convincing. The fourth criterion does, of course, require a prognosis when a new state emerges. There is, however, no reason why such a prognosis should not be possible. If an entity will not be able to enter into international relations independently, it will not become a state.

Some have argued that "actual independence" of an entity is necessary if it is to obtain statehood.[634] Not only is the definition of "actual independence" highly contentious, but the notion is also not supported by state practice. Many smaller states that have been recognized as such by the international community are far from having attained anything like "actual independence", no matter how the term is defined.[635] States in the Pacific, like Palau, or even in Europe, like Monaco, are completely or partly dependent on other states for their survival. Such states may be regarded as anomalies.

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[632] Duursma, *Fragmentation,* 120-127; Charlesworth, Chinkin, *The boundaries*, 133-135; Talmon, "The Constitutive", 111-116.
[633] See, for example: Talmon, "The Constitutive", 116-117.
[634] Thomas D. Grant, "Territorial Status, Recognition and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)", Stan. J. Int'l L., Vol. 33, 1997, 305-341, 312; Crawford, *The Creation,* 72-89.
[635] Grant, "Defining", 438-439; Talmon, "The Constitutive", 111-116 (he provides many examples of state practice which evidence that "factual" independence is not seen as a prerequisite of statehood).

Nevertheless international recognition of their statehood implies that "actual" independence is not required in order to obtain statehood. Even proponents of the criterion of "actual" independence admit that the requirement is often "hollow" in practice.[636]

Many, especially in recent years, have also argued that further criteria have been added to the "Montevideo list". Human rights and democratic government are two of the many additional criteria that are now supposedly decisive in obtaining statehood.[637] Actually, it seems debatable whether *opinio juris* and, especially, state practice have been consistent enough in applying new criteria when recognizing states to have led to changes in customary international law.[638]

As far as the recognition of Israel in May 1948 is concerned, there can, however, be no doubt that these new, "modern" criteria had no role to play in judging statehood. There certainly had been cases prior to 1948 where states had tried to force new states to behave in a specific way in order to obtain recognition, but none of these conditions

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[636] Crawford, *The Creation*, 88; Crawford admits there are cases where the criteria of "actual independence" can have "minimal content"; Quigley, *The Statehood*, 208.

[637] Grant, *The Recognition*, 83-119; Talmon, "The Constitutive", 121-126.

[638] Certainly, it seems very doubtful that additional criteria like democracy had been established in international law by even the early 1990s.The EC's handling of the recognition of the new states emerging from the former Soviet Union in 1991/1992 is a case in point. Despite demanding democracy and respect for human rights as prerequisites of gaining recognition, all of the former Soviet republics were recognized rapidly, although many of them had and have extremely dubious records in that respect, even nowadays. The EC's approach to Yugoslavia, certainly open to similar criticism, is described by Hannum as "attempting to create a new rule of international law", an attempt he views as "laudable", but "having failed" ("Self-determination", 64, 69); Weller, in "The International" (at 588), argues that the EC's "extensive catalogue of criteria" evidenced that "general international law" was not being applied; Crawford, *The Creation*, 148, 150-155; Koskenniemi, "National", 264-269; he also believes that the rules governing recognition of new states emerging on the territory of the former Yugoslavia and their application in practice were based more on "political priorities" than on legal considerations; see also the Written Statements submitted by Norway, Japan, Germany, and the United States to the ICJ during the Kosovo Advisory Opinion proceedings –referred to above- which indicate that at least these states do not apply additional legal criteria when deciding whether to recognize a new state; Talmon, "The Constitutive", 121-126; as Talmon has convincingly argued, it should therefore be assumed that such "new" criteria are to be viewed as criteria for extending recognition, not as criteria of statehood.

were ever imposed with the regularity necessary to establish state practice, nor did states at the time claim that they were criteria of statehood.[639]

(cc) Principle of non-recognition

There have been cases in the past when entities that objectively fulfilled the criteria of statehood were nevertheless collectively, or at least overwhelmingly, not recognized as states by the international community.-[640]

(i) General

State practice evidences two cases when state-like entities are regularly not recognized as states: (i) states where the principle of internal self-determination is fragrantly violated,[641] and (ii) states that were created by the illegal use of force.[642]

Regarding states where the principle of self-determination is fragrantly violated, it must be assumed that the principle of not recognising an entity guilty of such conduct had not yet been established by 1948.[643] As has been pointed out earlier, prior to the

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[639] For example, in the 19th century the British government demanded the abolition of the slave trade before recognizing Mexico and Brazil; in 1878 at the Congress of Berlin, leading European powers made the recognition of Bulgaria, Serbia, Montenegro, and Romania dependent on the protection of religious minorities; in the 20th century the USA made its recognition of Egypt and Albania dependent on commercial concessions ; H. Lauterpacht, *Recognition*, 35; Baer, *Der Zerfall Jugoslawiens*, 332; Wright, "The Proposed", 436-437; he lists many other cases between 1830 and 1923, when recognition was made dependent on the new state fulfilling specific conditions not related to statehood.

[640] For a very detailed examination of the principle of non-recognition, see: Talmon, "The Constitutive", 101-181, especially 122-153; Talmon believes, just as the author does, that states thus not recognized nevertheless meet the criteria of statehood, and that their non-recognition must be viewed as the "withholding from a state its legal status" (at 144).

[641] Hillgruber, "The Admission", 505-507; Talmon, "The Constitutive", 122-124, 146-147, 171-179.

[642] O'Brien, *International Law*, 185, Grant, "Territorial", 314; Talmon, "The Constitutive", 124, 144-146, 171-179.

[643] Crawford, *The Creation*, 433.

Second World War the principle of self-determination had become a political, but not yet a legal principle.[644]

That the principle of self-determination was included in the Atlantic Charter of 1941, and in the UN Charter of 1945 cannot obscure the fact that its legal content was still ill-defined (some even nowadays dispute it has any legal content).[645] General Assembly resolutions providing more exact definitions were only passed post-1948.[646] Regarding the recognition of states there is no evidence of any state practice or *opinio juris* that had established the connection between self-determination and non-recognition. It had certainly not yet established itself as a rule of customary international law.[647]

The principle of non-recognition of states created by illegal force had, however, already been developed by 1948.

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[644] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, paras. 79, 82; the court pointed out that the right of self-determination had "evolved" only in the "second half of the twentieth century".
[645] Crawford, *The Creation*, 427, 433; Kattan, *From Coexistence*, 143; Strawson, *Partitioning*, 88; Dunsky, "Israel", 172; Green, "Self-Determination", 43-44; Green argues that self-determination, as understood in the Charter, only refers to "nations"; writing in 1971, he claims that there was still no right of self-determination in international law (at 46); Murlakov, *Das Recht*, 86; according to Weller ("The International", 592), the EC Arbitration Commission on Yugoslavia even in 1991/1992 "found that in actual practice international law did not define the precise consequences of that right or its scope of application."
[646] *Resolution on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (1960); *International Covenant on Civil and Political Rights*, GA Res. 2200 (1966); *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200 (1966); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance with the Charter of the United Nations*, GA Res. 2625 (1970); Dajani, "Stalled", 29-30.

[647] The best-known application of the principle occurred in 1965, when Southern Rhodesia unilaterally declared itself independent of Britain, so that its white minority government could continue to suppress the black majority. There is no doubt Rhodesia fulfilled the criteria of statehood. This flagrant breach of the principle of self-determination, however, resulted in the UN Security Council (Resolutions 216 (1965) and 217 (1965) imposing a duty on all member states not to recognize the new state. Portugal and South Africa were the only two states that -to a limited extent- did not adhere to the Security Council's decision. Another example was the near universal refusal to recognize the "Bantustans" created by South Africa. Except for South Africa, no other state recognized these "states", although some have argued that Transkei probably fulfilled the criteria of statehood (see, for example: Grant, *The Recognition*, 92).

(ii) Non-recognition based on the illegal use of force

Beginning in the 1930s state practice began to develop which supported the principle that changes brought about by states by the illegal use of force should not be recognized.[648]

This principle is often referred to as the "*Stimson-Doctrine*", named after the US Secretary of State who is credited with being the first to articulate it. In response to the invasion of the Chinese province of Manchuria by Japan in violation of its treaty obligations, and the subsequent creation of the independent state of Manchukuo by the Japanese, Stimson stated in a note to the US Ambassador in Japan of January 7, 1932:

> ...*it* [the United States' government] *does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well as the United States, are parties.*[649]

Although the United States was not a member state, the League of Nations Assembly, on March 11, 1932, unanimously adopted a British-proposed resolution which stated:

> *...it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.*[650]

Thereby the concept of non-recognition had entered international law. There is, however, some doubt whether the League of Nations Resolution is necessarily conclusive evidence of states' *opinio juris* at the time, as the *Lytton Commission*

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[648] O'Brien, *International Law*, 185; Wright, "Some Thoughts", 556 and fn. 17; and "The Palestine", 27-30; H. Lauterpacht; *Recognition*, 416-420; Crawford, *The Creation*, 132-133.

[649] *The Secretary of State to the Ambassador in Japan (Forbes)*, January 7, 1932; United States Department of State, FRUS, Papers relating to the foreign relations of the United States, Japan, 1931-1941, 76; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 23/07/2011.

[650] For an excerpt, see: http://www.mtholyoke.edu/acad/intrel/WorldWar2/manchuria.htm; last accessed 23/07/2011.

Report for the League of Nations, which was the basis for the Resolution, concluded that Manchukuo was not independent, but rather a Japanese puppet state. [651]

Notwithstanding the fact that the League of Nations' decision was almost certainly based on a complex set of motives, it must nevertheless be acknowledged that the unanimous decision by the Assembly, and the American support for the notion, do evidence widespread support for viewing the principle of non-recognition as legally valid.[652]

Accordingly, Article 11 of the *Montevideo Convention* of 1933 stated:[653]

> *The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions...which have been obtained by force...*

The non-recognition of the incorporation of the Baltic States into the Soviet Union on the part of the Allies, as well as the non-recognition of border changes instigated by German, Italian, and Japanese aggression during the Second World War provide further evidence for the existence of the principle.[654]

After the Second World War, the prohibition on the use of force contained in Article 2 (4) UN Charter reinforced the principle.

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[651] H. Lauterpacht, *Recognition*, 417; Crawford, *The Creation*, 75-79.

[652] J.J. Lador-Lederer, "Recognition, Part I", 73; and "Recognition- A Historical Stocktaking, (Second Part)", Nordisk Tidsskrift Int'l Ret., Vol. 27, 1957, 117-142, 128, 131; writing in 1957, Lador-Lederer disagrees. He argues that because many states were prepared to recognize "aggressions", the principle of non-recognition in the case of *bellum injustum* had not been established in law but was only used as a political tool. He, however, overlooks the fact that states extending recognition always tried to justify the aggressions when recognizing the results, claiming a case of *bellum justum*, thereby implying the existence of *opinio juris* in favour of assuming that a ban on recognition existed in cases of *bellum injustum*.

[653] Similar provisions were included in the *Buenos Aires Declaration* of 1936 and the *Lima Declaration* of 1938 (both referring to the Americas).

[654] Grant, *The Recogntion*, 9; Lador-Lederer, "Recognition, Second Part", 126-128 (although he views theses non-recognitions as more political than legal, and cites the case of Austria as an example. Having recognized the incorporation of Austria into Germany in 1938, the Allies declared that incorporation "null and void" in November 1943).

Even though not directly relevant to the legal situation in 1948 it should be pointed out that there have been numerous cases since the Second World War, when the Security Council has asked member states not to recognize territorial changes achieved by the illegal use of force. Well-known examples are the non-recognition of Northern Cyprus,[655] and the annexation of Kuwait by Iraq.[656] The *International Court of Justice* has also re-affirmed the legal validity of the principle of non-recognition.[657]

By 1948 the principle of non-recognition of territorial changes achieved by the illegal use of force was still relatively novel, but had already become established in international law.[658]

(dd) Premature Recognition

Although the decision whether to recognize another state is still widely seen as being the prerogative of the individual recognizing state, there is agreement that recognizing an entity as a state before it fulfils the criteria of statehood is illegal.[659]

The issue of premature recognition becomes especially pertinent in cases of secession. A state that recognizes a seceding entity as a state before it fulfils the criteria of statehood, for example before it can claim to have an effective government, is guilty

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[655] UN Security Council Resolutions 541 (1983) and 550 (1984); another example is UN Security Council Resolution 787 (1992), in which it was made obvious that unilaterally declared entities seceding from Bosnia would not be recognized; this was in response to the declaration of the Republic of Srpska.
[656] UN Security Council Resolution 662 (1990).
[657] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West-Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21/06/1971, Leading Principle 2; see also: *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, General Assembly Resolution 2625 (XXV) (1970); the resolution requires states not to recognize as legal any "territorial acquisition resulting from the threat or use of force." This resolution is generally viewed as reflective of customary international law (a view confirmed by the ICJ in the *Armed Activities Case*, Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, para. 162).
[658] See also: Article 17 of the *Charter of the Organization of American States*, signed 30/04/1948.
[659] Briggs, "Community", 171; Ruda, "Recognition", 451; O'Brien, *International Law*, 186-187; Baer, *Der Zerfall Jugoslawiens*, 318-323; Grant, "Territorial", 326; Wright, "Some Thoughts", 556 and fn. 17.

of interference in the domestic affairs of the parent state.[660] It also undermines the *uti possidetis* principle, which the *International Court of Justice* views as a "general principle" of international law.[661]

Long before the UN Charter came into force there already was near universal agreement that premature recognition was contrary to international law.[662] Already in 1874 Theodore Woolsey declared that

> *If the question is still one of armed strife, as between a colony and the mother country, or between a state and a revolted portion of it, to take the part of the colony or of the revolted territory by recognition is an injury and may be a ground of war;...*[663]

William Hall, writing in 1924, also maintained that

> *Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition is therefore a wrong done to the parent state; in fact it amounts to an act of intervention.*[664]

Hall goes on to describe American and British reluctance to recognize the South American "Spanish" Republics' independence from Spain between 1810 and 1825 as

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[660] Ruda, "Recognition", 451; O'Brien, *International Law*, 186-187; Baer, *Der Zerfall Jugoslawiens*, 318-323; Grant, "Territorial", 326; Wright, "Some Thoughts", 556-557 ("...states can, therefore, promote their policies by recognizing facts not yet established..."(557); Lawrence, *The Principles*, 85-86.

[661] ICJ, *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali),* Judgement, 22/12/1986, I.C.J. Reports 1986, 554, 564-567 (paras. 19-26); the principle was also relied on by the EC Arbitration Commission on Yugoslavia as a "general principle of international law" (Opinion No. 3, reprinted in EJIL, Vol. 3, 1992, 184); see also Article 6 of GA Resolution 1514 (1960): "Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

[662] H. Lauterpacht, *Recognition*, 9-12; Lawrence, *The Principles*, 85-86; writing in 1923, Lawrence, referring to the French recognition of American independence in 1778, describes premature recognition as "an act of intervention which the parent state had a right to resent, as she did, by war."

[663] Woolsey, *Introduction*, 55 (§ 40).

[664] William Edward Hall, *A Treatise on International Law*, 8th ed., Oxford: The Clarendon Press, 1924, 105; a view also supported, in his book of 1927, by Hershey (*Essentials*, at 208); and by Lawrence, *The Principles* (1923), 85-86.

due to their common wish to avoid a violation of international law.[665] A report before the *Senate Foreign Affairs Committee* on the question of their recognition stated:

> *The political right of the United States to acknowledge the independence of the Spanish American Republics, without offending others, does not depend upon the justice but on the actual establishment of that independence.*[666]

Similarly, Hersch Lauterpacht stated in 1947:

> *It is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency.*[667]

He cites -among others- the examples of the French recognition of the United States in 1778, and the US recognition of Panama in 1903 as having been contrary to international law.[668] Hershey, writing in 1927, besides also citing these two examples, views the recognitions of Belgium and Greece in 1827-1830 "by the Powers", and the recognition of Cuba in 1898 as "premature", an "intervention in the guise of recognition", and therefore as a "gross affront to the parent State."[669]

The declaratory theory of recognition supported here means that the act of recognition does not alter the facts: the entity recognized as a state does not thereby become one. Nevertheless, it is self-evident that in cases of secession premature recognition amounts to actively supporting one side in an internal conflict, thereby ignoring the parent state's still existing sovereignty.[670]

As the Legal Advisor of the US Department of State stated in a memo of May 13, 1948, on the "Recognition of Successor States in Palestine":

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[665] Hall, *A Treatise,* 105-108.
[666] Hall, *A Treatise*, 106.
[667] H. Lauterpacht, *Recognition*, 8.
[668] H. Lauterpacht, *Recognition*, 8; examples also cited by Baer, *Der Zerfall Jugoslawiens*, 321; Lawrence, *The Principles*, 86 (he cites French recognition of US independence as an example).
[669] Hershey, *Essentials*, 208.
[670] Baer, *Der Zerfall Jugoslawiens*, 322; Lawrence, *The Principles*, 85-86.

> *Premature recognition of a new state's existence within the territory of a previous state is wrongful in international law because such recognition constitutes an unwarranted interference in the affairs of the previously existing state.*[671]

As Lauterpacht points out, such action is, however, illegal in another respect: it ignores the criteria developed in customary international law as regards statehood, and thereby illegally complicates the conduct of international relations within the international community to the disadvantage of all other states. The recognizing state is forced to treat the non-state as a state in bilateral relations, while the rest of the international community rightfully does not treat it as such. Such conduct therefore amounts to an "abuse of the power of recognition".[672] Besides being an intervention, premature recognition is therefore also a recipe for chaos within the international community.

Having established the customary international law principles governing the recognition of states these must now be applied to Israel as it was in mid-May 1948.

b) Recognition of Israel

aa) Situation in Palestine on termination of the Mandate

What was the status of Palestine in international law when the Mandate came to an end? The *International Court of Justice* avoided giving an opinion on the matter in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in*

[671] *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, May 13, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 960-965, 960, available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.
[672] H. Lauterpacht, *Recognition*, 8.

the Occupied Palestinian Territory, deeming it irrelevant to its conclusions.[673] The question must therefore now be examined in more detail.

(i) British Palestine Mandate after 1945

The "Declaration of Independence" was read out in Tel Aviv on May 14, 1948, and it was supposed to be "with effect from the moment of the termination of the Mandate".[674]

As has already been pointed out, the fact that some of the provisions of the Palestine Mandate violated Article 22 (4) Covenant of the League of Nations did not invalidate the whole Palestine Mandate. Palestine therefore emerged from the Second World War as a territory under mandate, Britain being the mandatory power.

Trusteeship

Palestine did not automatically become a territory governed by the novel "International Trusteeship System" envisaged in the UN Charter.[675] Although Article 77 (1a) does include "territories now held under mandate" as a category of territory to which the new system is to apply, Article 79 makes clear that a trusteeship agreement must be concluded with, among others, the mandatory power before that can happen. Regarding Palestine, Britain never concluded such an agreement, and shortly before the end of the mandate even explicitly ruled out concluding one for the short interim

[673] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 09/07/2004, I.C.J. Rep. 2004, 136, 177, para. 101. Referring to the area occupied by Israel in 1967, the ICJ declared: "The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories."

[674] *The Declaration of the Establishment of the State of Israel*; for the text, see: http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm; last accessed 23/07/2011.

[675] Anthony D'Amato, "The West Bank Wall, Part 2: The Merits", 1-5; available at: http://jurist.law.pitt.edu/forum/damato2.php; last accessed 23/07/2011; 1-5, 2; Gilchrist, "Colonial", 983, 988; Leeper, "Trusteeship", 1200-1201.

period before independence was to be granted.[676] That without such an agreement territories under mandate did not become trust territories has been confirmed by the *International Court of Justice*.[677] Palestine therefore never became a trust territory.

Consequently, according to Article 80 (1) UN Charter, Palestine remained under mandate.

Dissolution of the League of Nations

As the *International Court of Justice* has pointed out, the dissolution of the League of Nations following the Resolution of April 18, 1946, did not alter the status of the territory under mandate or of the mandatory power.[678] The consequence of the dissolution was that the League of Nations could no longer exercise its supervisory functions in respect of the mandate. [679] The League of Nations itself expressed the expectation that mandates would continue "until agreements had been reached between the mandatory powers and the United Nations."[680]

Palestine therefore remained territory under British mandate until midnight on May 14, 1948.

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[676] Quigley, *The Statehood*, 87.

[677] ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 138; the ICJ also rejected the notion that there was a duty on the part of the mandatory to bring the mandated territory into the trusteeship system (at 140); Gilchrist, "Colonial", 983; he makes the point that this (no automatic transfer to trusteeship) had already been agreed at Yalta.

[678] ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 134; the ICJ confirmed this view in the *South-West Africa Cases*, Preliminary Objections, Ethiopia v. South Africa and Liberia v. South Africa, Judgement, 21/12/1962, I.C.J. Rep. 1962, 332-334; Alexander, "Israel", 425-426; Quigley, *The Statehood*, 86-87; Goudy, "On Mandatory", 180-181; writing in 1919, he disagreed. He argued that the dissolution of the League of Nations "will doubtless put an end to the mandate".

[679] ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 134; Quigley, *The Statehood*, 86-87.

[680] "III. The League of Nations", *International Organization*, Vol. 1, 1947, 141-142, 141; *Provisional Record of the Twenty-First Ordinary Session of the Assembly*, 7th Meeting, April 18, 1946, Documents A/VR/7/46, 7; AI/P.V. 2/1946, 7; AI/P.V.3/1946, 5; This League of Nations Resolution is also quoted by the ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 134.

(ii) Termination of Mandate

Britain unilaterally terminated the Mandate as "unworkable" with effect from May 15, 1948.[681]

Some, especially the Americans, at first claimed that a unilateral termination of the Mandate by the British was not legally possible,[682] arguably resulting in a continuation of the Mandate after May 14, 1948. [683]

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[681] Shlaim, *Israel*, 21.

[682] *The Times*, "U.S. Support for Partition of Palestine", 13/10/1947, 4. The U.S. statement is described as taking "the view that Britain had a continuing responsibility for administration until a change of status of Palestine had been effected"; similarly, in "Britain and Palestine, Firm Statement to U.N."(*The Times*, 17/10/1947, 4), it is described how the Secretary of State for the Colonies had replied to an American statement "which had questioned Britain's right to relinquish the administration of the mandate". Furthermore, without explaining his assessment, the Legal Adviser at the US Department of State concluded in a memo: "British abandonment of the mandate may be a breach of Great Britain's international obligations.", *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, May 13, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 960-965, 962; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 23/07/2011.

[683] Stone, *Israel*, 121-122 (as far as East Jerusalem, the West Bank and Gaza are concerned); D'Amato, "The Wall", 2-3; D'Amato also argues that the Palestine Mandate continues. He argues that once Britain withdrew from the mandate it "devolved upon the United Nations" in the form of the General Assembly and the *International Court of Justice*. He seems to base his argument on the application of the English law on trusts. As has already been pointed out, this argument is deeply flawed. There is near universal agreement that the mandates system was not identical to the English concept of trusts, but only contained elements of it (see, for example: ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 132: "It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law"); Goudy, "On Mandatory", 177-182; he argues persuasively that the mandates system is "derived from Roman law", and that there are numerous differences to the English law on trusts; a point also made by Keith, "Mandates", 75. D'Amato seems to overlook the fact that the victors in WW I were not all common law countries, especially not the French who would have had no reason for signing up to an alien legal concept that was to govern their conduct in Syria. Furthermore, D'Amato's arguments are contradictory in that he acknowledges that no trusteeship agreement was concluded, but then goes on to claim that the mandated territory's administration passed on to the United Nations anyway. He thereby tries to create a loophole in the law where there is none. It is also widely accepted that the *International Court of Justice* can only act in those cases explicitly enumerated by the international community. Basing the ICJ's jurisdiction regarding the Palestine Mandate (he claims the ICJ would have to decide whether the people of Palestine can "stand on their own") on the English law of trusts can obviously not be reconciled with this principle. Furthermore this suggestion, as far as judging whether the people of Palestine can "stand on their own", is clearly contrary to the League of Nations' procedure when Iraq became independent in 1931/1932. When Iraq became independent it was the *Permanent Mandates Commission* and the Council that decided whether Iraq could stand on its own, the *Permanent Court of International Justice* had no role to play. Similarly, the ICJ also saw no role for the Court as far as that decision is concerned (ICJ, *International Status of South-West Africa*, I.C.J. Rep. 1950, 141-142). D'Amato also overlooks the fact that the UN had already decided that the mandate should and would be terminated (GA Resolution 181 (II). D'Amato's arguments are further undermined by his clear implication ("there is no doubt that Israel can build a wall on its own territory", 4) that the Palestine Mandate did not continue as far as Israel is concerned without giving any reasons for this.

The *Covenant of the League of Nations* contained no explicit provisions regarding the procedure of termination. In the case of the Iraq Mandate, all parties concerned (Iraq, Britain, and the League of Nations) had agreed to the termination.

Some have argued that a unilateral termination of a mandate was a violation of Article 27 of the Palestine Mandate, a provision contained in all Mandates, which stated:

> *The consent of the Council of the League of Nations is required for any modifications of the terms of this Mandate.*

Based on this it could be argued that -after the dissolution of the League- UN agreement was necessary when terminating the Mandate. Others have argued that the mandate's character as an international agreement made unilateral termination except in cases of breach impossible.[684]

In respect of "A"-Mandates, such as Palestine, this view is, however, not convincing. The termination of the mandate, the clear League of Nations' goal in regard of "A"-Mandates, is not a "modification" of the mandate's terms.[685] Article 27 is obviously a safeguard against any abuse of power by the mandatory, but is not intended to prohibit the mandatory power "giving notice". It would, after all, be possible for a different mandatory power to take over the mandate under the previous terms.

It is more convincing to assume -as some writers of the time did- that the unilateral termination of "A"-Mandates was possible simply because <u>their termination,</u> once the people concerned were able to stand on their own, was the mandates system's *raison*

[684] Wright, "Sovereignty", 699.
[685] Wright, "The Proposed", 440 (referring to Iraqi independence in 1932, he states: "not a modification...but fulfilment of a mandate").

d'être.[686] Even that the mandatory power may "weary of well-doing and renounce his mandate" was deemed permissible by some.[687]

Since all the parties concerned -UN bodies, Britain, the Arabs and Jews of Palestine, the USA, the Soviet Union, and the Arab states- wanted Palestine to become independent -albeit in very different forms, and in some cases after a short transition period-, and the termination of the Mandate was a foregone conclusion, it seems more convincing to assume that Britain did have the right to unilaterally terminate the Mandate. There was agreement that the people of Palestine were now able to stand on their own. The Mandate had therefore -officially- been fulfilled, irrespective of the fact that the British offered a different justification for the termination.[688]

Notwithstanding the question of Britain's right to unilaterally terminate the mandate, its termination was also accepted as a fact by the international community, and not seriously challenged as illegal.

The United Nations accepted British withdrawal as evidenced by Resolution 181 (II). Its preamble stated: "...takes note of the declaration of the mandatory Power that it plans to complete its evacuation of Palestine by August 1, 1948." The Resolution even demanded termination of the mandate "as soon as possible, but not later than by August 1, 1948",[689] and established a Commission which was to deal with the transfer of power.[690]

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[686] Keith, "Mandates", 81; Wright, "Sovereignty", 700; and "The Proposed", 440 (he is in favour of "automatic termination" in this case; he even doubts whether the mandatory's consent is necessary).
[687] McNair, "Mandates", 160.
[688] The British justified the termination on the grounds that the Mandate had become "unworkable".
[689] Part I A; General Assembly Resolution 181 (II), November 29, 1947.
[690] General Assembly Resolution 181 (II), November 29, 1947.

Even if the ICJ Advisory Opinion on the *International Status of South-West Africa* were taken to require the General Assembly's consent when terminating a mandate, it must be concluded that Resolution 181 (II) provided it.[691] Furthermore, the Security Council also implicitly accepted the termination of the mandate.

There is no evidence that any other state regarded Palestine as still being under British mandate after May 15, 1948. Against this backdrop it must be assumed that the international community viewed Britain's role as mandatory power in Palestine as having come to an end on May 15, 1948.

(iii) Resolution 181 (II) as legal basis of Israeli independence

It has often been claimed that General Assembly Resolution 181 (II) formed the legal basis for the subsequent partition of Palestine.[692] This assertion is based on the assumption that the Resolution was binding on the international community, and the

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[691] Rosenne, "Directions", 50; ICJ, *International Status of South-West Africa*, Advisory Opinion, 11/07/1950, I.C.J. Rep. 1950, 141-142; the court –referring to the South-West Africa Mandate- states: "Article 7 of the Mandate required the authorisation of the Council of the League for any modification of its terms...the Court said that those powers ...now belong to the General Assembly...By analogy it could be inferred that the same procedure was applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the trusteeship system." Although dealing with South African plans to annex the mandated territory, the ruling could imply that granting independence to a mandated territory/terminating a mandate also requires UN consent. Similarly, the *Permanent Mandates Commission*, in September 1931, enumerated the general prerequisites regarding the termination of a mandate (which it examined the in connection with Iraq's prospective independence): these principles were approved by the *Council of the League of Nations*; League of Nations Official Journal, Vol. 12, 1931, 2044-2057. The procedure in respect of Iraq could imply that the Council of the League viewed its consent as essential when a mandatory wanted to terminate a mandate. This view is, however, not convincing. Granting independence to dependent nations is the fulfilment of the UN's goal of realizing the right of self-determination and of the League of Nations' aim of full independence at least in respect of "A"-Mandates. Creating obstacles in that respect would be contradictory. Also, UN consent was not obtained when Transjordan was granted independence, without any questions of legality -as far as UN participation was concerned- being raised. Similarly, Syria was a founding member of the UN (although many argue the country only became independent in 1946) without any consent having been obtained from an international organization.

[692] Alexander, "Israel", 427; implicitly Blum, "The Missing", 287; implicitly Lador-Lederer, "Recognition, Part I", 84; implicitly Linowitz, "Analysis", 525; Dunsky, "Israel", 174, (although his arguments are not very clear; while arguing the Resolution "authorized Israel to declare legally its independence", he goes on to claim that the "Arabs were entitled to reject" it); this argument is also made by Murlakov, *Das Recht*, 50; Grief, "Legal Rights", 2; his arguments are also contradictory. On the one hand he argues that the "State of Israel" was "brought into existence" by the Resolution, while on the other hand he argues the resolution was "illegal" due to an illegal abrogation of Jewish rights, presumably resulting also in the illegality of the State of Israel; Dugard, *Recognition*, 60.

Arabs and Jews of Palestine. Israel's "Declaration of Independence" was therefore merely the execution of the international community's binding decision.[693]

That argument is, however, untenable. General Assembly Resolution 181 (II) was not legally binding.[694] The General Assembly is usually not competent to make binding decisions. As Articles 10-14 UN Charter clearly demonstrate, General Assembly Resolutions are generally of a recommendatory nature. The few exceptions to this rule are explicitly enumerated in the Charter (for example, Articles 16 and 17 UN Charter). Clearly, Resolution 181 (II) does not fit into any of these exceptional categories, so that it can only have been a recommendation.

The fact that a 2/3 majority was desired and achieved in the vote passing the Resolution does not in any way affect its nature as non-binding. Although Article 18 (2) UN-Charter states that "decisions" on important questions required such a qualified majority, the first examples of such a "decision", as understood in Article 18 (2) UN Charter, are the "recommendations with respect to the maintenance of international peace and security." Consequently, the Canadian representative at the

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[693] In December 1948 the USSR Representative at the UN declared, during the debate on the admission of Israel, that "the State of Israel has been created and exists in accordance with a resolution passed in the General Assembly...its territory is clearly defined by an international decision of the United Nations"; cited by Crawford, *The Creation*, 426, fn. 198; Israel declared that the resolution was "the only internationally valid adjudication on the future of the government of Palestine"; Letter dated 5 July 1948 addressed to the United Nations Mediator by the Minister for Foreign Affairs of the Provisional Government of Israel, U.N. Doc. A/648 (1948), Annex I, Document 4, para. 1; available at: http://unispal.un.org/UNISPAL.NSF/9a798adbf322aff38525617b006d88d7/ab14d4aafc4e1bb985256204004f55fa?OpenDocument; last accessed 23/07/2011.

[694] Halderman, "Some", 81; Clyde Eagleton, "Palestine and the Constitutional Law of the United Nations", AJIL, Vol. 42, 1948, 397-399, 397; Elaraby, "Some", 102, 103; Gendell and Stark, "Israel", 217; E. Lauterpacht, "State", 515; Allain, *International*, 96; Quigley, *The Statehood*, 94-95, 104; Kattan, *From Coexistence*, 155; Jessup, *The Birth*, 264 (Jessup was the Acting US Representative at the United Nations at the time of the recognition of Israel by the USA); Grief, "Legal Rights", 9; Grief argues that the Resolution was "illegal" because it contained the "illegal partition" of Palestine to the detriment of the Jewish people. Ignoring historical facts, he goes on to argue that the term "Palestinians" had always only referred to the Jews which is, of course, simply untrue. Before the Mandate period only 10 % of the population in what later became Palestine were Jewish, making it untenable to equate Palestinians and Jews. The rules on Palestinian citizenship, introduced during the Mandate, applied to both Arabs and Jews; Wright, "The Palestine", 26; Wright, on the other hand, argues that the Resolution violated Article 80 UN Charter, because it attempted to change Palestine's status and thereby infringed on the rights of the Palestinian Arabs.

UN stated in December 1948 that the resolution had the "force of a recommendation".[695]

Reactions to the General Assembly Resolution confirm that it was not viewed as binding by the major international actors involved in Palestine either. The other UN organ, the UN Security Council, took note of the various "requests" made of it by the General Assembly in the Resolution, but did not comply with them.[696] The General Assembly itself modified Resolution 181 (II) on May 14, 1948, "relieving" the UN Commission on Palestine of its "duties" and appointing a mediator.[697] Britain, contrary to the General Assembly Resolution, did not cooperate with the UN Commission on Palestine in order to organize the transfer of power.[698]

The view that Resolution 181 (II) was not legally binding seems to have been shared by the US Department of State. In a memo of January 26, 1948, which deals with the Resolution and is addressed to the Under Secretary of State, it is explained that "political recommendations" should not be viewed as "sacrosanct".[699] A further memo of April 13, 1948, states:

> *The action of the Security Council on March 5 in declining to accept the requests of the General Assembly of November 29 in conjunction with the action on*

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[695] UN Security Council, 386th meeting, UN Doc. S/PV.386, December 17, 1948, para. 24; quoted by Quigley, *The Statehood*, 94-95.
[696] Briggs, "Community", 169-170; Eagleton, "Palestine", 398; Weiß, "Die Entstehung, Teil 2", 803-804; Crawford, *The Creation*, 431.
[697] GA Resolution 186 (S-2).
[698] Weiß, "Die Entstehung, Teil 2", 801; Crawford, *The Creation*, 432.
[699] *Memorandum by Mr Dean Rusk to the Under Secretary of State (Lovett)*, January 26, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 556-562, 557; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011; this sentiment is reiterated in the *Memorandum by Mr. Samuel K. C. Kopper of the Office of Near Eastern and African Affairs*, January 27, 1948, *ibid*, 563-566, 564; he points out that the "growing tendency to refer to the recommendation of the General Assembly as a decision which must be carried out must not be allowed to divert our attention from the fact that the action of the General Assembly was only a recommendation".

> *April 1...indicates that the Security Council was not prepared to accept or implement the General Assembly's Resolution of November 29.*[700]

This interpretation was in line with what the US Representative at the United Nations, Austin, had already declared before the Security Council on February 24, 1948:

> *The Security Council's action, in other words, is directed towards keeping the peace and not to enforcing partition.*[701]

In another memorandum of May 13, 1948, prepared by the Legal Adviser at the State Department, the creation of a Jewish State was viewed as having received "moral sanction" in the General Assembly "Partition Plan", strongly indicating that the State Department did not view the Resolution as having granted "legal" sanction for such an endeavour.[702] The Acting US Representative at the United Nations at the time of Israel's recognition by the USA, Philip Jessup, later also stated that "like most General Assembly Resolutions, it [the Partition Resolution] was merely a recommendation."[703]

While Israel was preparing its "Declaration of Independence", the USA was also -at least officially-[704] trying to find a temporary solution that was contrary to the

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[700] *Action on the General Assembly's Resolution of November 29, 1947, on the Palestinian Question*, 3; Memo by Fraser Wilkins (Department of State); available at: http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/newPDF/2-20.pdf#zoom=100; last accessed 23/07/2011.

[701] *Statement made by the United States Representative at the United Nations (Austin) before the Security Council on February 24, 1948* (Extracts), United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 651-654, 653, available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[702] *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, May 13, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 960-965, 962; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

[703] Jessup, *The Birth*, 264.

[704] Jessup, *The Birth*, 279-281, 283-286; Jessup, as the Acting US Representative at the UN at that time, points out how the US delegation at the UN was caught completely by surprise by Truman's decision to recognize Israel. According to Jessup, other delegations seem to have been informed earlier than the US representatives, causing the latter extreme embarrassment.

Resolution's content, [705] thereby further underlining the American view of its non-binding character.

Lastly, neither the Arabs nor the Jews of Palestine adhered to the Resolution.[706] The Palestinian Arabs and the Arab states expressly stated that they viewed the Resolution as not binding on themselves,[707] although the ruler of Trans-Jordan, Abdullah, is believed to have sent out very different signals behind the scenes.[708]

While the Jews of Palestine officially declared their acquiescence to the Resolution, and even referred to it in the Israeli "Declaration of Independence", in truth they ignored the Resolution's content where it did not suit them.[709] No preparations were ever made for the economic union envisaged by the General Assembly,[710] and the timetable developed by the General Assembly for conferring independence on both states step-by-step was not followed by the Jewish Agency or the other Jewish groups. Actions like the attack on Deir Yassin -an Arab village that was, after all, outside the territory of the prospective Jewish state-, and *Plan Dalet* -which explicitly called for offensive military action beyond the Jewish state's envisaged borders- strongly suggest that the Jewish Agency was never prepared to accept the territorial boundaries and the population mix suggested by UNSCOP. [711]

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[705] Jessup, *The Birth*, 265-279; Jessup was the Acting US Representative at the UN at that time, and describes the discussions surrounding the American trustee proposal in some detail; Weiß, "Die Entstehung, Teil 2", 804.
[706] Halderman, "Some", 82.
[707] Elaraby, "Some", 103; Dunsky, "Israel", 174.
[708] Abdullah was hoping to annex the remaining Palestinian Arab territories; Allen, *Imperialism*, 388; Flapan, *The Birth*, 39; Gresh, *De quoi*, 82-83.
[709] Flapan, *The Birth*, 33; Flapan describes Jewish acceptance as being only "tactical"; Crawford, *The Creation*, 432; Quigley, *The Statehood*, 104; Kattan, *From Coexistence*, 232.
[710] Flapan, *The Birth*, 41; Moshe Naor, "Israel's 1948 War of Independence as a Total War", *Journal of Contemporary History*, Vol. 43, 2008, 241-257, 248-249; he outlines the Yishuv's preparations in the economic field during 1947.
[711] Glubb, "Violence", 552-553; Magnes, "Toward", 240; writing in 1942/1943, he quotes Zionist leaders coming out very much in favour of "exchange of populations"; Pappe, "Clusters", 11; Pappe accuses the "Zionist movement" in Palestine of "ethnic cleansing"; Hirst, *The Gun*, 248-268; Hirst makes the same point and provides a lot of evidence; Flapan, *The Birth*, 22, 42; he also claims that -behind the scenes- Ben Gurion

Jewish non-adherence to the Resolution is sometimes justified on the grounds that the Arabs had clearly rejected the binding Resolution so that the Jews of Palestine had also been freed from their obligation to respect the General Assembly's decision.[712]

That argument is contradictory and therefore fails to convince. If Resolution 181 (II) - a decision by a world body, not a contract between Arabs and Jews- was indeed a binding Resolution, then any form of non-compliance would have been a question of enforcement. Arab non-compliance would therefore not have resulted in Jewish freedom of action, but in the world body having to enforce its decision. Except in the case of self-defence, post- WW II international law does not allow individual states, let alone non-state actors, to unilaterally resort to the use of force in response to a wrongful act.[713] Jewish action went way beyond enforcement of the Resolution, the Jewish state in the end being about 50 % larger than envisaged. Jewish freedom of action can only be reconciled with the view that the Resolution was non-binding.

The international and local reactions to the Resolution also invalidate the argument that the General Assembly Resolution -though in itself not binding- reflected international *opinio juris* and therefore became binding.[714] State practice, as just outlined, does not confirm this. This view also overlooks the fact that there were 23

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had made it plain in 1934 already that he was against any form of partition, because Palestine as a whole should become a Jewish State; Gresh, *De quoi*, 76-77, 83-86; he makes very similar claims; Salt, *The Unmaking*, 142-144; Quigley, *The Statehood*, 104; Kattan, *From Coexistence*, 189-203; Shlaim, *Israel*, 58-61; Mansfield, *A History*, 235.

[712] Letter dated 5 July 1948 addressed to the United Nations Mediator by the Minister for Foreign Affairs of the Provisional Government of Israel, U.N. Doc. A/648, Annex I, paras. 4.2 (borders), 4.4 (economic union), 4.6 (Jerusalem); available at: http://unispal.un.org/UNISPAL.NSF/9a798adbf322aff38525617b006d88d7/ab14d4aafc4e1bb985256204004f55fa?OpenDocument; last accessed 23/07/2011.

[713] Antonio Cassese, *International Law*, Oxford: Oxford University Press, 2nd. ed., 2005, 241-277; Nigel White, Ademola Abass, "Countermeasures and Sanctions" in *International Law*, Malcolm D. Evans (ed.), Oxford: Oxford University Press, 3rd ed., 2010, Ch. 18, 531-558, 534-545; in both textbooks it is pointed out that only non-forcible countermeasures in response to wrongful acts can in some cases be justified; see also: Article 50 of the International Law Commission's *Draft Articles on State Responsibility for Internationally Wrongful Acts*; available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf: last accessed 20/07/2012.

[714] Allain, *International*, 97.

states (of 56 voting) that did not vote in favour of the Resolution (no-votes and abstentions). There is therefore no evidence that by 1948 the General Assembly's Resolution had attained more legal value than a recommendation.

It follows that the sometimes discussed question of whether the General Assembly acted *ultra vires* by approving the plan of partition (and establishing UNSCOP in the first place) is not legally relevant due to the recommendatory nature of the Resolution.

(iv) Secession

Having outlined earlier that the correct view of the mandates system should be that sovereignty rested in the inhabitants of the mandated territories, even though its functions were exercised by the mandatory for the duration of the mandate, it must be assumed that this "suspension" automatically ended with the termination of the mandate. Full sovereignty therefore rested with the people of Palestine, once the British role there had come to an end. [715]

This correct interpretation of the mandates system also invalidates the argument that the "Declaration of Independence" was justified on the basis that, once the British had

[715] The Foreign Office came to a similar conclusion. In a Minute dated May 14, 1948 (FO. 371/68664) addressed to the UK delegation at the UN in New York and prepared by the Legal Advisers of the FO it was argued that once the Palestine Mandate had been terminated, sovereignty in Palestine "will probably lie in the people of Palestine"; quoted in Kattan, *From Coexistence*, 189; It must also be pointed out that many insignia of an independent state were already put in place in Palestine during the Mandate (flag, own citizenship laws, a system of criminal and civil laws, etc.); McGeachy, "Is it", 247; Kattan, *From Coexistence*, 58-59, 137-138, 189; Grief, "Legal Rights", 7; he, however, argues that once the British Mandate ended sovereignty rested only in the Jewish people regarding the whole of Palestine. He therefore views the creation of Israel not as a secession, but, implausibly, argues that the Arabs were "in illegal possession" of those parts of Palestine not under Israeli control. This is an extreme view with no legal merit, which is also not supported by the text of Israel's own Declaration of Independence.

left, sovereignty was "up for grabs" -a kind of *terra nullius* situation- and that Israel therefore had every right to assert its sovereignty.[716]

Since Palestine, as an "A"-Mandate, had already been "provisionally recognized" as an "independent nation", [717] it automatically became independent, once the mandate was terminated, notwithstanding the dire situation there.[718] This ties in with the views of the USA, Spain, and Italy, expressed in 1932 and outlined earlier, whereby Palestine was, in relation to the United Kingdom, a "foreign country", which, according to Spain, was to be treated "analogous to other sovereign states".[719]

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[716] The ICJ would most likely reject any such argument; see ICJ, *Western Sahara*, Advisory Opinion, 16/10/1975, I.C.J. Rep. 1975, 12, 38-39, paras. 79-81. When dealing with Spanish colonization of the Western Sahara in 1884, the ICJ declared: In the view of the Court, therefore, a determination that Western Sahara was a *"terra nullius"* at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation". Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as "*terra nullius*". It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a *"terra nullius"* in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*. In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; Crawford, *The Creation*, 432; Kattan, *From Coexistence*, 134 (no *terra nullius* situation). In support of the rejected argument: Alexander, "Israel", 426; he, however, goes on to argue that there was continuity in sovereignty from the Turkish Empire to Israel. It remains unclear on what basis he arrives at that conclusion, since the "Principal Allies", who, according to him, retained sovereignty over Palestine during the whole Mandate period and after WW II, did certainly not agree to "release sovereignty to Israel" as he states; Blum also adopts a somewhat contradictory position (in "The Missing"). While stating (at 283) that "no mandated territory can be regarded, on termination of the mandate, as a *res nullius* open to acquisition by the first comer", he then goes on to claim that Israel held the rightful title to the Occupied Territories on the West Bank because "no other State can show a better title" (at 294), which surely implies a *res nullius* situation before Israel acted; Gendell and Stark, "Israel", 226; they claim that the Arabs of Palestine had "lost their title" because they had not claimed it in time; Lador-Lederer, "Recognition, Second Part", 118 (implicitly).

[717] Article 22 (4) Covenant of the League of Nations.

[718] A view obviously supported by the Ukrainian Ambassador to the UN who, when discussing the Arab intervention in Palestine in the Security Council, stated: "none of the States whose troops have entered Palestine can claim that Palestine forms part of its territory; It is an altogether separate territory"; S.C.O.R., 297th meeting, May 20, 1948, 5; Kattan, *From Coexistence*, 137-138, 189.

[719] *The Secretary of State to the British Chargé (Osborne),* August 27, 1932; *The Chargé in Italy (Kirk) to the Secretary of State*, October 22, 1932; *The Ambassador in Spain (Laughlin) to the Secretary of State*, October 28, 1932; United States Department of State, FRUS, Diplomatic Papers, 1932, The British Commonwealth, Europe,

Similarly, the view on Palestine expressed by the Chairman of the *Permanent Mandates Commission* in 1937, Mr. Orts, when dealing with an Iraqi statement on the Arab unrest there, leads to the same conclusion:

> *For the Mandates Commission, Palestine had never ceased to constitute a separate entity. It was one of those territories which, under the terms of the Covenant, might be regarded as "provisionally independent". The country was administered under an A mandate by the United Kingdom, subject to certain conditions and particularly to the condition appearing in Article 5: "The Mandatory shall be responsible for seeing that no Palestine territory shall be . . . in any way placed under the control of the Government of any foreign Power".*
>
> *The Chairman would not go so far as to say that the Iraqi Government was making a deliberate attempt to control Palestine; but a foreign Power was intervening in Palestine's internal affairs, and it was difficult to distinguish between intervention and control.*
>
> *Palestine, as the mandate clearly showed, was a subject under international law. While she could not conclude international conventions, the mandatory Power, until further notice, concluded them on her behalf, in virtue of Article 19 of the mandate. The mandate, in Article 7, obliged the Mandatory to enact a nationality law, which again showed that the Palestinians formed a nation, and that Palestine was a State, though provisionally under guardianship. It was, moreover, unnecessary to labour the point; there was no doubt whatever that Palestine was a separate political entity.*[720]

Based on the *Permanent Mandates Commission's* view there can be no doubt that once the "guardianship" was terminated, Palestine became a fully independent state.

The US Department of State at the time seems to have adopted a similar view. In a debate in the Security Council on February 24, 1948, on how to respond to the General Assembly's requests outlined earlier, the US Representative Austin declared:

> *What this means is this: The Security Council, under the Charter, can take action to prevent aggression against Palestine from outside. The Security Council, by*

Near East and Africa, 32, 35-36, 36-37; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

[720] League of Nations, *Permanent Mandates Commission*, Minutes of the Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th-August 18th, 1937, Tenth Meeting; available at: http://unispal.un.org/UNISPAL.NSF/0/FD05535118AEF0DE052565ED0065DDF7; accessed 13/07/2011.

> *these same powers, can take action to prevent a threat to international peace and security from inside Palestine...*[721]

Furthermore, in a memo of May 13, 1948, the State Department Legal Adviser states:

> *We are then faced with the situation where the only agencies claiming to have governing powers over Palestine are organizations within that country. The law of nations recognizes an inherent right of people lacking the agencies and institutions of social and political control to organize a state and operate a government.*[722]

Similarly, on May 12, 1948, the Legal Adviser proposed an amendment to a planned General Assembly Resolution to include the following paragraph:

> *Recognizes that after May 14, 1948, local and community authorities will exercise the powers of government in Palestine (, except in the city of Jerusalem)...*[723]

Palestine was independent as of May 15, 1948.[724] When Israel declared its independence it -officially- did not lay claim to the whole of Palestine, but only to the territory allotted to the Jewish state in General Assembly Resolution 181 (II). It must therefore be concluded that at the moment Palestine achieved independence Israel seceded from it.[725]

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[721] *Statement made by the United States Representative at the United Nations (Austin) before the Security Council on February 24, 1948* (Extracts), United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 651-654, 653; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[722] *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, May 13, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 960-965, 962; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[723] *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett)*, May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 980-981, 980; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[724] Accordingly, the Secretary-General of the Arab League, in a cablegram of May 15, 1948 to the UN Secretary-General, declared: "The Arab States recognize that the independence and sovereignty of Palestine which was so far subject to the British Mandate has now, with the termination of the Mandate, become established in fact, and maintain that the lawful inhabitants of Palestine are alone competent and entitled to set up an administration in Palestine for the discharge of all governmental functions without any external interference."; Cablegram from the Secretary-General of the League of Arab States to the Secretary-General of the United Nations, May 15, 1948, para. 10 (e); UN Doc. S/745; also quoted in Quigley, *The Statehood*, 105.

[725] Crawford, *The Creation*, 427, 433; Quigley, *The Statehood*, 103-104; to some extent this is also evidenced by the statements made by the Arab Higher Committee and by the Jewish Agency in the Security Council on May 15, 1948; the spokesman for the Arab Higher Committee referred to Palestine as an "independent nation" with a "rebellious minority", while the representative of the Jewish Agency explained that the State of Israel had been "established within Palestine"; both statements indicate that an attempted secession was taking place; UN

This declaration of independence in itself, it should be pointed out, was not contrary to international law. As the ICJ pointed out in respect of Kosovo, there is no rule in international law prohibiting the unilateral declaration of independence by an entity.[726] The same does, however, not apply to the decision of other states on whether to recognize this seceding entity as a state, a topic the ICJ explicitly did not deal with.[727]

bb) Did Israel fulfil the criteria of statehood in mid-May 1948?

As will be shown Israel, in mid-May 1948, did not fulfil the criteria of statehood as accepted in customary international law. In fact, the new Jewish state did not meet any of the four requirements necessary for it to be recognized as a state.

(i) Permanent population

As has already been mentioned, Palestine, at the time, was in a state of civil war. At the time of the "Declaration of Independence" thousands of prospective Arab citizens of the new Jewish state were fleeing the area.[728] Because the boundaries were undetermined, it was unclear who would be a citizen of which entity at the end of the war. Therefore Israel could not claim to have a permanent population in mid-May 1948.

Security Council, 292nd meeting, May 15, 1948, UN Doc. S/PV.292 (also quoted in: Quigley, *The Statehood*, 103-104).

[726] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, paras. 79-81.

[727] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, para. 51. The ICJ declared it had not been asked "whether or not Kosovo has achieved statehood", nor had it been asked "about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent state."

[728] Naor, "Israel's", 256; he states: "By the close of the war, 700000 Palestinian residents of Palestine (out of 1.1 million) had become refugees"; Segev, "Mohammed", 84 ("the war led to the flight and expulsion of 750000 Arabs"); Don Peretz, "A Binational Approach to the Palestine Conflict", Law & Contemp. Probs., Vol. 33, 1968, 32-43, 33, fn. 8; he provides similar figures; Flapan, *The Birth*, 81-118; Quigley, *The Statehood*, 104; Strawson, *Partitioning*, 137; Shlaim, *Israel*, 28-29.

(ii) Defined territory

It is obvious that with war raging in Palestine and no agreed or obvious boundaries in existence, Israel did not possess a defined territory.[729] The war can also not be claimed to be a mere border dispute, but, as mentioned earlier, the Arab side denied the new Jewish state's right to exist. Due to its non-binding nature, Resolution 181 (II) did also not provide any firm borders for the new state as evidenced by the fact that both sides did not plan to adhere to it. Since the Jewish people formed a minority in Palestine, and the Arab population was dispersed right across Palestine, there was also no obvious "natural", or administrative[730] border Israel could lay claim to, a fact that distinguishes Israel's secession from many other sessions.

(iii) Effective government

Although the Jewish Agency and the military groups supporting it were without doubt much more effective and much better organized than anything the Arab population had been able to create (not to mention the non-existence of any all-Palestine institutions once the British had left),[731] the Jews of Palestine could still not claim to have an effective government in the sense of being able to enforce law and order in the prospective Jewish state.[732] As far as its Arab citizens were concerned there was

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[729] Eban, "Israel", 424, ("the year 1948 was characterized by a struggle for sheer physical survival...these doubts were not resolved until the end of the year..."); Kattan, *From Coexistence*, 235.

[730] The existence of administrative borders in the case of Yugoslavia allowed the European Community to argue that the state of Yugoslavia was in the process of "dissolution" instead of having to assume that multiple sessions were taking place (Croatia, Slovenia, Bosnia, etc.); see: Opinion No. 1, Arbitration Commission, EC Conference on Yugoslavia, 29/11/2001 ("...that the Socialist Federal Republic of Yugoslavia is in the process of dissolution..."); for text, see: http://tu-dresden.de/die_tu_dresden/fakultaeten/juristische_fakultaet/jfoeffl3/voelkerrecht_1/skript-vr-b3.pdf; last accessed 23/07/2011.

[731] Weiß, "Die Entstehung, Teil 2", 806.

[732] Weiß, "Die Entstehung, Teil 2", 806; Quigley, *The Statehood*, 104; Kattan, *From Coexistence*, 232, 234-235; he also points out there were still British troops in Palestine at the time of the Declaration of Independence, the last troops were evacuated on June 29, 1948; Strawson, *Partitioning*, 132; he points out that the "Peoples Administration" set up by the Jewish Agency only voted by a small majority (6:4) in favour of the "Declaration of Independence". According to Strawson this was due "to the precarious military situation".

complete chaos. On the first day of independence, the Arab states -as had been expected- mounted an attack on the prospective new state. It must therefore be concluded that, although the Jewish authorities were the most effective institutions within Palestine, they could not claim to be able to provide an effective government for the new state.[733]

(iv) Capacity to enter into relations with other states

Based on the lack of effective government and the fact that formally at least Israel was a part of Palestine in mid-May 1948, it was formally also not able to conduct its foreign affairs independently.

In summary therefore, Israel, in mid-May 1948, did not fulfil any of the "Montevideo" criteria.[734] Nevertheless, the United States and the Soviet Union extended recognition.

(v) Recognition de facto or de jure?

The US statement is sometimes described as "only" being a *de facto* recognition, which is generally seen as a minus to the *de jure* recognition extended by the Soviet Union.[735] Regarding the State of Israel, the American statement actually seems much closer to a *de jure* recognition, while being of a *de facto* nature as far as the provisional government is concerned. After all, the State of Israel is mentioned in a matter-of fact-way as the "new State of Israel", as if there were no doubt regarding its

[733] Naor, "Israel's", 243 ("in the eyes of the Yishuv's leadership, the war was perceived...as an existential struggle"). On May 19, 1948, the Israeli National Council was forced to declare a State of Emergency. Naor also describes some of the post-May 1948- effects the war had on the Jewish community in Palestine (at 254-256); Kattan, *From Coexistence*, 232, 234-235.

[734] Naor, "Israel's", 256; referring to the War of Independence as of May 1948 he declares: "in the course of the war, the transition from Yishuv to statehood began..."; Ottolenghi, "Harry", 973; he states that in May 1948 "the Yishuv ...was moving towards statehood."

[735] Kattan, *From Coexistence*, 233; he, for example, takes that view.

existence and viability.[736] In a "proposed" telegram[737] from President Truman to Rabbi Wise, the President, in September 1948, explained:

> *In answer to your question, there is no question but that my action on May 14, 1948, constituted an unconditional recognition of the State of Israel. In addition, at that time, a provisional government had been established and de facto recognition was given the provisional government.*[738]

The difference between *de facto* and *de jure* recognition is, however, not relevant in this case, as a *de facto* recognition of the State of Israel was, at the time, just as unjustified as a *de jure* recognition due to the non-fulfilment of any of the "Montevideo" criteria.[739]

cc) Principle of non-recognition

The principle of non-recognition does not offer any further reasons for not recognizing Israel.

As already explained the principle of non-recognition in cases of flagrant violations of self-determination had, by 1948, not yet become a part of customary international law.[740]

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[736] This interpretation is supported by a statement the Acting US Representative Jessup made before the Security Council in December 1948: "The U.S. extended (on May 14) immediate and full recognition of the State of Israel. Perhaps some confusion arises between the recognition of the State of Israel and recognition of the Provisional Government of Israel. So far as recognition of the State of Israel is concerned...the recognition accorded by the U.S. Government was immediate and full recognition. There was no qualification. It was not conditional; it was not de facto recognition; it was full recognition of the state." (as quoted by Jessup himself, in *The Birth*, 294-295).

[737] According to the State Department, it is not clear whether the telegram was actually sent. Another version of the telegram was found in the "Clifford Papers", in which the word "established" had been substituted by "elected".

[738] *Proposed Telegram by President Truman to Rabbi Stephen S. Wise*; available at: United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 1432; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 08/07/2011.

[739] Lador-Lederer, "Recognition, Part I", 64; he argues that there is no "practical distinction" between *de facto* and *de jure* recognition but that the distinction was used as a diplomatic tool.

[740] Crawford, *The Creation*, 427, 433; Kattan, *From Coexistence*, 143; ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*,

The principle of non-recognition in the case of illegal use of force is also not applicable to the recognition of the State of Israel. The situation in Palestine was primarily one of civil war, not of outside military intervention. Whether it could be argued that the principle could or should be applied, as far as Israel's borders -based on the 1949 armistices, instead of Resolution 181 (II)- are concerned, is not relevant to the question of the recognition of the state as such. The existence of the State of Israel is not dependent on where exactly its borders are delineated.

dd) Premature recognition

Both the American and the Soviet recognition were premature.[741] This view was shared by the British government that declared that Israel did not "fulfil the criteria of an independent state".[742] The Israelis themselves describe the war between them and the Arabs as of May 15, 1948, as the "War of Independence", a misnomer had an independent state already been established on May 14, 1948. [743] Accordingly, Chaim

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Advisory Opinion of October 22, 2010, paras. 79, 82; the court pointed out that the right of self-determination had only "evolved" during "the second half of the twentieth century".

[741] Allain, *International,* 99 ("...the willingness of States to recognize Israel before it had established itself was clearly a leap of faith..."); Latter, *The Making*, 404-405; Crawford, *The Creation*, 427; Kattan, *From Coexistence*, 232-236.

[742] Brown, "The Recognition", 620 (quote); "British Caution", *The Times*, 18/05/1948, 4; "Britain is aloof to the New State", *The New York Times*, 15/05/1948, 2; Kattan, *From Coexistence*, 233-236; Miriam Haron, "Britain and Israel, 1948-1950", *Modern Judaism*, Vol. 3, 1983, 217-223, 217; she points out that according to internal British documents the British Government still "had strong reservations about the viability of Israel" eight months after Israel's Declaration of Independence. The British minister in Tel Aviv arrived in May 1949 and reported that Israel was an "artificial creation" that only survived thanks to "American Jewry" (at 219-220). However, she also claims (at 217) that Britain hesitated in its recognition of Israel because it wanted the United States to recognize Trans-Jordan in return which it had so far refused to do. On January 30, 1949, British *de facto* recognition was granted, *de jure* recognition followed in 1950. Similarly, only in March 1949 did India's Nehru declare that Israel was a "State that is functioning as such", while in August 1948 he still had declared that India's Government "had to wait" as far as recognition was concerned; see: Kumaraswany, "India's", 125.

[743] Naor, "Israel's", 243, ("the struggle to lay the foundations of the State of Israel's sovereignty after its establishment in May 1948").

Herzog, later to become President of Israel, concluded: "In the War of Independence the fate of Israel hung precariously in the balance."[744]

The view that American recognition was premature was also widely shared in the US Department of State.[745] In a conversation with the President on May 12, 1948, the Under-Secretary of State, Lovett, declared that "it would be"

> *highly injurious to the United Nations to announce the recognition of the Jewish State even before it had come into existence...to recognize the Jewish State prematurely would be buying a pig in a poke. How did we know what kind of Jewish State would be set up?* [746]

According to a memo written by the Secretary of State himself, he agreed with this assessment. He acknowledged that the Jews were currently having military successes, but added that "there was no assurance that the tide might not turn against them." He proposed "taking another look at the situation in Palestine after May 16 in the light of the facts as they existed."[747] In fact, even in 1953, the US State Department still came

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[744] Chaim Herzog, *The Arab-Israeli Wars, War and Peace in the Middle East from the 1948 War of Independence to the Present*, Updated by Shlomo Gazit, London: Greenhill Books, 2004, 108.

[745] Allen, *Imperialism*, 394; Salt, *The Unmaking*, 153-155; Kinzer, *Reset*, 154 (who adds the US Secretary of State James Forrestal to the opponents of recognition); the Acting US Representative at the UN at the time of Israel's recognition by the USA, Philip Jessup, indicated that he shared the view that US recognition was premature, when he later stated: "One could terminate the story of the birth of Israel with its declaration of independence on May 14, 1948, but I have pointed out the importance that the Israeli government itself attached to the admission as a member of the United Nations, which occurred almost a year later. Despite recognition accorded by many states, Israel's statehood and position in the international community, as Foreign Minister Sharett himself told the Knesseth, was not perfected until admission to the United Nations."; Jessup, *The Birth*, 260.

[746] *Memorandum of Conversation, by Secretary of State,* May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 975; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[747] *Memorandum of Conversation, by Secretary of State,* May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 973, 975; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

to the conclusion that "Israel is not a viable state".[748] The President, however, in the end ignored the US Department of State's advice.[749]

The premature recognition extended to Israel amounted to an illegal intervention in the affairs of independent Palestine, and was an attempt to make the creation of the Jewish state a foregone conclusion. There can be no doubt that in comparison to Iraq's statement on the situation in Palestine, which the *Permanent Mandates Commission* in 1937 had described as a "a foreign Power ... intervening in Palestine's internal affairs," [750] this intervention, by extending recognition of a secession, was much more serious. As there is very little doubt that Israel, in mid-1948, did not fulfil *any* of the "Montevideo" criteria, there also can be no doubt that the USA and the USSR both committed an intentional violation of international law.[751]

The "general principle" of *uti possidetis* or territorial integrity severely circumscribes the right of secession by implicitly limiting the way other states can react to secessions, especially in cases where minorities attempt to secede from a state created by a colonial regime that has, however, achieved independence.[752] Israel was, after all,

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[748] *Department of State Position Paper*, May 5, 1953, *Israel*, United States Department of State, FRUS, 1952-1954, Volume IX (Part 1), 1952-1954, 1188-1199, 1189; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[749] The US recognition came as a complete surprise even to the American UN delegation; at first it was feared that the whole delegation, which had been busy trying to gain acceptance of the new US trusteeship proposal, would resign in protest (see: Allen, *Imperialism*, 395; Salt, *The Unmaking*, 155).

[750] League of Nations, *Permanent Mandates Commission*, Minutes of the Thirty-Second (Extraordinary) Session, Devoted to Palestine, Held at Geneva from July 30th-August 18th, 1937, Tenth Meeting; available at: http://unispal.un.org/UNISPAL.NSF/0/FD05535118AEF0DE052565ED0065DDF7; accessed 13/07/2011.

[751] On the basic illegality of premature recognition as seen by the US Department of State, see: *Memorandum by the Legal Adviser (Gross) to the Under Secretary of State (Lovett), Recognition of Successor States in Palestine*, May 13, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 960-965, 960; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[752] Koskenniemi, "National", 254-256; as Koskenniemi points out (at 256) Principle VII of the *Helsinki Final Act* (1975) also implies "that the self-determination principle" in Principle VIII "should not be taken to mean a right of secession"; for the *Helsinki Final Act*, see: OSCE; available at: http://www.osce.org/mc/39501?download=true; accessed 31/07/2012; Craven, "Statehood", 232-233; see also fn. 754 and fn. 759 (for examples of UN reaction to moves by smaller entities to separate from larger entities subsequent to decolonization).

seceding from Palestine, not from Britain. [753] This further supports the argument that this particular intervention during an attempted secession was a case of what Lauterpacht described as an "abuse" of the right to recognize.

The fact that there was no effective government of Palestine does not in any way affect the *uti possidetis* principle.[754] Even nowadays, when colonialism has more or less been overcome, this principle is taken very seriously.[755] This is evidenced by the case of Somaliland, which declared its independence in 1991, and is widely seen as fulfilling the criteria of statehood at a time when there is no sort of effective government in Somalia. Nevertheless, Somaliland has not been recognized as an independent state by the international community.[756]

There are, however, exceptional cases when the *uti possidetis* principle has in recent times come to be seen as secondary to the right of (external) self-determination in a

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[753] ICJ, *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali), Judgement of December 22, 1986, I.C.J. Rep. 1986, 554, 564-567, paras. 19-26; and *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, para. 80; the principle has also been reaffirmed by the Security Council, for example in Resolution 787 (1992) in respect of the Republic of Srpska; Collins, "Self-Determination", 147-149; Dajani, "Stalled", 29-30.

[754] Certainly this was the position the United Nations adopted in respect of the Belgian Congo, which became independent on June 30, 1960, following a Belgian declaration to that effect of January 27, 1960. On June 14, 1960, the region of South Kasai had declared its indendence, followed by the Katangan declaration of independence on July 11, 1960. As far as the Congolese central government was concerned, Crawford (*The Creation*, at 57) has commented that "anything less like effective government it would be hard to imagine". Nevertheless, Congo's UN membership "had already been approved and UN action had been taken on the basis of preserving the 'sovereign rights of the Republic of Congo'" in the face of these separatist movements (see: Craven, "Statehood", 225); H. Lauterpacht, *Recognition*, 10-11 and fn. 1; he describes how Britain and the United States, in the post-WW I period, delayed "recognition *de jure*" of the Baltic States and Finland by many years "on the ground that the possibility of a united Russia, then in the throes of revolutionary convulsions, was not altogether outside the range of possibilities".

[755] It is, for example, generally assumed that the *uti possedetis* principle was the main reason behind the EC's decision, in the early 1990s, to view the developments in Yugoslavia as a process of "dissolution" of the state instead of treating them as multiple secessions; Opinion No. 1, Arbitration Commission, EC Conference on Yugoslavia, 29/11/2001; for text, see: http://tu-dresden.de/die_tu_dresden/fakultaeten/juristische_fakultaet/jfoeffl3/voelkerrecht_1/skript-vr-b3.pdf; last accessed 23/07/2011; see also: Koskenniemi, "National", 256-257.

[756] Craven, "Statehood", 204; for further details, see: Eggers, "When is a State a State?", 211-222.

non-colonial context.[757] But even if it were possible, contrary to the argument made here, [758] to argue that, by 1948, the right of self-determination had achieved such an elevated status that it could even justify secessions when no colonial ruler was involved this exception would not apply in the case of Israel.[759]

In Israel -according to the UN statistics- 45 % of the population of the prospective new Jewish state were vehemently opposed to partition (officially, nobody expected the prospective Arab population of Israel to leave, and, as already mentioned, the British claimed the Arab population in the prospective Jewish state was even larger).

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[757] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, para. 82; the ICJ did not decide whether there is such a "remedial right" of secession based on the right of self-determination (para. 83), but pointed out that this was a "subject on which radically different views were expressed by those taking part in the proceedings."; Collins, "Self-Determination", 148.

[758] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion of October 22, 2010, paras. 79, 82; the court pointed out that the right of self-determination had "evolved" only "in the second half of the twentieth century"; Dunsky, "Israel", 172; Kattan, *From Coexistence*, 143; Strawson, *Partitioning*, 88, 108.

[759] Based on the General Assembly's treatment of Gibraltar and of the Island of Mayotte, it seems likely that a Jewish right of self-determination in Palestine permitting secession would not have been accepted by the vast majority of states. As Koskenniemi has pointed out, the General Assembly's resolutions on Gibraltar and Mayotte in fact indicate that "the will of the population... may at least in a colonial context be overridden by the self-determination of a larger entity." ("National", 262-263).
Transferred to the situation in Palestine, the view adopted by the General Assembly would seem to suggest that the right of self-determination of Palestine's people -arising in a colonial context- would have to be judged to outweigh any Jewish right of self-determination there. This would seem to be even more the case when it is considered that a large majority of the Jewish residents of Palestine were not of indigenous origin (similar to the residents of Gibraltar, a point raised by the Tunisian representative in respect of Gibraltarians).
The General Assembly adopted the following positions:
Island of Mayotte: Geographically the island is part of the "Union of Comoros" which became independent from France in 1975. In the referendum on independence in 1974 the Island of Mayotte was the only territory within the Comoros to vote against independence. The island has since continued to be ruled by France, a situation the "Union of Comoros" refuses to recognize. Despite a large majority of the island's inhabitants supporting French rule (in a 2009 referendum 95 % of the population voted in favour of Mayotte becoming a French département), the General Assembly has repeatedly "reaffirmed" the "Union of Comoros'" sovereignty over the island (see, for example, GA Resolution 37/65 (1982); GA Resolution 49/18 (1994); in 1976 a draft resolution of the Security Council, recognizing the "Union of Comoros'" sovereignty, received 11 affirmative votes, but was vetoed by France).
Gibraltar: In the 1964 "consensus" on Gibraltar adopted by the UN *Special Committee on Decolonization* (the so-called "Committee of 24") the committee declared "that the provisions of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*" were "fully applicable to the Territory of Gibraltar" (at para. 812), irrespective of the local residents' views. On the basis of the report's recommendations, the General Assembly subsequently "invited" the UK and Spain to initiate negotiations on the future status of Gibraltar (Resolution 2070 (1965), passed in a 96:0:11 vote). The "consensus" on Gibraltar (paras. 787-822) is available at: http://untreaty.un.org/cod/repertory/art73/english/rep_supp3_vol3-art73_e.pdf#pagemode=none; accessed 31/07/2012.

These 45 % were not simply political opponents of creating an independent Jewish state, but, according to their understanding of themselves, these people clearly belonged to the state Israel was seceding from and could claim that secession violated their right of self-determination, forcing them into a (sizable) minority status in what they saw as their own country.[760] Any claim that the creation of the State of Israel with the envisaged borders[761] was merely a realization of Jewish self-determination is therefore very difficult to put forward, whether one basically accepts the concept of a right to Jewish self-determination in Palestine or not.

Because Israel, in mid-May 1948, did not fulfil any of the criteria of statehood, the question of realizing Jewish self-determination is, however, not relevant. Even if the argument in favour of recognizing a right to Jewish self-determination in Palestine were accepted, that would not alter the fact that the recognitions extended to Israel on May 14 and May 17, 1948, were premature, as Israel could not yet lay claim to having achieved statehood according to international law.[762]

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[760] Kattan, *From Coexistence*, 140-141; Strawson, *Partitioning*, 100-101; Koskenniemi, "The National", 249-257, 260-264; Koskenniemi outlines the general problem of finding the "authentic 'self-determination unit'" (quote at 260) to which the right of self-determination is to be applied. According to him, this is due, firstly, to the existence of two concepts of self-determination which, to some extent, contradict each other; and, secondly, to the "indeterminacy" of the concept of "nation". In this context he refers to the "classical" concept of self-determination which emphasizes the role of states as the only "legitimate holders of the various goods of collective personhood" and which therefore has "a strong preference for the statehood of existing states" (at 250). On the other hand, he argues, there is the "romantic" concept of self-determination which "sees nationhood as primary" and therefore "contains an inbuilt preference for secession and independence" (at 251). According to him this has, in the past, led to a constant balancing between the two concepts (at 251-257). Finding the "authentic 'self-determination unit'" is further complicated, he argues, by the fact that there are no agreed criteria to decide which community should be recognized as a "nation" (at 260-264). Developing such criteria is, in Koskenniemi's view, especially difficult as a "claim for national self-determination" can sometimes be based on no more than a "common hatred" of the "oppressor". This can have the consequence that "once the oppression has been removed, there may be little or nothing more to sustain a sense of community" (at 261-262). In respect of Palestine he points out how the "demand for a Jewish State" is "intimately connected with the pogroms and the holocaust" and how, on the other hand, Israel's "practices serve to sustain and develop a Palestinian nationalism" (at 262); see also: Craven, "Statehood", 237.

[761] The borders envisaged in GA Resolution 181 (II), without considering any population transfer.

[762] Many of those who argue that US recognition of Israel was "plainly justified" also negate the existence of any international law rules on recognition (see, for example: Brown, "The Recognition", 620-627); Lador-Lederer, "Recognition, Part I", 84; he, on the other hand, argues that there is no reason to assume American recognition of Israel was premature, as the Declaration of Independence was issued "half a year after its

c) American and Soviet interests and the results of their actions

Having just explained that the recognitions extended by the USA and the USSR were illegal under customary international law, it remains to be examined why they acted in that fashion.

aa) United States

By virtually all accounts President Truman was partly motivated by domestic electoral concerns.[763] The USA, at the time, was evenly divided between Democrats and Republicans, and Truman was facing a tough re-election battle in 1948.[764] Although Jewish voters amounted to a small percentage of American voters over all, they were strategically concentrated in key battleground states, such as New York. Zionist groups with their potential for gaining Jewish electoral support therefore had enormous influence within the White House. Even within the US Government, especially within the US Department of State, there were many who saw Truman's policy on Palestine as blatant vote-buying, and as not in the national interest.[765]

In a conversation with the President on May 12, 1948, Under-Secretary of State, Lovett, declared that recognizing the Jewish state prematurely would be

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[Israel's] establishment had been decided by the United Nations- but thirty years after the Balfour Declaration." This argument is not convincing. Even leaving aside the legal questions raised by Lador-Lederer's assertions relating to the United Nations and the Balfour Declaration, these "decisions" cannot obviate the necessity to establish whether an entity has fulfilled the criteria of statehood -criteria he himself supports, but which in the case of Israel he does not examine.

[763] McGeachy, "Is it", 245; Ulfkotte, *Kontinuität,* 24; Ovendale, *Britain*, 300-303, 306; Salt, *The Unmaking*, 160; Keay, *Sowing*, 368; Jessup, *The Birth*, 297-298 (Jessup was the Acting US Representative at the United Nations at the time of the recognition of Israel by the USA).

[764] Ovendale, *Britain*, 253.

[765] Roosevelt (who later played a key role in toppling Mossadegh in Iran), "The Partition", 16 ("No American leader has the right to compromise American interests to gain partisan votes.").

> *...injurious to the prestige of the President. It was a very transparent attempt to win the Jewish vote.*[766]

This assessment was echoed the Secretary of State who stated that premature recognition was

> *...a transparent dodge to win a few votes...the great office of the President would be seriously diminished...*[767]

He went on to say that if the President followed Clifford's contrary advice, he himself would vote against the President, as that "counsel was based on domestic political considerations while the problem which confronted" the US "was international". [768]

Premature recognition was seen by these officials for what it was: an attempt to win possibly decisive votes. [769] Britain, too, had repeatedly accused the United States government of basing its Palestine policies solely on the electoral calendar.[770]

Palestine was, however, also seen by the USA as occupying a "geographic position of great strategic significance to the U.S.", as it "was important for the control of the eastern end of the Mediterranean and the Suez Canal", and was also "an outlet for the oil of the Middle East." [771] Many in the US government were worried that Truman's

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[766] *Memorandum of Conversation, by Secretary of State,* May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 975; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[767] *Memorandum of Conversation, by Secretary of State,* May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 975; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[768] *Memorandum of Conversation, by Secretary of State,* May 12, 1948, United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 975; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 16/07/2011.

[769] McGeachy, "Is it", 245; Ulfkotte, *Kontinuität*, 24; Jessup, *The Birth*, 297-298.

[770] In a speech before the House of Commons, when asked about American pressure on the UK, British Foreign Secretary Bevin declared: "In international affairs I cannot settle things if my problem is made the subject of local elections."; Hansard, Palestine (Government Policy), HC Deb 25 Feb 1947 vol 433 cc1901-2007, c1908; available at: http://hansard.millbanksystems.com/commons/1947/feb/25/palestine-government-policy; accessed 12/07/2011; see also: *The Times,* "The Palestine Outlook, Mr. Bevin on U.S. 'pressure'"; "House of Commons"; both 26/02/1947, 4, 6. The White House promptly issued a statement calling Bevin's statement "unfortunate and misleading"; see: *The Times,* "U.S. Replies to Mr. Bevin", 27/02/1947, 4.

[771] *Report by the Policy Planning Staff on Position of the United States With Respect to Palestine*, January 19, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part

policy was hurting US interests in the oil-rich Arab Middle East, while not gaining much by supporting the creation of a Jewish state there.[772] Early on, officials in the Department of State therefore thought the USSR might exploit America's pro-Zionist policies by siding with the embittered Arabs.[773] This argument was, however, severely undermined, when it became evident that the Soviet Union would endorse the creation of a Jewish state.[774]

Supporters of the early recognition of Israel within the White House then turned this argument against the Department of State, arguing that America was in danger of losing its foothold in the Jewish state if the USSR were to recognize the new state before the USA did.[775] They generally viewed the creation of Israel as useful to American interests in the region, and had been assured by their Zionist contacts that Israel would be a democratic state, which was likely to become the natural ally of the USA against any Soviet encroachment in the region.[776]

This view was already expressed as early as 1937. In two messages US Secretary of State Hull pointed out that a Jewish "National Home" in Palestine would be a "stabilizing factor in the region of the Eastern Mediterranean", and that Jews generally were "logical supporters of democratic institutions", and therefore "look to

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2), 1948, 546-554, 546-547; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

[772] Ottolenghi, "Harry", 973.

[773] Ottolenghi, "Harry", 973; Watrin, *Machtwechsel*, 181.

[774] Ottolenghi, "Harry", 973.

[775] *Memorandum of Conversation, by Secretary of State*, May 12, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 972-976, 974; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011; Ovendale, *Britain*, 304; Jessup, *The Birth*, 292.

[776] Eban, "Israel", 435; W.E. Hart, "Middle East Problems", Int'l J., Vol. 1, 1946, 229-234, 233 (he also mentions the Jewish war effort); *Statement presented by the President's Special Counsel Clifford at the White House Meeting of May 12, 1948*; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 977-978, 978; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

the democratic governments of the world" for support.[777] More than a decade later, in 1948, one of the most ardent supporters of a new Jewish State, the President's Special Counsel Clifford, explained to Truman in his *Proposals for American Policy in Palestine*: "Jewish Palestine is strongly orientated towards the United States and away from Russia and will remain so...", unless, of course, the USA stopped actively supporting partition.[778] It was these supporters of Zionism who prevailed.

President Truman was indeed re-elected, and Israel did become an important US ally in the Middle East and beyond. This would suggest that violating international law had paid off for the USA.

Given the turmoil of the last 60 or more years in the Middle East following the creation of the State of Israel, that assessment is, however, called into doubt. The imposition of a new state in 1948 has led to sustained instability in the region. In addition to many, more minor skirmishes, there have been three major Arab-Israeli wars. In terms of military expense and animosity towards it in this resource-rich area, there is no doubt that, besides Israel, it has been the United States that has been paying and continues to pay the price for the non-negotiated settlement indirectly imposed on the Middle East by the USA and the Soviet Union by their premature recognitions. [779]

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[777] *The Secretary of State to the Ambassador in Turkey (MacMurray)* and *The Secretary of State to the Ambassador in the United Kingdom (Bingham),* both April 27, 1937; United States Department of State, FRUS, Diplomatic Papers, 1937, The British Commonwealth, Europe, Near East and Africa, 1937, 881-882; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

[778] *Memorandum by the President's Special Counsel (Clifford) to President Truman,* March 8, 1948; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 690-696, 696; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

[779] Jessup, *The Birth*, 289-291, 299-301; Jessup, the Acting US Representative at the UN at the time of Israel's recognition by the USA, writing in 1974, repeatedly implies that he believed the "abrupt" recognition of that state to have been a mistake. He refers to Truman's decision as a "surprise" and goes on to state that "Diplomacy by surprise is a dangerous practice. It may be useful from the point of view of domestic politics, but it can be ruinous to our relations with other countries" (at 289). He then goes on to state: "I am sure that no

Loy Henderson of the State Department predicted in 1947 that the "advocacy" for "the establishment in Palestine of a Jewish state... would...at this time... not be in the national interest of the United States", as it "would be certain to undermine our relations with the Arab, and to a lesser extent with the Moslem...world."[780] In March 2010, almost sixty-three years later, General Petraeus, Head of US Central Command, declared that the Arab-Israeli conflict was "fomenting anti-American sentiment" and "limits the strength and depth of U.S. partnerships with governments and peoples [in the Middle East]."[781]

bb) Soviet Union

Soviet motives for recognizing Israel early on seem, at first sight, more difficult to ascertain, especially given the fact that the Soviet Union had refused to recognize the Palestine Mandate.[782] The Communist Party regarded Zionism as counter-revolutionary and suspected it of being supportive of British imperialism.[783] Stalin

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knowledgeable official in Washington, or in the U.S. Mission in New York, thought that the abrupt recognition of the state of Israel would contribute to a peaceful settlement. The violent fighting that followed was no surprise...The United States boggled at the idea that Russia might have a place in the Middle East; now they are in, in spite of our efforts to keep them out, and largely because of our diplomatic blunders" (at 299, 301).

[780] *The Director of the Office of Near Eastern and African Affairs (Henderson) to the Secretary of State*, September 22, 1947; United States Department of State, FRUS, 1947, The Near East and Africa, 1947, 1153-1158, 1154; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 19/07/2011.

[781] General David Petraeus, then Head of US Central Command, currently Director of the CIA; in a statement before the Senate Armed Services Committee on March 16, 2010; available at: http://www.haaretz.com/news/u-s-general-israel-palestinian-conflict-foments-anti-u-s-sentiment-1.264910; accessed 19/07/2011.

[782] Ottolenghi, "Harry", 973; he claims the US State Department was "mystified" by Soviet policy on Israel; Ovendale (*Britain*, 230) claims that both "Britain and the United States were mystified" by Soviet support of Israel; John Bunzl, "Die Sowjetunion und der Nahe Osten- Elemente einer Analyse" *in Falscher Alarm? Studien zur sowjetischen Nahostpolitik*, John Bunzl, Alexander Flores, Fadel Rasoul (eds.), Wien: Wilhelm Braumüller, 1985,13-149, 32; Ben-Gurion, *Israel*, 26; Ben-Gurion describes his reaction to Gromyko's pro-Jewish stance at the UN as one of "great surprise".

[783] Weiß, "Die Entstehung, Teil 2", 786; Bethell, *The Palestine*, 310; Bunzl, "Die Sowjetunion", 32; *The Ambassador in the Soviet Union (Smith) to the Secretary of State*, May 31, 1948; reporting on a conversation between an "Arab colleague" and the Soviet Deputy Foreign Minister Vishinsky; United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 1081; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

himself was never a friend of the Jews, and the Jews in Russia were generally treated badly during his reign.[784]

Nevertheless, it must be remembered that parts of Zionist ideology were close to socialist ideals. The system of Kibbutzim is a prime example of socialist ideas being put into practice by the Jewish settlers in Palestine.[785] Many of the Zionists' policies were therefore much closer to Soviet ideology than the Arab feudal system dominant in the Arab states of the Middle East.[786] Israel therefore seemed a more likely future ally than the Arab monarchies surrounding it. Perhaps the creation of Israel could even lead Arabs to revolt against their demonstrably ineffective conservative rulers.[787] Certainly, those same Arab rulers never tired of warning of the "subversive" nature of any prospective Jewish state and regularly accused the Zionists of being communists who were trying to overthrow neighbouring regimes.[788]

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[784] Weiß, "Die Entstehung, Teil 2", 786-787.

[785] "Der Kibbuz in Israel", available at: http://schule.judentum.de/projekt/israelkibbuz.htm; accessed 09/07/2011; Gresh, *De quoi*, 68, 73-74; Gresh describes the great success of the moshavs and the kibbutzes; by 1944 about 100 of the 250 Jewish colonies in Palestine were "moshavs" (individual farms that nevertheless cooperate) and more than 110 were kibbutzes. Referring to these cooperatives, the French consul in Jerusalem warned as early as 1924 that Zionist endeavours in Palestine would only be successful if "old communist passions" were utilised by the movement.

[786] Bunzl, "Die Sowjetunion", 51-52; Gresh, *De quoi*, 80; Ulfkotte, *Kontinuität*, 43; Strawson, *Partitioning*, 16-17, 52-53, 119, 152-153; Hart, "Middle East", 230 (feudalism); Roosevelt, "The Partition", 8; Roosevelt also argues that the Soviets were interested in gaining influence within the Zionist community worldwide. Considering the way the Jews were treated in the Soviet Union -which surely achieved the opposite- that does not seem plausible, except as a very secondary motive.

[787] Oles M. Smolansky, "The Soviet Role in the Emergence of Israel" in *The End of the Palestine Mandate*, Wm. Roger Louis and Robert W. Stookey (eds.), London: I.B. Tauris & Co. Ltd., 1986, 61-78, 73; Strawson, *Partitioning*, 119.

[788] During a debate in the General Assembly on November 28, 1947, the representative of Iraq declared: "A Jewish State in Palestine would be a great danger to international peace in that part of the world. It would be a place where conflicting power politics would play a role. A recent trial of underground communists in Baghdad who were precipitating a subversive movement against the constitution of the country revealed that these communists were financed by Zionist sources in Palestine from the sale of all forms of merchandise, the returns of which were spent on subversive movements. This, by the way, is a method which was used by the Nazis before the last war. The immigrants coming into Palestine -the origins of many of whom are not known- carry the seeds of many a subversive movement into the Near East. This certainly will contribute to the disturbance of international peace and security in the Arab world"; UNGA, A/PV.126 of 28 November 1947; available at: http://unispal.un.org/UNISPAL.NSF/0/93DCDF1CBC3F2C6685256CF3005723F2; accessed 16/07/2011; Strawson, *Partitioning*, 52-53, 115-116; he also cites examples of incidents in the 1920s, when Arab delegations complained to both Britain and the United States that Jewish immigrants were "spreading Bolshevism".

The Soviet Union was also not as dependent on oil from the region as the USA, and especially Europe were, so that they did not have to worry too much about initial Arab reaction to Soviet policy.[789] The Soviet government realized that a Jewish state surrounded by Arab states would create a persistent source of instability in the Middle East, something that could possibly be exploited in years to come, perhaps even enabling the deployment of Soviet troops to the region in order to safeguard any future peace agreement.[790]

The main Soviet goal seems, however, to have been to force the British out of Palestine, and, if possible, out of this strategically important region altogether.[791] If it were possible to achieve this by demonstrating Britain's increasing weakness, there might be the added bonus of leading other dependent territories to revolt against British rule.[792] Immediately creating independent Jewish and Arab states was the best way of doing so. Any other arrangement posed the risk that the British might continue in some role in Palestine, something the Russians (and for a long time the Americans, too) suspected the British of secretly wanting to achieve.[793]

Based on different "sources" reporting to American officials, the USA came to similar conclusions, as far as Soviet motives were concerned:

> *It is our impression that the influence of the USSR in Palestine and the Near East is not at present very substantial. It is certain that they have virtually no influence within the Arab Government, not only because of the fear of those governments of*

[789] Rustow, "Defense", 274.
[790] Smolansky, "The Soviet", 73-74; Ovendale, *Britain*, 231; Latter, *The Making*, 364; Strawson, *Partitioning*, 123-124; Keay, *Sowing*, 369; Roosevelt, "The Partition", 8; Roosevelt also argues that the Soviets might have wanted to establish an international law principle of "partition" in order to be able to argue for the partition of states like Iran (Azeris) and Turkey (Kurds); Ovendale, *Britain*, 230, makes a similar argument. Given the danger such a principle in international law might have posed to the Soviet Union (and Russia) itself that argument is not convincing.
[791] Smolansky, "The Soviet", 66, 73; Bunzl, "Die Sowjetunion", 51; Ulfkotte, *Kontinuität*, 43; Ovendale, *Britain*, 231; Strawson, *Partitioning*, 130; Bethell, *The Palestine*, 312; Gresh, *De quoi*, 80.
[792] Smolansky, "The Soviet", 73.
[793] Weiß, "Die Entstehung, Teil 2", 786; Ulkotte, *Kontinuität*, 24; Strawson, *Partitioning*, 130.

> *communism,... Moreover, as indicated in conversations here with Asil and Fawzi, although there are some individuals in the Arab countries inclined towards communism, for religious reasons, as well as because of the low economic and cultural level of the masses of the population of the Arab countries, it is not apparent that communism has any substantial following among the masses. On the other hand, there are apparently a substantial number of Communists in the Irgun, the Stern Gang and other dissident groups. Beyond that the Soviet Union, through its support of partition and prompt recognition of Israel must be considered as having substantial influence with the PGI* [Provisional Government of Israel]...
>
> *Second, through its consistent support of the partition plan and its early recognition of Israel, the USSR is in a position to extend its influence through that state. This could be a very serious factor if the PGI should at any time feel that its vital interests were threatened by the mediator's proposals or by inadequate or inconsistent support by the US...*[794]

Furthermore, the British and the Americans had been informed that the Soviet Union was convinced that the "Jewish population" in Palestine wanted, and was "prepared for real independence and 'real democracy'", that the "Soviet objective was to get UK forces out of Palestine and neighboring countries", and that "Israel as ME state" was "most likely to offer opportunity for Soviet domination". According to these sources, the Soviet Union was preparing to "support both Jewish and Arab states against their reactionary leaders".[795] Lastly, continued fighting between the Jews and the Arabs with the "resultant chaos" would obviously be of "benefit to the USSR".[796]

The Soviet Union failed spectacularly in its endeavours as far as Israel was concerned. The British did "leave" Palestine and, in time, the rest of the region. This, however,

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[794] *The Acting Representative of the United States at the United Nations (Jessup) to the Secretary of State,* July 1, 1948; available at: United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 1180-1186, 1182-1183; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

[795] *The Ambassador in the Soviet Union (Smith) to the Secretary of State*, May 31, 1948; reporting on a conversation between an "Arab colleague" and the Soviet Deputy Foreign Minister Vishinsky; available at: United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 1081; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011; as far as British sources are concerned, see: 1081, fn. 1; a cable "from London" of June 1, 1948, based on reports by a "reliable Communist student source" in Bucharest is cited.

[796] *The Acting Representative of the United States at the United Nations (Jessup) to the Secretary of State,* July 1, 1948; available at: United States Department of State, FRUS, 1948, The Near East, South Africa and Africa, Volume V (Part 2), 1948, 1180-1186, 1182-1183; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 09/07/2011.

was not due to the creation of the State of Israel, but to the UK's steady decline and to its complete loss of interest in remaining in control of Palestine.

Instability in the region did become increasingly pronounced, once Israel had become a state, but that did not benefit the Soviets. They made very little headway in gaining any noteworthy support among the Arab states.

And, lastly, by helping to create Israel, the USSR, in the long run, helped provide the USA with a militarily strong ally in the region who was -to some extent- even prepared to do the United States' bidding in other parts of the world.[797]

C. Conclusion

By 1948 Palestine had seen two World Wars. Its size had decreased considerably, the territorially much larger part, Trans-Jordan, having become an independent state in 1946. In 1948 western Palestine was partitioned again, and Israel emerged as the new Jewish state. The Arabs of western Palestine, although forming 2/3 of the population, were in their majority left without a state and ended up as refugees in other states that were usually not very welcoming.

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[797] As Chomsky has explained, Israel sent military advisors to Central American and African countries in lieu of American advisors who could not be sent due to the US Congress' disapproval. Furthermore, Israel was the conduit for secret weapon deals with Apartheid South Africa in contravention of a UN arms embargo; Noam Chomsky, *Fateful Triangle, The United States, Israel and the Palestinians*, London: Pluto Press, 1999 (Updated Edition), 67-68; Kinzer, *Reset*, 157, 161-165; Kinzer also describes Israel's "work" in Honduras, Guatemala, Nicaragua, and Angola; he quotes General Peled, a member of the Israeli Knesset, as saying that Israel had, in Central America, become "the 'dirty-work' contractor for the U.S. Administration". He also describes an incident in 1956 when Israel managed to obtain a copy of Khrushchev's speech denouncing Stalin via an agent in Poland and subsequently handed it over to the United States. Of course, Israel also served as conduit for the secret deals between the USA and Iran which enabled the US government to channel money to the Nicaraguan *Contras* in contravention of a ban imposed by the US Congress (the infamous Iran-Contra scandal); Gabriel Kolko, *Another Century of War?*, New York: The New Press, 2002, 33.

For the Palestinian Arabs, the arrival of the British in 1917 with their promises of Arab independence and liberation from the Ottomans proved to be a catastrophe in the making. The end of the First World War brought peace conferences and resulted in the League of Nations. The rule of law in international relations was supposed to ensure stability and avoid another war. President Wilson's concept of self-determination further encouraged the peoples of the Middle East to hope for a better future.

For many Arabs in the Middle East all these promises proved to be hollow, for none more so than for the Arabs of Palestine. Their territory had been promised to the Jewish people in order to create a national home there without them ever having been consulted.

In Palestine the new world order based on legality became little more than a charade. British military occupation was replaced by a civil administration intent on implementing the "Balfour Declaration" at a time when there was no peace treaty with Turkey, a clear violation of the 1907 Hague Regulations, to which Britain was a party. This was followed by the Palestine Mandate which could not be reconciled with the Covenant of the League of Nations, itself a poor reflection of the concept of self-determination. In truth, Palestine was being colonized in a familiar way: alien, mostly European, white settlers arrived who bought the most fertile land while gaining ever more political influence locally, and in this case, internationally.

The British, having made promises to everybody, soon realized they would not be able to keep their side of the bargain. Once serious unrest erupted in the late 1930s, they veered from extreme to extreme, suggesting policies that angered the Arabs, then the Jews, but which had in common their inherent violation of the Palestine

Mandate's terms that had so carefully been drafted by the victorious Allies to suit their needs.

Thus the new era of legality proved to be a continuation of power politics in the guise of legality. Britain was treating Palestine as a dependent territory with little reference to international law. "Imperfections" in the application of international law were often acknowledged, but not acted upon. On other occasions, however, the law was re-interpreted to suit the perceived British needs, or simply ignored.

Despite all these efforts at disguising the violations of international law committed by the United Kingdom, there is no disguising the fact that they were to no avail. When Britain finally left Palestine, it could only point to a huge loss of resources, and a reputation tarnished by its inability to impose order in its mandated territory. International law had been damaged, but even more so Britain's prestige and influence. The French diplomat, Robert de Caix, had predicted as much in 1917. When confronted with British plans for Palestine, he reacted with incredulity: "The question of an English protectorate over a Jewish Palestine scarcely arises... The British government is certainly not dreaming of it...It would, for very thin profit, provoke serious difficulties."[798] The historian Elizabeth Monroe, referring to the Balfour Declaration, subsequently concluded: "Measured by British interests alone, it is one of the greatest mistakes in our imperial history."[799]

The end of the Second World War again produced many legal documents, and self-determination finally made it into the new UN Charter. Once more a new legal order was to be created, guaranteeing peace and security for all. Not for Palestine, however,

[798] Robert de Caix; as quoted by Barr, *A Line*, 35.
[799] Elizabeth Monroe; as quoted by Shlaim, *Israel*, 4.

where conflict erupted immediately. Britain, already desperate by 1939, and exhausted by the Second World War, gave up on Palestine. The Americans and, to a lesser extent, the Soviets were to become the major players in the Palestine conflict.

The Palestinian Arabs, without major lobbying groups abroad, were now even worse off than before. [800] Had they in the past at least been able to influence British officials on the ground, and thereby also get messages across to the British government, they had no way of communicating with the new super-powers who were making remote decisions and manipulating events at the United Nations. The Jews, having suffered the disaster of the Holocaust, were viewed with understandable sympathy. The many Jews living in America, whose lobbying was extremely effective, also ensured they got a hearing with at least one of the super-powers. This, in turn, made the Palestinian Arabs feel they were paying the price for crimes committed in Europe by Europeans against Europeans.

Again a committee was sent to Palestine. Although they did not participate in the UNSCOP investigations, everybody knew the Arab majority in Palestine opposed partition. As had become the norm they were ignored and partition became the favoured option. International law under the new legal order was of no great concern to the UN member states. Suggestions that it would be a good idea to have complicated legal questions adjudicated by the *International Court of Justice* were rejected, very likely because the major powers knew how problematic their legal case would be. The drama came to a head when the USA and the Soviet Union forced the issue by recognizing Israel in mid-May 1948. As has been shown these actions, too, were inconsistent with international law.

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[800] Woolbert, "Pan Arabism", 312.

The history of Palestine 1917-1948 is thus characterized by the rule of law in international affairs as understood by the Great Powers: useful when in compliance with general strategy, not of great consequence when it is not. This was a time of persistent outside intervention by the Great Powers of the day, leading to the creation of Israel. Balfour's summary of the Allies' behaviour, whereby they had "made no statement that was not admittedly wrong" and "made no declaration of policy, which at least in the letter" they had "not always intended to violate", was and remained a succinct description of the powerful nations' attitude to Palestine for the era examined here.[801]

Whatever guise international law took in Palestine one thing never changed: the wishes of the vast majority of Palestinians (90 % in 1917, 67 % in 1948) were of no relevance. As far as Palestine was concerned a colonization process that began in the aftermath of the First World War was completed in the aftermath of the Second World War, despite all the rhetoric of self-determination and the end of imperialism. Given this history it is not really surprising that Palestinian Arabs might seem rather sceptical when western powers demand they should finally adhere to international law norms.[802]

Nevertheless, the analysis of the events in Palestine between 1917 and 1948 also allows another, much more remarkable conclusion: the Great Powers' conscious decision to ignore international law in the pursuit of strategic goals, when dealing with Palestine, back-fired badly.

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[801] British Foreign Secretary Arthur Balfour in a Memorandum (11/08/1919) to Earl Curzon; extracts reprinted in Ingrams, *Palestine*, 73.
[802] Tolin, "The Palestinian", 338.

Britain paid dearly for its attempt at creating and holding on to a European outpost near the Suez Canal. Far from securing Britain's vital trade links, the Jewish immigration into Palestine led to incessant conflict there, severly draining Britain's depleting resources. The Soviet Union and the USA fared little better as a result of imposing a non-negotiated settlement on the Middle East by prematurely recognizing Israel as a state. The Soviet Union thereby helped create a strong US ally, while the USA is, more than sixty years later, still paying the price for its decision: it is strongly disliked in most Arab states, its citizens sometimes become terrorist targets, and it is involved in seemingly unending military conflict in the region.

The lesson taught by the unhappy history of Palestine is that to ignore, or worse, consciously breach international law is a choice that is not cost-free, even for the Great Powers. While we cannot know how the Middle East would have progressed had international law been respected, it does seem extraordinarily improbable that it could have been worse than what in fact transpired.

III. Suez (1956)*

The Cabinet agreed that we should be on weak ground in basing our resistance on the narrow argument that Colonel Nasser had acted illegally. The Suez Canal Company was registered as an Egyptian company under Egyptian law; ...From a narrow legal point of view, his actions amounted to no more than a decision to buy out the shareholders...[803]

...we have, from the beginning and at all times, strongly opposed the use of force as having no legal justification in any of the circumstances that had or have arisen hitherto...The Law Officers of the Crown, that is to say, the Attorney-General and the Solicitor-General, who take the same view...on the use of force, have never been consulted on that point, although the Attorney-General has privately made his views clear to the Lord Chancellor.[804]

"Suez" is generally seen as a watershed moment in the post- WW II history of the Middle East. The consequences of the nationalization of the *Universal Company of the Suez Maritime Canal* and the subsequent military intervention in Egypt in 1956 are generally viewed as symbolizing Britain's final retreat from its role as *the* major power in the region. France's and Britain's failure to achieve their goals and the humiliating climb-down, which especially Britain was subject to, are widely believed to have heralded the advent of the United States as the new hegemonic power in the wider Middle East.[805] This handing-over of the baton was spelt out explicitly in January 1957 in an address by President Eisenhower to Congress, in which he

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* A shorter version of this chapter was published as an article in the *Journal of African and International Law*, Vol. 4, No. 2, 2011, 327-370; the title of the article is "International Law Strikes Back or Suez 1956- A forerunner of the Iraq Fiasco in 2003".

[803] Minutes of the Cabinet Meeting, July 27, 1956 (CAB 128/30, Part 2, 469-470 (C.M. 54 (56); quoted in Geoffrey Marston, "Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice tendered to the British Government", ICLQ, Vol. 37, 1988, 773- 817, 776; Louise Richardson, "Avoiding and incurring losses: decision-making in the Suez Crisis", Int'l J., Vol. 47, 1991-1992, 370-401, 381.

[804] Gerald Fitzmaurice, Legal Advisor at the Foreign Office, in a note circulated to his colleagues at the Foreign Office, on November 1st, 1956 (FO 800/748); quoted by Marston, "Armed Intervention", 806.

[805] Philipp H. Gordon, "Trading Places: America and Europe in the Middle East", *Survival*, Vol. 47, 2005, 87-100, 95; Percy E. Corbett, "Power and Law at Suez", Int'l J., Vol. 12, 1956-1957, 1-12, 11-12; Gordon Martel, "Decolonisation after Suez: Retreat or Rationalization?", *Australian Journal of Politics and History*, Vol. 46, 2000, 403-417, 403; Allen, *Imperialism*, 457; Allain, *International*, 47, 70; Steven Z. Freiberger, *Dawn over Suez, The Rise of American Power in the Middle East, 1953-1957*, Chicago: Ivan R. Dee, Inc., 1992, 189, 206; Woollacott, *After Suez*, 16, 18, 108; Andrew Bacevich, "A Hell of a Spot", *London Review of Books*, Vol. 33, No. 12, 2011, 1-6, 6; available at: http://www.lrb.co.uk/v33/n12/andrew-bacevich/a-hell-of-a-spot/print; last accessed 12/12/2011.

outlined new American policy in the Middle East, later to be referred to as the *Eisenhower Doctrine*.[806]

The crisis of 1956, leading to the -as we now know collusive- use of force by Israel, France, and Britain against Egypt, moreover, also offers a striking example of the Great Powers' attitude towards international law: official statements were issued denouncing the illegality of Nasser's nationalization and Egypt's conduct in general, while in truth, they neither believed their own allegations, nor accorded international law more than a very subordinate role when deciding on their own course of action.

The Suez Crisis, moreover, was also the moment when the traditionally fraught Anglo-Egyptian relations deteriorated into open warfare. Britain had imposed itself on Egypt by "temporarily" occupying the country in 1882, followed by unilaterally declaring it a British Protectorate in 1914, and had been trying to hang on ever since.

After WW I Egypt -with a history as a state going back many thousands of years- had been condemned to watch on the sidelines, as newly created states like Iraq were first elevated to mandate status, and then became independent, while Egypt -despite a unilateral British declaration in 1922 to the contrary-[807] remained, in essence, a British Protectorate until 1936. Independence, when finally granted on the basis of the Anglo-Egyptian Treaty of 1936, was curtailed in many areas.[808]

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[806] "The Eisenhower Doctrine on the Middle East, A Message to Congress", January 5, 1957; available at: http://www.fordham.edu/halsall/mod/1957eisenhowerdoctrine.html; last accessed 15/08/2011; Bacevich, "A Hell", 6; Keay, *Sowing*, 441.

[807] *Correspondence Respecting Affairs in Egypt*, *Egypt No. 1*, Cmd. 1592 (1922), *Declaration to Egypt*, February 28, 1922 (the Declaration and some of the correspondence are also reprinted in *The Times*, 01/03/1922, 9); Allain, *International*, 55; Joseph A. Obieta, *The International Status of the Suez Canal*, The Hague: Martinus Nijhoff, 1970, 14.

[808] Anglo-Egyptian Treaty, 140 BFSP 192; especially Articles 7 and 8.

This sorry state of affairs was mainly due to the Suez Canal, Britain's vital link to India. Although Britain had vehemently opposed the Canal's construction,[809] it quickly became a "British waterway" once in existence.[810] Even after the Second World War, and after India had become independent in 1947, the Suez Canal remained important for trade, especially for the import of oil from the Middle East, on which Britain was dependent.[811] From the British point of view, the Canal was also a vital element in any military strategy to counter-act possible Soviet aggression. Thus, the Suez Canal seemed to remain a near insurmountable barrier to Egypt's full independence and sovereignty.

Although Anglo-Egyptian relations had thus been deteriorating for decades, tensions finally came to a head, once the King of Egypt had been deposed in 1952. The new military rulers were not willing to accept a continued British say in Egyptian matters. Even though the 1954 *Suez Canal Base Agreement* between Egypt and Britain seemed to offer the chance of a rapprochement, any such hopes were dashed by the events of 1956, which culminated in the nationalization of the *Universal Company of the Suez Maritime Canal,* the organization responsible for running the Canal. That move was Nasser's retaliation for promises made by the Americans and the British which were later revoked.[812]

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[809] Barry Turner, *Suez 1956, The Inside Story of the First Oil War*, London: Hodder & Stoughton Ltd., 2006, 18, 21; he describes the British Prime Minister Palmerston as a "Francophobe" and as "determined that the canal should not be built" (at 21); André Siegfried, "The Suez: International Waterway", Foreign Aff., Vol. 31, 1952-1953, 605-618, 609; Keith Kyle, *Suez*, London: Weidenfeld & Nicolson, 1991, 12 (the House of Commons, in 1858, voted 290:62 in favour of offering no support to the construction of the Canal); Mansfield, *A History*, 87.

[810] Turner, *Suez 1956*, 26 (by 1875 about 4/5 of the traffic through the Canal was British-flagged); Siegfried, "The Suez", 610 (in the period 1870-1880 76 % of the tonnage going through the Canal was British-flagged).

[811] Benjamin Shwadran, "Oil in the Middle East Crisis", Int'l J., Vol. 12, 1956-1957, 13-23, 13, 15-17; he points out that Britain -at the time- derived 80 % of its oil "for home consumption" from the Middle East (at 16).

[812] These promises were made in relation to the construction of the Aswan Dam. It was evident that Egypt would not be able to shoulder such an enormous project on its own and would therefore be dependent on external financial support. The British and the Americans had promised such support and also agreed to support Egypt's loan application to the World Bank. However, on July 19, 1956, the Americans informed the Egyptians

For Britain, having been severely weakened by WW II and fighting to retain its world power status, the Suez Crisis was more than just a commercial issue: it became a matter of prestige.[813] Would Britain be able to defend its interests in the Middle East, or would the country be reduced to the status "of the Netherlands"? [814]

France, although no longer significantly involved in Egypt, and evidently in decline as a world power, also had interests in Northern Africa it wanted to defend. Having already been dislodged as a major power in most of the Middle East, France was desperately hanging on to Algeria, where it was fighting an escalating insurgency. Egypt -under the new military rulers- was thought to be actively supporting the military opposition to French rule there. France, too, was thus not only fighting for the significant stake held by French shareholders in the Suez Canal Company, but was in truth trying to retain a semblance of being a great power.

Early on and undeterred by questions of international legality, France and Britain concluded that the nationalization of the *Universal Company of the Suez Maritime Canal*, announced by President Nasser on July 26, 1956, would not be allowed to stand. As will be shown both states were keen to use this opportunity to cut Nasser, an annoying Arab nationalist who, irritatingly, also was an adherent of neutralism in the

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that they were withdrawing their support for the project and the British immediately followed suit (Gamal Abdel Nasser, "The Egyptian Revolution", Foreign Aff., Vol. 33, 1954-1955, 199-211, 204-205; Roy Fullick/Geoffrey Powell, *Suez. The Double War*, Barnsley: Pen & Sword Military, 1979, 2006 (reprint), 10-11; Turner, *Suez 1956*, 150-151, 155-156, 175-176; Ulfkotte, *Kontinuität*, 15; Robert R. Bowie, *Suez 1956. International Crises and the Rule of Law*, Oxford: Oxford University Press, 1974, 2, 12; Bacevich, "A Hell", 3, 4; Humphrey Trevelyan, *The Middle East in Revolution*, London: Macmillan & Co. Ltd., 1970, 49, 53-55; Kyle, *Suez*, 82-85; Freiberger, *Dawn*, 150-152, 154-155; Keay, *Sowing*, 429-430, 433; Salt, *The Unmaking*, 167; Allen, *Imperialism*, 451-452; Allain, *International*, 58; Woollacott, *After Suez*, 37; Geoffrey McDermott, *The Eden Legacy and the Decline of British Diplomacy*, London: Lesley Frewin Publishers Ltd., 1969, 132).

[813] Fullick/Powell, *Suez*, 190-191; Kyle, *Suez*, 43; Freiberger, *Dawn*, 49; Iris Borowy, *Diplomatie als Balanceakt. Die Nahostpolitik der Eisenhoweradministration 1953-1957 im Schatten der Suezkrise*, Rostock: Universität Rostock, 1998, 589; Richardson, "Avoiding", 386-387.

[814] Chancellor of the Exchequer (and future Prime Minister) Harold Macmillan; as quoted by Freiberger, *Dawn*, 163; Fullick/Powell, *Suez*, 15; Salt, *The Unmaking*, 173; Kyle, *Suez*, 43; Borowy, *Diplomatie*, 476.

escalating Cold War, down to size -a goal that could best be achieved by intervening militarily in Egypt in order to depose or at least humiliate him.

The third ally, Israel, had its own issues with Egypt and its President. Israel, unsatisfied with the situation created by the Armistice Agreements of 1949, was keen to strike out against Egypt, so as to prevent that country from becoming a threat to its own interests in the future. The delivery of Soviet arms to Egypt led Israeli military planners to develop possible strategies for a preventive attack as early as 1955. Furthermore, Egypt's rulers were continuing to disrupt Israel's economic development by barring Israeli shipping from the Suez Canal and the Straits of Tiran in defiance of international condemnation.

These three states came together to launch an attack on Egypt. Months of French-Israeli negotiations -which Britain joined at a later stage- resulted in the Israeli incursion into the Sinai on October 29, 1956. As pre-arranged and agreed between the three states at Sèvres only a week earlier this was followed by a swift Anglo-French ultimatum to both sides, which was certain to be accepted by Israel and rejected by Egypt.

On October 31, 1956, Britain and France launched their own attack on Egypt. Isolated within the international community, the two allies quickly came under intense pressure to stop the fighting. The Soviet Union, and more surprisingly, the United States, used the UN as a forum to vigorously oppose the military action in Egypt.

In great financial distress, Britain buckled first, and Britain and France agreed to a ceasefire as of midnight on November 6, 1956. By the end of December 1956 British and French troops had been withdrawn from Egypt, followed by the Israelis in March

1957. None of the Anglo-French goals had been achieved. As will be shown the Israelis fared only slightly better.

The Chapter will commence with the trilateral agreement at Sèvres. In order to be able to fully evaluate Anglo-French arguments the Egyptian conduct as far as the Suez Canal and the Suez Canal Company will then be examined. It will be demonstrated that the allegations of illegality, as far as Egypt's actions were concerned, were mostly unfounded and certainly hypocritical.

Realizing this, the British and the French justified their use of force on other grounds, not directly related to the nationalization of the Suez Canal Company. These official justifications will be scrutinized. It will be argued that neither the alleged necessity of protecting nationals, or nationals' property, nor a right to undertake "police action" in order to protect the Canal against the (anyway pre-arranged) Israeli-Egyptian conflict provided any legal justification for the Anglo-French intervention. This was well-known in British government circles at the time, as the legal advisors to the government, who had not even been informed of the tripartite agreements reached at Sèvres, were nevertheless unanimous in their verdict that the use of force against Egypt was illegal.

Israel's official and unofficial justifications for attacking Egypt, mainly based on self-defence, will then be examined. The expansive view of self-defence adopted by the Israeli government will be shown to have also been contrary to international law, its true motives will be exposed as being even less justifiable.

Following on from the legal analyses, the international reactions to, and the results of the illegal tripartite use of force will be examined. It will be shown that not only were

the three allies' actions vehemently condemned by the vast majority of states, but the illegal use of force against Egypt actually resulted in disaster, especially for Britain and France.

Far from humiliating Nasser, it was Britain and France that were humbled. Not only did the Suez Canal Company remain nationalized, but Nasser's stature had actually grown as a result of simply having survived the Great Powers' onslaught. He became an Arab hero. Britain's and France's prestige in the Middle East would never recover from this episode, which is why the Suez Crisis is seen as a pivotal event in the history of the Middle East.

Israel fared only slightly better. Its international reputation tarnished, it did nevertheless manage to open the Straits of Tiran to its shipping. However, Israel had neither managed to increase its territory, nor had it been able to enforce regional stability on its own terms, as evidenced by two further Arab-Israeli wars in the next seventeen years.

International law is often viewed as having had a "good war". The principled stand taken by the United States at the United Nations in opposing three close allies on the basis of legal arguments was deemed to have reinforced the international legal order. And, indeed, it is true that the United States, vehemently supported by -among others- the Soviet Union, successfully opposed the use of force against Egypt, officially mainly on legal grounds.

In this chapter it will, however, also not be overlooked that these seemingly benign protestations on the part of the United States and the Soviet Union should not be taken literally. After all, the US Administration had only recently organized coups in Iran

(1953) and Guatemala (1954), and was at the time of Suez trying to inspire a coup in Syria, actions obviously not undertaken in the spirit of upholding the international legal order.[815] Similarly, the Soviet Union, which at the time of the attack on Egypt was invading Hungary on spurious grounds, seems an unlikely champion of international law. Therefore a brief analysis of what really motivated American and Soviet opposition to the "tripartite aggression" will be provided.

Despite the dubious role played by international law's defenders during the Suez Crisis, Suez nevertheless does serve to expose the folly of blindly pursuing the national interest while paying scant respect to international law. The three allies, mainly, however, the Great Powers Britain and France, paid a very high prize for their course of action. They went to war in the national interest, but ended up doing their countries a disservice. British, French, and Israeli politicians, not international law, had lost touch with reality.[816]

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[815] Selwyn Lloyd, *Suez 1956, A personal account*, London: Book Club Association, 1978, 217, 241; in his account of the Suez Crisis, the former British Foreign Secretary makes exactly that point in respect of Guatemala. He complains that the American UN Ambassador had approached him with a "high moral note" during the Suez crisis. Lloyd then explicitly refers to Guatemala and poses the question whether the USA had not reacted in exactly the same way as the British and the French had by ignoring the Security Council. Later, Lloyd again refers to the American actions in Guatemala and "elsewhere", and concludes that the American actions demonstrated "what they [the Americans] thought, when their interests were concerned, of this theoretical excommunication of the use of force."

[816] Woollacott, *After Suez*, 136.

A. The Suez War

1. Countdown to the military conflict[817]

Nasser's nationalization of the Suez Canal Company on July 26, 1956, had led to international conferences and negotiations, but without achieving the results the British and French were hoping for. In the autumn of 1956 ongoing secret bilateral and trilateral negotiations on a joint attack on Egypt were therefore intensified. Britain, France, and Israel had already come a long way in agreeing the way forward. Worried about the trustworthiness of the British in the face of American opposition to any military action, the French had utilized a visit by the Israeli Defence Secretary Peres to Paris in order to procure French weapons to advance the idea of French-Israeli collaboration in an attack on Egypt.[818] Hesitant at first, because there were worries that Israel might be left in the lurch by the Europeans,[819] the Israeli government agreed to the French proposal after having obtained some French concessions.[820] Now the question arose whether the British would join the French-Israeli conspiracy.[821]

This was a dangerous proposition for the British. Following the creation of Israel, Britain had been trying hard to develop close relations with the Arab states in the

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[817] A more detailed account of the state of Anglo-Egyptian relations, the developments leading up to the actual Suez Crisis, and, subsequently, to the military conflict can be found in Turner, *Suez 1956;* Bowie, *Suez 1956*; Martin Gilbert, *Israel, A History*, New York: William Morrow and Company, Inc., 1998; McDermott, *The Eden*; Herzog, *The Arab-Israeli*; Woollacott, *After Suez*, 43; D.A. Farnie, *East and West of Suez, The Suez Canal in History 1854-1956*, Oxford: Clarendon Press, 1969; Kyle, *Suez.*

[818] Fullick/Powell, *Suez*, 68-69; Turner, *Suez 1956,* 262-263; Bowie, *Suez,* 56-57; Gilbert, *Israel,* 312; McDermott, *The Eden,* 145; Herzog, *The Arab-Israeli*, 114; Woollacott, *After Suez*, 43.

[819] Ben-Gurion is generally thought to have been the most hesitant, being distrustful of the Europeans, especially of the British (Fullick/Powell, *Suez*, 93; Turner, *Suez 1956.* 257-258, 263, 268, 282); at times he apparently even suspected a British plot to discredit Israel (Turner, *Suez 1956*, 282); Defence Secretary Peres and Chief of Staff Dayan seem to have been much more enthusiastic; Fullick/Powell, *Suez*, 71-75; Turner, *Suez 1956*, 263 (Peres).

[820] Turner, *Suez 1956*, 263, 268; Bowie, *Suez 1956*, 56-57; McDermott, *The Eden*, 145; Herzog, *The Arab-Israeli*, 114.

[821] It is generally assumed that the British were informed of the French-Israeli agreement in detail on October 14, 1956; Turner, *Suez 1956*, 279-282; Freiberger, *Dawn*, 181; Woollacott, *After Suez*, 41.

region. It seemed almost foolhardy to risk these relations by entering into an alliance with Israel in order to attack Egypt.[822] Not only would any such collaboration -if it became public knowledge- severely strain Anglo-Arab relations, it might also endanger pro-British regimes in states like Iraq and Jordan.[823]

Nevertheless, in a sign of the British government's desperation, Eden agreed to join the French and the Israelis and to work out a plan for jointly attacking Egypt.[824] At the Israeli Prime Minister Ben Gurion's insistence the agreement –subsequently arrived at between October 22 and October 24, 1956 in Sèvres-[825] was put down in writing: the "*Protocol of Sèvres*" was born.[826]

As agreed at Sèvres, the Israelis entered Egyptian territory in the Sinai on October 29, 1956. The Anglo-French ultimatum to the combatants was issued and -exactly as arranged and foreseen -the Israelis accepted the terms, while the Egyptians -who were being asked to stop the fighting and pull back ten miles from the Suez Canal, while foreign troops were occupying parts of their country- rejected them.[827] On October 31, 1956, the French and British subsequently launched their own attack on Egypt. By

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[822] Bowie, *Suez 1956*, 57; Richardson, "Avoiding", 375; Woollacott, *After Suez*, 43; Mansfield, *A History*, 257.
[823] In a meeting between Lloyd, French, and American diplomats at the Foreign Office on July 27, 1956, the British Foreign Secretary had declared that "HMG thought it imperative to keep Israel out of this situation"; *Telegram from the Embassy in the United Kingdom to the Department of State*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 13-15, 14; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Turner, *Suez 1956*, 259; Woollacott, *After Suez*, 43-44.
[824] Fullick/Powell, *Suez*, 79-80; Turner, *Suez 1956*, 282-283; Gainsborough, *The Arab-Israeli*, 73; Bowie, *Suez 1956*, 53; McDermott, *The Eden*, 148; Herzog, *The Arab-Israeli*, 114; Woollacott, *After Suez*, 41; Keay, *Sowing*, 437-439.
[825] Fullick/Powell, *Suez*, 81-86; Salt, *The Unmaking*, 174; Turner, *Suez 1956*, 289-299; Bowie, *Suez 1956*, 59; Allain, *International*, 64; Lloyd, *Suez*, 181-189; the former British Foreign Secretary confirms the meeting at Sèvres and describes the discussions that took place, but downplays their significance; Kyle, *Suez*, 315-330; Freiberger, *Dawn*, 183-184; Karen Scott, "Commentary on Suez: Forty Years On", J. Armed Conflict L., Vol. 1, 1996, 205-215, 208; Gilbert, *Israel*, 317; Woollacott, *After Suez*, 44.
[826] An English translation of the *Protocol of Sèvres* is re-printed in Kyle, *Suez*, Appendix A, 565-566; a summary can be found in Fullick/Powell, *Suez*, 85; and in Turner, *Suez 1956*, 298-299.
[827] McDermott, *The Eden*, 150; McDermott, a civil servant in the Foreign Office charged early on with preparing an attack on Egypt, describes the ultimatum as "the apex of hypocrisy and absurdity".

midnight of November 6, 1956, a ceasefire had come into force, and by March 1957 all foreign troops had been withdrawn from Egypt.

Could these actions undertaken by Britain, France, and Israel possibly be legal under international law? When examining this issue it will be necessary to distinguish between the official justifications put forward by these three states and the agreement reached at Sèvres.

Although, as will be shown, not directly relevant to the question of whether the "tripartite aggression" was lawful, it will be illuminating to have a closer look at the lawfulness of Egyptian actions in regard of the Suez Canal: the nationalization of the *Universal Company of the Suez Maritime Canal,* and the blocking of the Suez Canal to Israeli shipping. These were, after all, the supposedly lawless Egyptian actions that had caused the crisis in the first place.

2. Egyptian conduct regarding the Suez Canal

a) The Suez Canal in international law: applicable legal instruments

From the outset everything to do with the Suez Canal was subject to intense international scrutiny. The link between the Mediterranean and the Red Sea was, for the Europeans, a significant short-cut on the voyage to the Far East, the east coast of Africa, and the territories along the Persian Gulf.

At first the British -apprehensive as far as the French motives were concerned and worried about European competition- vehemently opposed the scheme, developed by

the Frenchman de Lesseps, and lobbied against it at every opportunity. Because of de Lesseps's influence with the Khedive, the Suez Canal was nevertheless constructed.

In 1854 de Lesseps was granted the concession to construct the canal; in a further concession of 1856 the rights, privileges, and the main principles of the not yet existent *Universal Company of the Suez Maritime Canal* were laid down. In 1866 the by then existing company was granted the concession for running the Canal for a period of 99 years as of its opening (1869). This concession was confirmed by *Imperial Firman*, granted by the Ottoman Sultan on March 19, 1866.

The opening of the Canal immediately attracted the interest of the major maritime powers of the time. The Ottoman ruler, at the time already severely weakened, was, for exactly that reason, willingly accepted as the Canal's ultimate sovereign. The Sultan invited the major maritime powers to Constantinople, in order to agree tonnage and tolls. On December 1, 1873, the Turkish delegate to the conference declared

> *2. That no modification, for the future, of the conditions for the passage through the Canal shall be permitted,... except with the consent of the Sublime Porte, which will not take any decision on this subject without previously coming to an understanding with the principle Powers interested therein.* [828]

The British quickly became the dominant users and therefore attempted to increase their influence on the running of the canal. The first opportunity arose when, in 1875, the Khedive's financial situation forced him to sell his 44 % stake in the *Universal Company of the Suez Maritime Company* to the British government. The events of

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[828] *The Final Report of the Commission*, December 18, 1873, which included the Declaration of December 1, 1873; for extracts (in English) see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 45.

1882 then gave the British the opportunity to "temporarily" occupy Egypt, and, subsequently, the canal was run by them.

This in turn led the other European states, especially the French, to demand safeguards that ensured the canal's openness to all.[829] Now it was the British who were reluctant to have any kind of international oversight over the canal.[830] Nevertheless, negotiations ensued, which were to lead to the *Convention of Constantinople*, the Suez Canal Convention, of October 29, 1888. Its main purpose was to guarantee that

> *The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.*[831]

The British, formerly advocates of "internationalisation", were now unwilling to permit any outside involvement in the running of the canal and jealously guarded their position of strength in Egypt.[832]Article VIII, which required the "Agents in Egypt of the Signatory Powers of the present Treaty...to watch over its execution", and to meet once a year proved too much for the British. They therefore entered the following reservation to the treaty:

> *The delegates of Great Britain, in offering this text as the definitive rule to secure the free use of the Suez Canal believe it is their duty to announce a general reservation as to the applicability of its provisions in so far as they are*

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[829] Siegfried, "The Suez", 610; Allain, *International*, 51; Obieta, *The International* 10-12; Farnie, *East*, 325, 330, 339; he points out that most of the restrictive provisions were directed against the British, not the Ottomans, because the other Europeans feared British dominance.

[830] Robert Delson, "Nationalization of the Suez Canal Company: Issues of Public and Private International Law", Columb. L. Rev., Vol. 75, 1957, 755-786, 758; Siegfried, "The Suez", 710; Halford L. Hoskins, "The Suez Canal as an International Waterway", AJIL, Vol. 37, 1943, 373-385, 376; writing in 1943, he describes the Egyptian role during the negotiations as follows: "Inasmuch as the Government of Egypt during the period of occupation obviously stemmed from Whitehall, it is apparent that Egypt was to be merely a stalking horse"; Bowie, *Suez 1956*, 4; Farnie, *East*, 329.

[831] Article I, *Convention of Constantinople.*

[832] Delson, "Nationalization", 758; Hoskins, "The Suez Canal as an International Waterway" (1943), 376-377; Bowie, *Suez 1956*, 4; Farnie, *East*, 329, 340.

> *incompatible with the transitory and exceptional state in which Egypt is actually found and so far as they might fetter the liberty of action of the government during the occupation of Egypt by the British forces.*[833]

This, of course, meant that -due to the fact that the "temporary" British occupation of Egypt was in reality no such thing- the treaty was inoperable.[834] A conclusion confirmed by the French declaration, which, in accepting the British reservation, stated that the restrictions imposed by Britain applied reciprocally.[835]

Only in 1904, as a result of the Anglo-French *Entente Cordiale*, did the Convention of Constantinople finally come into force.[836] In the Declaration of April 8, 1904, the British agreed not to interfere with the French in Morocco, in exchange for the French not interfering with the British in Egypt. Article 6 of that Declaration stated:

> *In order to ensure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the treaty of the 29th October, 1888, and that they agree to their being put into force, The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of article 8 of that treaty will remain in abeyance.*[837]

According to Article 1 of the "Secret Articles", annexed to the *Entente Cordiale,* Article 6 of said Declaration was to remain in force even "in the event of either Government finding themselves constrained, by force of circumstances, to modify their policy in respect of Egypt or Morocco", meaning, of course, annexation of those territories.[838]

While the British had remained resistant to any international oversight over the running of the Canal, as evidenced by the rejection of Article 8 (2), they had,

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[833] Allain, *International*, 53.
[834] Hoskins, "The Suez Canal as an International Waterway" (1943), 377; Bowie, *Suez 1956*, 4; Farnie, *East*, 341; Allain, *International*, 47.
[835] Allain, *International*, 53.
[836] Delson, "Nationalization", 758; Hoskins, "The Suez Canal as an International Waterway" (1943), 377; Bowie, *Suez 1956*, 4; Allain, *International*, 53; Obieta, *The International*, 12-13.
[837] Allain, *International*, 53-54.
[838] Allain, *International*, 54.

nevertheless, now at least agreed to keep the canal open to all users. Needless to say, the Anglo-French discussions also reveal that the Egyptians and the Ottomans were of little relevance, as far as the Canal, running through, and part of Ottoman/Egyptian territory, was concerned.

At the outbreak of WW I, on August 5, 1914, Egypt, still "temporarily" occupied by Britain, declared that the canal would be open to all commercial vessels.[839] As will be shown this was a promise the British, authorized by the Egyptian government to run the Canal, would not uphold for very long.

Having in late 1914 already established a British Protectorate in Egypt, the British quickly sought to legalize their supreme position, as far as the Canal was concerned, once the War was over.[840] In all the relevant peace treaties the former enemies were forced to acknowledge and accept Britain's privileged position as successor to the Ottomans in regard of the Suez Canal.[841] As far as Turkey was concerned, Article 99 of the *Treaty of Lausanne* stipulated that the *Convention of Constantinople* was to "enter again into force ... (6) ...subject to the special stipulations provided for by Article 19 of the present Treaty". In Articles 17-19 of the *Treaty of Lausanne* Turkey had renounced all rights as far as Egypt was concerned as of November 5, 1914.[842]

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[839] Farnie, *East*, 530; Allain, *International*, 54.
[840] Delson, "Nationalization", 758-759.
[841] Article 152, *Treaty of Versailles* (with Germany): "Germany consents, in so far as she is concerned, to the transfer to His Britannic Majesty's Government of the powers conferred on His Imperial Majesty the Sultan by the Convention at Constantinople on October 29, 1888, relating to the free navigation of the Suez Canal." Virtually identical provisions were included in the *Treaty of Saint-Germain* (peace treaty with Austria, Article 107) and the *Treaty of Trianon* (peace treaty with Hungary, Article 91).
[842] Hoskins, "The Suez Canal as an International Waterway" (1943), 379; Hoskins describes this process of signing treaties with the defeated powers after WW I as follows: "This substitution of British for Ottoman authority merely formalized a situation which had existed in most essentials since 1882 and in all since 1914".

Britain, having thus successfully ensured its dominant position as far as the Suez Canal was concerned, was not likely to give up this prize voluntarily, especially not in the face of Egyptian demands for independence.

In Britain's unilateral declaration of Egyptian "independence" of February 28, 1922, the Suez Canal was to be excluded from any such venture.[843] The Declaration stated that "until such time as it may be possible ...to conclude agreements"

> *a) The security of the communications of the British Empire in Egypt;* and
>
> *b) The defence of Egypt against all foreign aggression or interference, direct or indirect; ...*

would be matters that remained "absolutely reserved" to the "discretion of His Majesty's Government"; "pending the conclusion of such agreement, the *status quo*...shall remain intact."[844]

This farcical version of independence unsurprisingly not satisfying the Egyptians, Britain was, however, soon forced to grant Egypt a status more akin to true independence: the 1936 Anglo-Egyptian Treaty, whose provisions superseded the 1922 declaration and finally terminated the British occupation of Egypt, was negotiated and ratified. Nevertheless, the British, via Article VIII of said treaty, managed to salvage their Suez Canal role:

> *In view of the fact that the Suez Canal, whilst being an integral part of Egypt, is a universal means of communication between the different parts of the British Empire, His Majesty the King of Egypt, until such time as the High Contracting Parties agree that the Egyptian Army is in a position to ensure by its own resources the liberty and entire security of navigation of the Canal, authorizes His Majesty the King and Emperor to station forces in Egyptian territory in the vicinity of the Canal.*

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[843] Delson, "Nationalization", 759.

[844] *Correspondence Respecting Affairs in Egypt, Egypt No. 1*, Cmd. 1592 (1922), *Declaration to Egypt*, February 28, 1922, "Principle" 3; the Declaration and some correspondence is also reprinted in *The Times*, 01/03/1922, 9.

If the British had any say in the matter that state of readiness on the part of the Egyptian Army would surely never arrive.

It has convincingly been argued that Article VIII of the 1936 Treaty in itself amounted to a violation of Articles IX, X, and XII of the *Convention of Constantinople,* as there was no legal basis for the stationing of British troops along the Canal, once Egypt had become truly independent. Even Egypt's consent could not alter that legal situation, because the Convention's main purpose had been to guarantee the Powers' equal treatment, so that Britain could no longer claim a special status once Egypt had become a sovereign state.[845]

The international law rules governing the passage through the Suez Canal were further illuminated by a judgement of the *Permanent Court of International Justice* in 1923. In the *Case of the S.S. Wimbledon*,[846] which dealt with the German conduct in regard of the Kiel Canal, the Court outlined the general principles as far as international canals are concerned. The court clarified the distinction between national and international canals, a problem that results from the fact that canals, by definition, run through and are part of the sovereign territory of a state that has often also had to carry the costs of their construction.[847] There is therefore no inherent reason to suppose that a canal, even if vitally important, should be assumed to be subject to an international law regime separate from that of the "host" state.[848]

While assuming that a canal was an "internal waterway of the state holding both banks", the Court went on to point out that a different approach had to be adopted

[845] Obieta, *The International*, 83.
[846] *Permanent Court of International Justice*, *Case of the S.S. Wimbledon*, Judgement, 17/08/1923.
[847] *Permanent Court of International Justice*, *Case of the S.S. Wimbledon*, Judgement, 17/08/1923, 23, 25.
[848] Obieta, *The International*, 25.

when the canal had been subject to an international agreement.[849] As of the conclusion of an international agreement, which allowed the free passage of ships of other contracting parties, a canal became subject to an international legal regime.[850] Thus the Kiel Canal devolved from being an "internal" German "waterway" to being, as of 1919, an international waterway by virtue of Article 380 of the *Treaty of Versailles*.[851] In its judgement, the court explicitly referred to the similarities of the Kiel, Suez, and Panama Canals' legal position.[852]

Application of the *Permanent Court of International Justice's* decision to the Suez Canal therefore allows the definite conclusion that the Suez Canal -by virtue of the *Convention of Constantinople*- had changed its status from being an internal, Egyptian, or more precisely, Ottoman waterway, to being a waterway subject to an international legal regime which limited Egypt's "exercise of sovereignty" as far as the Canal was concerned.[853] There can be no doubt that the principles developed by the court also applied to British conduct in relation to the Suez Canal.

Following WW II, during which Britain had remained in control of the Canal, the "ungrateful" Egyptians were no longer prepared to allow British soldiers to be stationed on Egyptian territory. Not only had the victorious powers, once again, promised self-determination to the peoples of the world, but former colonies, such as India, had actually gained full independence. The British, as ever unwilling to give up the Suez Canal, would have to go. In 1951, Egypt, after fruitless negotiations,

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[849] *Permanent Court of International Justice, Case of the S.S. Wimbledon*, Judgement, 17/08/1923, 23; R. R. Baxter, "Passage of Ships through International Waterways in Time of War", BYIL, Vol. 31, 1954, 187-216, 191; Obieta, *The International*, 25; Ralph H. Smith, "Beyond the Treaties: Limitations on Neutrality in the Panama Canal", Yale Stud. World Pub. Ord., Vol. 4, 1977-1978, 1- 37, 5-6; Ruth Lapidoth, "The Reopened Suez Canal in International Law", Syracuse J. Int'l L. & Com., Vol. 4, 1976-1977, 1-49, 1-7; Norman J. Padelford, "The Panama Canal and the Suez Crisis", Am. Soc'y Int'l L. Proc., Vol. 51, 1957, 10-20, 17.
[850] Baxter, "Passage", 191; Obieta, *The International*, 25.
[851] *Permanent Court of International Justice, Case of the S.S. Wimbledon*, Judgement, 17/08/1923, 23-25.
[852] *Permanent Court of International Justice, Case of the S.S. Wimbledon*, Judgement, 17/08/1923, 25-28.
[853] *Permanent Court of International Justice, Case of the S.S Wimbledon*, Judgement, 17/08/1923, 25 (quote).

unilaterally abrogated the 1936 Treaty,[854] a move rejected by Britain as a treaty violation. [855]

Based on Britain's persistent violation of Article VIII and its Annex,[856] as well as its perpetual interference in internal Egyptian affairs during WW II, the abrogation could arguably be justified.[857] In 1954 the issue, however, became moot, when the Anglo-Egyptian *Agreement Regarding the Suez Canal Base* was concluded on October 19. According to its Article 2, the treaty of 1936 was "terminated"; Article 1 stipulated that "Her Majesty's Forces" had to be "completely withdrawn from Egyptian territory...within...twenty months".

Nevertheless, the British again managed to retain a foothold, as far as the Canal was concerned. Article 4 allowed the British a right of return to the Suez Canal Base in the event of an attack on a member of the Arab League and/or Turkey, while Article 3

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[854] Turner, *Suez 1956*, 87; Allen, *Imperialism*, 441; Siegfried, "The Suez", 614; Farnie, *East*, 698 (the decision was taken by Egypt's Parliament in a unanimous vote); Selak, "The Suez Canal", 493. In 1947 Egypt had already asked the Security Council to intervene, to no avail; for details of the proceedings before the UN Security Council, see: Herbert W. Briggs, "Rebus Sic Stantibus Before the Security Council: The Anglo-Egyptian Question", AJIL, Vol. 43, 1949, 762-769; Farnie, *East*, 638; Obieta, *The International*, 17; Selak, "The Suez Canal", 493.

[855] In response to the Egyptian abrogation of the 1936 Treaty, the British Foreign Secretary Morrison issued the following statement (on October 9, 1951): "His Majesty's Government do not recognize the legality of a unilateral denunciation of the 1936 Treaty and of the condominium agreements, and they maintain their full rights under those treaties,..."; see: "British Adherence to 1936 Treaty Rights", *The Times*, 10/10/1951, 4; see also: "Abrogation Has 'No Legal Force'", *The Canberra Times*, 10/10/1951, 1.

[856] According to the Annex to Article 8 of the 1936 Treaty, the British were allowed to station 10,000 troops, 3,000 airmen, and 400 pilots in the Canal Zone; in 1949/1950 the British were constructing new housing for 20,000 troops, and in 1954, after the *Suez Canal Base Agreement* of 1954 had been concluded, 80,000 British troops had to be withdrawn; Farnie, *East*, 605, 632, 693, 714-715; Kyle, *Suez*, 18, 21, 40. By 1946 the Suez Canal Base Zone had become "the largest military base in the world" (120 miles x 30 miles); Turner, *Suez 1956*, 78; Freiberger, *Dawn*, 59.

[857] The most notorious example of British interference occurred in February 1942 (the so-called "February Incident"), when the British told the King of Egypt he would be forced to abdicate if he did not sack a particular Prime Minister (the British subsequently surrounded the Palace with tanks). They suspected both the King and his Prime Minister of having pro-Axis-Powers leanings.This conduct on the part of the UK arguably violated Articles 4, 5, and 7 of the Anglo-Egyptian Treaty of 1936. Egyptian "notables" signed a resolution accusing Britain of violating the treaty of friendship at a time when Britain was at war "defending the democracy and liberty of nations"; Turner, *Suez 1956*, 64; Farnie, *East*, 627; he claims this event "destroyed the moral foundations of the Anglo-Egyptian alliance of 1936"; Nasser, "The Egyptian", 202.

obliged the Egyptians to maintain the base's facilities for the duration of the treaty.[858] Article 8 of the Treaty re-affirmed the validity of the 1888 *Convention of Constantinople.*

As far as international law is concerned, the Suez Canal was therefore still subject to the *Convention of Constantinople* of 1888 when the crisis of 1956 erupted. Whether the concessions of 1854 and 1866, the Declaration of 1873 and/or the 1954 Anglo-Egyptian Treaty are relevant to judging Egypt's conduct under international law is contentious and will now be examined in more detail.

b) Nationalization of the *Universal Company of the Suez Maritime Canal*

On July 26, 1956, President Nasser announced the immediate nationalization of the Suez Canal Company. Article 1 of the Presidential Decree of the same day stated that:

> *The Suez Maritime Canal Company, S.A.E. is nationalized. All money, rights and obligations of the company are transferred to the State. All organizations and committees now operating the company are dissolved.*
> *Shareholders and holders of constituent shares shall be compensated in accordance with the value of the shares on the Paris Stock Market on the day preceding the enforcement of this law.*
>
> *Payment of compensation shall take place immediately the State receives all the assets and property of the nationalized company.*[859]

The western powers, especially the USA, Britain, and France were taken by surprise. On August 2, 1956, they issued a "Tripartite Statement" which outlined a first - *official*- legal assessment of the Egyptian move:

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[858] According to Article 12, the duration was fixed at seven years.
[859] Law No. 285 (1956); see "Suez Canal Company Nationalization Law, July 26th, 1956"; also available at: http://www.suezcanal.gov.eg/Files/Suez%20Canal%20Company%20Nationalization%20Law.pdf; last accessed 15/08/2011.

> *1... The Universal Suez Canal Company has always had an international character in terms of its shareholders, Directors and operating personnel...*
>
> *2...The present action involves more than a simple act of nationalization. It involves the arbitrary and unilateral seizure of an international agency which has responsibility to maintain and to operate the Suez Canal...*
>
> *3. They consider that the action taken by the Government of Egypt, having regard to all the attendant circumstances, threatens the freedom and security as guaranteed by the Convention of 1888...*[860]

The critics of Egypt's act of nationalization in truth realized that their case was a difficult one to argue from a legal point of view. By 1956 it had become the overwhelming view that -as far as public international law was concerned- it was a state's prerogative to nationalize domestic companies.[861] In a detailed examination of the legality of nationalizations in international law based on state practice,[862] Foighel, in 1956/1957, came to the conclusion that "the nationalization of foreign property is legal in itself in international law."[863] Following the Second World War, many states had decided to nationalize key industries, be it for ideological reasons as in Poland, Bulgaria or Romania, or be it in an attempt to support those business sectors damaged

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[860] *Tripartite Talks London, 2-4 August 1956, Statement* (Cmd. 9853); reprinted in D.C.Watt, *Documents on the Suez Crisis, 26 July to 6 November 1956*, London: Royal Institute of International Affairs, 1957, 50-51; extracts also reprinted in Obieta, *The International*, 90.

[861] This general principle was already implicitly accepted by the *Permanent Court of International Justice*; in *The Case Concerning the Factory at Chorzow*, the Court stated: "The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation- to render which lawful only the payment of fair compensation would have been wanting;..." (Judgement, 13/09/1928, at 46-47). The Soviet Foreign Minister Shepilov also emphasized the Egyptian nationalization's legality, when discussing the issue with US Secretary of State Dulles in August 1956 (Turner, *Suez 1956*, 237); Allain, *International*, 59; Corbett, "Power", 6; Salt, *The Unmaking*, 173; Harry Calvert, "The Nationalization of the Suez Canal Company in International Law", U.W. Austl. Ann. L. Rev., Vol. 4, 1957-1959, 30-57, 48; Delson, "Nationalization", 761; Thomas T. F. Huang, "Some International and Legal Aspects of the Suez Canal Question", AJIL, Vol. 51, 1957, 277-307, 303-307; Burton Andrews, "Suez Canal Controversy", Alb. L. Rev., Vol. 21, 1957, 14-33, 16; McDermott, *The Eden*, 134.

[862] Isi Foighel, "Nationalization, A Study in the Protection of Alien Property in International Law", Parts I and II, Nordisk Tidsskrift Int'l Ret., Vol. 26, 1956, 89-152; Part III, Nordisk Tidsskrift Int'l Ret., Vol. 27, 1957, 143-204.

[863] Foighel, "Nationalization, Part I", 147-149; "Nationalization, Part III", 143 (quote); similarly, in 1929 already, John Fisher Williams concluded that international law basically did not even prohibit expropriation without compensation, although he did accept there were some exceptions to this rule; in *Chapters on Current International Law and the League of Nations*, London: Longmans, Green & Co., 1929, 147-187, 184-187; J. Mervyn Jones argued that a foreign government's right to intervene in favour of nationals who were also shareholders in companies nationalized by other states was limited to cases where there were "no local remedies" and there already was "a real loss, already accrued;" in "Claims on Behalf of Nationals who are Shareholders in Foreign Countries", BYIL, Vol. 26, 1949, 225-258, 256-257; Huang, "Some", 303-307.

by the war, or seen as vital to a state's future, as was the case with nationalizations carried out in Holland, Japan, New Zealand, and Austria.[864]

Notably, the United Kingdom and the United States recognized other states' right to nationalize property located in their territory. In 1951, although denying that this principle applied to the *Anglo-Iranian Oil Company*, the British Foreign Secretary Morrison had nevertheless declared that the British government did, "of course, not dispute the right of a government to acquire property in their own territory."[865] Similarly, in a note of September 7, 1948, to the Romanian Government, while objecting to provisions in that country's nationalization legislation, the United States did confirm that it had "consistently recognized the right of a sovereign power to expropriate property subject to its jurisdiction and belonging to American nationals."[866] Of course, France[867] and the United Kingdom[868] had themselves, since 1945, already nationalized large sections of their industries.

This right was only curtailed insofar as the act of nationalization was generally not viewed as having extra-territorial effect, meaning that a foreign state harbouring some of the nationalized company's assets was not required to give effect to the nationalization as far as these assets were concerned.[869] Furthermore, the legality of

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[864] For a more detailed look at these nationalizations, as well as other nationalizations, such as those carried out in India, Burma, and Mexico, see: Foighel, "Nationalization, Part I", 134-147.
[865] Herbert Morrison, Hansard, Persia (Anglo-Iranian Oil Company), HC Deb 01 May 1951 vol 487 cc1008-1014, c1012; available at: http://hansard.millbanksystems.com/commons/1951/may/01/persia-anglo-iranian-oil-company#S5CV0487P0_19510501_HOC_290; accessed 11/08/2011.
[866] "Romanian Nationalization Legislation Considered Violation of Peace Treaty, U.S. Note to Romania Delivered on September 7", *Department of State Bulletin*, Vol. 19, 1948, 408.
[867] Beginning in 1945, France nationalized its leading banks, its airways, 2/3 of its insurance industry, its gas and electricity "undertakings", and its coal mines; for details, see: Foighel, "Nationalization, Part I", 138-139.
[868] Beginning in 1947, the United Kingdom nationalized its coal industry, its transport industry, its electricity "undertakings" and its steel industry (with the notable exception of the American-owned Ford works in Dagenham); for details, see: Foighel, "Nationalization, Part I", 139-140.
[869] Delson, "Nationalization", 760-763; Foighel, "Nationalization, Part I", 114-115.

nationalizations was sometimes viewed as being dependent on fair compensation being offered to foreign shareholders or owners.[870]

This basic legal situation would obviously make it much more difficult for opponents of the nationalization of the Suez Canal Company to argue that this act was in itself a violation of public international law. The Statement of August 2, 1956, therefore foreshadowed the frequently repeated, somewhat complicated legal arguments put forward by Egypt's opponents in the following months: on the one hand it was argued that the Suez Canal Company was not, or at least not really, an Egyptian, but -as its name implied- an international company, which in turn meant the Egyptian government had no right to nationalize it.

On the other hand, the actually separate issues of the Suez Canal itself and the Suez Canal Company were, most likely deliberately, treated as one, resulting in the impression that the nationalization of the Suez Canal Company actually amounted to a nationalization of the Canal itself, thereby threatening the free passage guaranteed to the international community in the Convention of 1888.[871]

A related, but not identical argument, put forward -among others- by British Prime Minister Eden in a speech to the House of Commons on August 2, 1956, was that the nationalization violated the concessions granted to the Suez Canal Company in 1856 and 1866. Although at first sight it might seem implausible that the violation of a concession granted to a private company could be construed to amount to a breach of

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[870] This seems to have been the position of the US government; in the note of September 7, 1948, to the Romanian government (already quoted in the main text), the US government stated that, while recognising the right of other states to nationalize property within their jurisdiction, it had "refused the validity of such expropriations in cases ...where provisions for equitable valuation and prompt, adequate and effective compensation are not provided by the expropriating Government.", *Department of State Bulletin*, Vol. 19, 1948, 408; Calvert, "The nationalization", 50.

[871] Corbett, "Power", 6.

public international law, it was nevertheless argued that, by virtue of their being mentioned in the Preamble of the Convention of 1888, these concessions had themselves become part of, and protected by the treaty, and as such by public international law.[872]

As was well-known in government circles on both sides of the Atlantic,[873] these arguments were highly problematic, and the Americans -unofficially- took the line that the nationalization of the Suez Canal Company in itself was perfectly legal,[874] a conclusion the British Cabinet had also reached early on. According to the minutes of the Cabinet meeting of July 27, 1956, the day after the nationalization,

> *The Cabinet agreed that we should be on weak ground in basing our resistance on the narrow argument that Colonel Nasser had acted illegally. The Suez Canal Company was registered as an Egyptian company under Egyptian law;...From a narrow legal point of view, his actions amounted to no more than a decision to buy out the shareholders...*[875]

Nevertheless, the Cabinet concluded during this meeting:

> *Her Majesty's Government should seek to secure, by the use of force if necessary, the reversal of the decision of the Egyptian Government to nationalise the Suez Canal Company.*[876]

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[872] Anthony Eden, *Full Circle, The Memoirs of the Rt. Hon. Sir Anthony Eden,* London: Cassel & Company Ltd., 1960, 474-475; Corbett, "Power", 6.

[873] In a private conversation with TIME Magazine's publisher H. Luce, French Prime Minister Mollet admitted, on August 10, 1956, that his legal advisors had still not come up with a legal argument to fault Nasser's nationalization of the company; Borowy, *Diplomatie*, 493 (incl. fn. 129).

[874] *Memorandum by the Assistant Legal Advisor for United Nations Affairs (Meeker), Egyptian Nationalization of the Suez Canal Company*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 16-18; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Bowie, *Suez 1956*, 31-32, 34; he quotes Eisenhower as stating that Egypt's "inherent right" to nationalize the Suez Canal Company could "scarcely be doubted" (at 31); Eisenhower's view is confirmed by a memorandum of July 28, 1956, which states: "In discussion of the legal situation, the President said it seemed to him State was taking the stand that Egypt was within its rights"; *Memorandum of a Conversation with the President, White House, Washington, July 28, 1956, 10 a.m., Supplementary Note*; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 27-28, 28; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Bacevich, "A Hell", 4.

[875] CAB 128/30, Part 2, 469-470 (C.M. 54 (56); quoted in Marston, "Armed Intervention", 776; Richardson, "Avoiding", 381.

[876] CAB 128/30, Part 2, 469-470 (C.M. 54 (56); quoted in Marston, "Armed Intervention", 777.

aa) "Nationality" of the Suez Canal Company

Despite this unofficial agreement that the Suez Canal Company was an Egyptian company, it was sometimes officially argued that it was in truth an international company.[877] By nationalizing it, the Egyptian Government had consequently violated international law.

Although the *Universal Company of the Suez Maritime Canal* was international in name, it was hardly possible to argue it was such in legal terms. Many of the provisions in the company's concessions and statutes were vague. Nevertheless, it was repeatedly asserted that the company was, for legal purposes, Egyptian rather than international, or as some suggested, French.

Confusion arose as a result of Articles 3 and 73 of the company's statutes of 1856 which stated that, while the seat of the company was Alexandria, its "administrative domicile" was to be Paris, "where all writs" had to be served. The company was organized as a "joint stock company, by analogy to the joint stock companies authorized by the French Government", and internal company disputes were to be settled before the Court of Appeals in Paris (Article 74).[878]

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[877] Despite the conclusions reached by the Cabinet on July 27, 1956, the Lord Chancellor, on July 31, 1956, presented some ministers with a "Legal Opinion" in which he *-inter alia-* stated that "the Company was of an international character and to nationalise it was itself a breach of international law" (LCO 2/5760); quoted in Marston "Armed Intervention", 779; (Law) Professor Goodhart (Oxford), in a letter to *The Times* of August 10, 1956, argued that despite its registration in Egypt "there can be no doubt that in fact the Suez company has always been international", *The Times*, 11/08/1956, 7; In a "sound and television broadcast" of August 8, 1956, Eden referred to the Suez Canal Company as an "international company", and Nasser's nationalization as "an act of plunder"; quoted at length in Connell, *Most*, 117-118; a view apparently shared by the former British Foreign Secretary Lloyd, *Suez*, 92; the French Foreign Minister Pineau compared the Suez Canal Company to the Bank for International Settlements, and claimed that Egypt had "no more right to nationalize the Company than Switzerland would have to nationalize the Bank"; quoted by Delson, "Nationalization", 771.

[878] *Statutes of the Universal Suez Canal Company*, January 5, 1856; for (original) French text and extracts translated into English (incl. Articles 3, 73, 74), see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 11-31.

This initial uncertainty -which did allow de Lesseps to claim immunity from Egyptian jurisdiction in 1875, after having previously claimed immunity from French jurisdiction in 1872-[879] had actually been reduced considerably by the concession of 1866,[880] confirmed by the Ottoman Sultan in a *firman* of the same year.[881] Its Article 16 stated:

> *The Universal Suez Canal Company, being Egyptian, is governed by the laws and customs of the country; however, with respect to its status as a company and relations between its shareholders, it is, by special agreement, governed by the laws, which, in France, govern joint-stock companies. It is agreed that all disputes of this nature will be judged in France by arbitrators subject to appeal, as over-arbitrator, to the Imperial Court in Paris....*
>
> *Disputes which arise between the Egyptian Government and the Company will also be placed before local courts and decided according to the laws of the country and by treaties.* [882]

In the following decades various courts had no problem in asserting the company's Egyptian "nationality".[883] The French *Tribunal de Cassation*, in a decision of February 23, 1874, agreed[884] with an official Ottoman protest against a lower court's decision- that

> *la Compagnie universelle du canal maritime de Suez, dont le siège principal se trouve établi à Alexandrie, est égyptienne,...* [885]

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[879] Obieta, *The International*, 91-92.
[880] Allain, *International*, 50.
[881] For (English) text of the *firman*: see *Imperial Firman of March 19, 1866*; *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 41.
[882] *Concession of February 22, 1866* (emphases by author); for (original) French text and extracts translated into English (incl. Article 16), see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 32-40.
[883] Huang, "Some", 288; Huang also points out that, during that "formative period", the British and the French governments were in agreement that the Suez Canal Company was Egyptian, and the Company consequently "submitted to the jurisdiction of local Egyptian courts".
[884] Obieta, *The International*, 92.
[885] Obieta, *The International*, 92.

In the same vein, in the case of *Credit Alexandrin v. Cie Universelle du Canal Maritime de Suez*, the *Mixed Court of Appeals* in Alexandria decided on February 26, 1940, that

> *D'après les actes de concessions et les statuts, la nationalité égyptienne de la Compagnie du Canal de Suez ne saurait être l'objet d'une sérieuse contestation...*[886]

Attempts at equating the company's international composition -as far as its shareholders and directors were concerned- and the fact its statutes were based on French law with an ill-defined status as an "international" company not subject to Egyptian laws were therefore not convincing.[887]

Claims that the Suez Canal Company had attained an international status by virtue of the Declaration of 1873 were just as unconvincing.[888] The argument that the Ottomans had "internationalized" the running of the Canal and thereby created an "international status" for the Suez Canal Company by declaring an obligation not to change the "conditions for the passage" without first coming to an "understanding with the Principal Powers"[889] had one severe defect: the *Suez Canal Company*, though in existence for about 15 years at the time of the Declaration, was not mentioned in it.

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[886] Obieta, *The International*, 92; the UK Ambassador at the time of the Suez Crisis, Trevelyan, recalled a conversation he had had with the Egyptian Foreign Secretary Dr. Fawzi, during which Dr. Fawzi pointed out that a few years prior to the Suez Crisis "the lawyer for the British Government had claimed that it [the Suez Canal Company] was an ordinary Egyptian national company, without universal character" in a case before the "Mixed Courts"; in *The Middle East*, 80.

[887] Delson, "Nationalization", 771-772; Farnie, East, 722; Allain, *International*, 62; Obieta, *The International*, 7, 93.

[888] *The Final Report of the Commission*, December 18, 1873, which included the Declaration of December 1, 1873; for extracts (in English) see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 45.

[889] Huang, "Some", 283-284; he, however, argues that case. He claims that the Declaration of 1873 was a "legally binding obligation" on the part of the Ottomans, and had "established *per se* an objective international status for the Suez Canal Company"; a similar argument is put forward by Andrews, "Suez", 25-26; and by the former British Foreign Secretary Lloyd, *Suez*, 272 (Reprint of his speech of October 5, 1956, Appendix III).

The argument is further undermined by the fact that issuing a Declaration concerning the "conditions for the passage" at a conference dealing with the tonnage of ships and tolls obviously refers to such conditions as "tonnage" and "tolls" and not to the question of who runs the Canal. The Declaration actually seems to imply a very subordinate role for the Company, which is simply obliged to implement the decisions arrived at by the Ottoman government following consultation. [890]

For legal purposes the *Universal Company of the Suez Maritime Canal* was Egyptian, and therefore, as Article 16 of the concession of 1866 had already pointed out, subject to Egyptian laws.[891] Based on the overwhelming acceptance of a state's prerogative to nationalize companies residing within its territory there can be little doubt that Egypt was well within its rights to nationalize an Egyptian company as far as public international law was concerned. In his detailed study on the legality of nationalizations in international law, Foighel, in order to support his argument in favour of a state's right, in international law, to nationalize domestic property, actually explicitly mentions Egypt's nationalization of the Suez Canal Company because, he claims, it was viewed as legal "by most of the states which took part in the London Conference of August 1956" on the future of the Suez Canal Company.[892]

This assessment seems to be have been shared by the British Prime Minister. In a telegram Eden sent to Eisenhower on July 27, 1956, in reaction to the nationalization of the Suez Canal Company, and reflecting his Cabinet's views outlined earlier, he wrote:

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[890] Bowie, *Suez 1956*, 4; Bowie claims that the procedure envisaged in the *Declaration* of 1873 was actually never followed in practice, which further undermines that declaration's status; Calvert, "The Nationalization", 47.

[891] Delson, "Nationalization", 782; D. H. N. Johnson, "The Eden Memoirs in International Law", Nordisk Tidsskrift Int'l Ret., Vol. 31, 1961, 181-197, 190-191; Padelford, "The Panama", 13; Trevelyan, *The Middle East*, 80-81 (Trevelyan was the UK Ambassador in Cairo at the time of the Suez Crisis).

[892] Foighel, "Nationalization, Part I", 151.

We should not allow ourselves to become involved in legal quibbles about the rights of the Egyptian Government to nationalize what is technically an Egyptian company, ...[893]

bb) Violation of the *Convention of Constantinople* (1888)

As already pointed out another argument put forward to justify the accusation that Egypt, by nationalizing the Suez Canal Company, had violated international law was an alleged breach of the 1888 Convention of Constantinople.

This assertion was based on two arguments:

Firstly, by nationalizing the *Suez Canal Company*, Egypt had violated the Convention by threatening free passage through the canal, an obligation which could only be fulfilled by an international company running the canal's affairs; this argument also seemed to imply the canal -as an international public utility- itself was "internationalized" in the sense that is was no longer subject to Egyptian sovereignty.[894]

[893] As quoted by himself in Eden, *Full Circle*, 428; earlier he, nevertheless, refers to the Suez Canal Company as an "international" company (at 425-426); Mc Dermott, *The Eden*, 134; McDermott, at the time a civil servant in the Foreign Office, responds to Eden's comments as follows: "The FO legal adviser's firmly, but vainly, expressed view that there were no 'quibbles' and that the company was indeed Egyptian, not just technically, was brushed aside."

[894] The Lord Chancellor seems to have adhered to this line of argument; in an "expanded memorandum" to the Attorney-General and the Solicitor-General of October 15, 1956, he stated: "It is clearly within the doctrine of self-defence to resist by force an attempt to annex national territory by invasion. It cannot be right, or good international law, that international territory could be annexed by invasion and that the countries affected are powerless to act..."; he then subsumes Nasser's actions under these definitions and concludes that Nasser had committed an "invasion of the international nature of the Canal" (LO 2/825); quoted by Marston, "Armed Intervention", 793; Eden, *Full Circle*, 475; Eden, unsurprisingly, also makes that argument; which is also supported by Siegfried, "The Suez", 616; George A. Finch, "Post-Mortem on the Suez Crisis", AJIL, Vol. 51, 1957, 376-380, 377; Finch alleges that the nationalization violated Article XII of the Convention, which obliged the contracting parties not to seek any advantage in relation to the other contracting parties. This argument is not convincing, because that obligation clearly referred to "international arrangements", which obviously do not include domestic acts of nationalization.

Secondly, the company's status as manager of the Canal's affairs was protected by the incorporation of the 1856 and 1866 concessions into the *Convention of Constantinople.*[895]

Both arguments fail to convince.

- International company as only possible guarantor of free passage

The first argument, probably deliberately, confused the status of the company with the status of the canal. The Egyptian government repeatedly stated that it was going to fulfil its obligations under the *Convention of Constantinople* and would therefore guarantee the international community's right of free passage through the Canal.[896] As the months went by following the nationalization of the company, the Egyptians -to the dismay of the French and the British- kept their word.[897] The one exception was Israel, an example often cited by the British and the French.

As will be shown, it is contentious whether the barring of the Canal to Israeli shipping actually was a violation of the 1888 *Convention of Constantinople.* Israeli shipping had been barred since 1948, a matter the Security Council had repeatedly dealt with

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[895] The Attorney-General and the Solicitor-General seem to have adopted this line of argument; in a memo to the Foreign Secretary of August 2, 1956, they had concluded that it was "implicit in the Convention of 1888 that so long as the concession existed the operation of the Canal should not be entrusted to any single power, but that is should be operated by the Canal Company for the benefit of all nations" (FO 800/747); quoted in Marston, "Armed Intervention", 780; this view was also shared by the former Prime Minister (Eden, *Full Circle*, 474-475) and the former British Foreign Secretary (Lloyd, *Suez*, 272-273; Reprint of his speech of October 5, 1956, Appendix III). This view was, however, rejected by the Legal Advisor at the Foreign Office; Marston, "Armed Intervention", 781. The same argument is also outlined by Calvert, "The Nationalization", 42 (who, however, also disagrees with it) and was put forward by US Secretary of State Dulles before and during the first London Conference in August 1956 (Freiberger, *Dawn*, 166; Borowy, *Diplomatie*, 498; and Obieta, *The International*, 100). During a Security Council debate on the Suez issue, the British representative declared, referring to the Suez Canal Company: "...although technically registered in Egypt, (the company) was in substance as in name an international company enjoying concessions built into an international treaty"; the French representative concurred, claiming that the company "formed an essential part of the international system recognized by the 1888 Convention"; quoted by Huang, "Some", 280; Obieta, *The International*, 99-100; he quotes the Belgian representative making a similar statement during the debate in the Security Council.

[896] Gainsborough, *The Arab-Israeli*, 100; Andres, "The Suez", 32.

[897] Allain, *International*, 58; Borowy, *Diplomatie*, 547.

since then. Nevertheless, the so-called "international character" of the *Suez Canal Company* prior to Nasser's nationalization decree (and, it must be added, a large number of British soldiers in the Canal Zone until 1956) had obviously not offered Israel the kind of protection the British and French were now eager to claim.[898]

That the Suez Canal itself was part of Egyptian territory and therefore subject to Egyptian sovereignty and jurisdiction was, from the very beginning, beyond doubt.[899] In 1855 the Khedive, in a dispatch to the Ottoman Sultan, declared:

> *Il n'y aura lieu de réclamer de la Compagnie concessionnaire du canal des deux mers aucune garantie concernant la souveraineté territoriale, qui restera intacte en Turquie. ...* [900]

The Khedive's claim that Turkish sovereignty had remained intact was supported, among others, by Ferdinand de Lesseps, the Khedive's contractual partner.[901] In January 1856 de Lesseps declared that

> *La concession faite à une compagnie d'ouvrir et d'exploiter un passage à travers le territoire égyptien, avec declaration de neutralité, ne dénationalise pas ce passage.* [902]

A statement he re-confirmed in 1865 in a "*Note sur la jurisdiction dans l'Isthme*" to the French Ambassador, in which he maintained that "Egyptian juridiction applied to all persons of any nationality working in the Canal".[903]

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[898] A point also made by the Israeli UN Ambassador during a conversation at the US Department of State; he stated that "the discrimination by Egypt against Israeli shipping began while the British were still in control of the Suez base and the Canal Company in the 'plenitude' of its rights"; *Memorandum of Conversation, Department of State, Washington, August 9, 1956, 3:40 p.m.;* United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 178-181, 178; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; J. F. McClure, "The Law of International Waterways: An Approach to a Suez Canal Solution", U. Pa. L. Rev., Vol. 105, 1956-1957, 714-744, 717, 726; Bowie, *Suez 1956*, 5-6; Farnie, *East*, 716; Kyle, *Suez*, 38, 79; Borowy, *Diplomatie*, 43.

[899] Obieta, *The International*, 93-94.

[900] Obieta, *The International*, 94 (emphasis by author).

[901] Siegfried, "The Suez", 608-609; Obieta, *The International*, 94.

[902] Obieta, *The International*, 94 (emphasis by author).

[903] Obieta, *The International*, 94.

This acceptance of Egyptian sovereignty over the Suez Canal was then repeatedly re-confirmed in the following decades.

Article 9 of the concession of 1866, which was confirmed by Ottoman *firman* of March 19, 1866, maintained the Egyptian police's jurisdiction as far as the Suez Canal and its environs were concerned. [904]

Article XIII of the 1888 Convention of Constantinople stated that

> *With the exceptions of the obligations expressly provided by the clauses of the present treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the firmans, are in no way affected.*

Furthermore, Article XII maintained that the "rights of Turkey as territorial power are reserved".

The *Permanent Court of International Justice* in the *Case of the S.S. Wimbledon* also used the Suez Canal as an example of when an international treaty had "placed upon the exercise of the sovereignty of certain states restrictions", which, of course, underlines the fact that sovereignty as far as the Suez Canal was concerned had not been withdrawn from Egypt.[905]

Similarly, Article 8 of the Anglo-Egyptian Treaty of 1936 confirmed once more that the Suez Canal was "an integral part of Egypt", a statement repeated verbatim in Article 8 of the *Suez Canal Base Agreement* of October 19, 1954.

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[904] Article 9 of the Concession of February 22, 1866: "Le Canal Maritime et toutes ses dépendances restent soumis à la police egyptienne..."; for the French text see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 36.

[905] *Permanent Court of International Justice*, *Case of the S.S. Wimbledon*, Judgement 17/08/1923, 25.

There can also be no doubt that the Canal itself was Egypt's, and not the Suez Canal Company's property. [906] Article 10 of the 1854 Concession and Article 16 of the 1856 Concession both made it plain that the Canal would revert to the Egyptian government when the respective concession came to an end, without any compensation for the Suez Canal being due. [907] Furthermore, the Ottoman government intervened forcefully when de Lesseps tried to sell the Canal in 1872, pointing out that he had no authority to negotiate any sale.[908]

Any argument based on an "internationalization" of the Suez Canal, resulting in it no longer being subject to Egyptian sovereignty, therefore finds no basis in law, [909] which in turn means that the mere act of nationalization could not violate the *Convention of Constantinople*.[910] The British Ambassador in Cairo at the time of the Suez crisis later simply concluded: "Nasser did not violate the 1888 Convention."[911]

- Suez Canal Company is itself protected by the Convention of Constantinople

The second argument -that the company's right to manage the canal's affairs was protected by the *Convention of Constantinople* by virtue of the inclusion of the concessions granted to the company in that Treaty-[912] is even more specious.[913]

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[906] Obieta, *The International*, 96.
[907] *Firman of Concession, November 30, 1854* and *Charter of Concession and Book of Charges,* January 5, 1856; for (original) French text see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 1-4 and 4-10.
[908] Obieta, *The International*, 95.
[909] Delson, "Nationalization", 772-775; Huang, "Some", 300-301; Obieta, *The International*, 95; Padelford, "The Panama", 13.
[910] Calvert, "The Nationalization", 47.
[911] Trevelyan, *The Middle East*, 80.
[912] This "complicated" argument was put forward, because by 1956 it had become overwhelmingly accepted that the violation of a concession was in itself not an issue of public international law; in the *Anglo-Iranian Oil Case* (UK v. Iran, Judgement 22/07/1952, I.C.J. Rep. 1952, 93, 111-113) the ICJ had already rejected the British argument that the concession granted by Iran to the *Anglo-Iranian Oil Company* was of a double nature, namely a contract between company and state on the one hand, and between Iran and the UK on the other. The Court declared: "The Court cannot accept the view that the contract signed between the Iranian Government and the

Supporters of this argument invariably pointed to the Preamble of the *Convention of Constantinople* which included the sentence:

> *wishing to establish,...,a definite system destined to guarantee at all times, and for all Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this Canal has been placed by the Firman...confirming the Concessions...*[914]

By describing the Convention as "completing the system" which had been set up to "guarantee the free use of the Suez Maritime Canal", the signatories to the Treaty had, the argument continues, agreed that the concessions, which ensured the Suez Canal Company's running of the Canal, were a vital component of the "system" which secured free passage through the Canal.[915]

This line of argument is in itself not very convincing. It is difficult to justify the reliance on the preamble of a treaty in order to create obligations, which are not

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Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom." Similarly, the *Permanent Court of International Justice*, in *The Mavrommatis Concessions Case*, (Judgement 30/08/1924, 11-15) described this dispute over concessions as having started off as a "dispute...between a private person and a State" (12); only because Greece claimed the treatment of its citizen by the UK had violated the Palestine Mandate, and therefore international law, did it become an issue under public international law. In the *Serbian Loans Cases* the *Permanent Court of International Justice* (Judgement 12/07/1929) declared (at 41): "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country"; Calvert, "The Nationalization", 41-42; Delson, "Nationalization", 762; Obieta, *The International*, 96; Padelford, "The Panama", 14.

[913] A view also adopted by the Assistant Legal Adviser Meeker in his memo of July 27, 1956; he states: "The concession agreement relating to the Suez Canal appears to be an agreement between the Government of Egypt and the Company. There is evidently no agreement of governments regarding the concession"; *Memorandum by the Assistant Legal Advisor for United Nations Affairs, Egyptian Nationalization of the Suez Canal Company*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 16-18, 16; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Obieta, *The International*, 100.

[914] Preamble of the *Convention of Constantinople* (emphasis by author).

[915] During a Security Council debate on the Suez issue the British representative declared, referring to the Suez Canal Company: "...although technically registered in Egypt, (the company) was in substance as in name an international company enjoying concessions built into an international treaty"; the French representative concurred, claiming that the company "formed an essential part of the international system recognized by the 1888 Convention" (quoted by Huang, "Some", 280); Obieta, *The International*, 99-100; he quotes the Belgian representative making a similar statement during the debate in the Security Council; Delson, "Nationalization", 769 (he outlines this argument, but disagrees with it).

mentioned in the operative part of the treaty text.[916] Furthermore, in the light of the limited duration of the concessions, a much more definite statement, guaranteeing the Suez Canal Company's rights beyond the concessions' duration, would have to be expected, had the treaty's signatories really sought to overrule that duration.[917]

The *Universal Suez Canal Company* is only mentioned once in the *Convention of Constantinople,* as far as the Suez Canal is concerned,[918] in Article XIV. In this provision the *Convention of Constantinople* is, however, actually de-coupled from the concessions granted to the Suez Canal Company and that company's fate:

> *The High Contracting Parties agree that the engagements resulting from the present treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.*

By including Article XIV, the treaty's signatories acknowledged the fact that - according to the terms of the concession granted in 1866- the concession was to come to an end within ninety-nine years of the Canal's opening. This had first been determined in Article 16 of the concession of 1856:

> *La durée de la Societé est fixée à quatre-vingt-dix-neuf années, à compter de l'achèvement des travaux et de l'ouverture du Canal à grande navigation.*
>
> *A l'expiration de cette période, le Gouvernement Egyptien rentrera en possession du Canal maritime...*[919]

In the concession granted in 1866 this provision was confirmed in Article 15:

> *It is declared by way of interpretation that at the expiration of the ninety-nine years of the Concession of the Suez Canal and in default of a new agreement*

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[916] Delson, "Nationalization", 770.
[917] Calvert, "The Nationalization", 43-44; he points out that the word "system" in the Preamble refers to free passage; a point also made by Obieta in *The International*, 101.
[918] The Suez Canal Company is also mentioned in Article II of the Convention, in relation to a Fresh Water Canal not relevant here.
[919] *Charter of Concession and Book of Charges, January 5, 1856,* Article 16 (emphases by author); for French text see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 4-10, 8.

between the Egyptian Government and the Company, the Concession will come to an end. [920]

The fact that the concession granted to the Suez Canal Company was definitely going to come to an end in 1968, while the *Convention of Constantinople* was to remain in force, severely undermines any argument that the Suez Canal Company's rights were in any way protected under said Convention. [921] Obviously the treaty's signatories were of the opinion that the "system" guaranteeing free passage through the canal could and would work without the input of the Suez Canal Company.[922]

Any protection of the Suez Canal Company's role in running the Canal's affairs can therefore not be read into the preamble of the *Convention of Constantinople*.[923] The nationalization of the Suez Canal Company could therefore also not be said to violate the Convention on the basis of the second line of argument.

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[920] *Concession of February 22, 1866*; for (original) French text and extracts translated into English (incl. Article 16), see: *The Suez Canal, A Selection of Documents relating to the International Status of the Suez Canal and the position of the Suez Canal Company*, ICLQ, Special Supplement, 1956 (reprint 1970), 32-40.

[921] Calvert, "The Nationalization", 44; Delson, "Nationalization", 770; Obieta, *The International*, 101-102; Trevelyan, *The Middle East*, 80 (he was UK Ambassador in Cairo at the time of the Suez Crisis).

[922] Huang, "Some", 281-283, 307; Huang outlines the discussions surrounding the Suez Canal Company's concessions during the drafting of the *Convention of Constantinople*.
France had proposed the inclusion of the following sentence in the preamble of the Convention: "The President of the French Republic and the Contracting Parties, being desirous of confirming by a conventional act the system under which the navigation of the Suez Canal has been placed since its origin by concessions of His Highness the Khedive and the *Firmans* of His Imperial Majesty the Sultan...". Huang then points out that it actually was Britain that subsequently insisted on not mentioning the concessions in the Convention because they only referred to "merchant vessels, whereas the task of the conference was to draw up regulations for the passage of vessels of war." Furthermore, Britain argued that the conference was "not authorized to give sanction to the concessions and *Firmans* in question" (at 282). Accordingly, the British draft did not mention the concessions or the *firmans*. In the following discussions Austria-Hungary and France did in the end accept the British view, which resulted in the preamble as later agreed. This negotiating history seems to imply that the delegates of the Maritime Powers were well aware of a lack of authority/jurisdiction on their part, as far as the concessions granted by the Ottomans were concerned, and therefore did not "guarantee" them in the treaty.

[923] Delson, "Nationalization", 763; Obieta, *The International*, 102. In a memorandum ("Future of the Suez Canal", April 27, 1955) for the State Department (Bureau for Near Eastern Affairs) on the legal situation, once the concessions expired in 1968, a legal advisor came to the conclusion that "the Convention of 1888 merely recognizes the private agreements without stipulating or requiring any particular operational organization for the Canal." ; see: Borowy, *Diplomatie*, 456 (and fn. 4); Johnson, "The Eden", 194; McDermott, *The Eden*, 136.

cc) Compensation

The only issue that could possibly have made the legality, under public international law, of Egypt's nationalization doubtful was the question of adequate compensation. As many at the time pointed out, the issue of compensation was highly controversial.[924] Because of this, states had, by 1956, adopted the practice of concluding bilateral treaties in the aftermath of nationalizations to deal with that issue.[925]

The majority view was that the nationalization's legality in international law was to be judged independently of the question of compensation, but that following nationalization the domestic state was obliged to compensate foreign owners. Failing to do so was in itself viewed as a violation of public international law.[926] Some, however, argued that without adequate compensation the act of nationalization itself became illegal under international law.[927]

While Nasser's Presidential Decree promised to compensate the shareholders on the basis of the share price prior to nationalization, it seemed to make that conditional on the nationalization being given extra-territorial effect. Domestic public law acts are

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[924] Foighel, "Nationalization, Part III", 143-204; he provides a detailed study on the issue of compensation, based mainly on state practice as it was in 1956/1957; Delson, "Nationalization", 764-768, 765; Calvert, "Nationalization", 51-57; Huang, "Some", 306-307; Allain, *International*, 59.

[925] Foighel, "Nationalization, Part III", 145-147; Delson, "Nationalization", 766; Huang, "Some", 306.

[926] Calvert, "Nationalization", 55-56; Delson, "Nationalization", 763-764; Allain, *International*, 59; Foighel, "Nationalization, Part III", 153-155; after an extensive analysis, Foighel is more doubtful as to the existence, in 1956/1957, of a public international law obligation to compensate foreign owners of nationalized property. He claims that treaty practice "has not been extensive enough" to assert the existence of such a rule, although he does concede that "recent development in the rules of international law" was "tending towards" such a rule.

[927] A view adopted by the USA in a dispute with Mexico between 1937 and 1940; Huang, "Some", 305-306; Delson, "Nationalization", 763-764 (both describe the USA- Mexico dispute in some detail); Johnson, "The Eden", 194; Calvert, "Nationalization", 55; it is contentious whether the *Permanent Court of International Justice* implicitly imposed such a conditionality; in *The Case Concerning the Factory at Chorzow*, the Court stated: "The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation- to render which lawful only the payment of fair compensation would have been wanting;..." (Judgement, 13/09/1928, 46-47); however, Delson, "Nationalization", points out that the Court (at 47) went on to say the violation would consist "merely in not having paid to the two Companies the just price...", which indicates that the two issues have to be assessed separately; Allain, *International*, 59.

generally, however, only recognized as effective within a state's territory. In the absence of a treaty to the contrary other states are not obliged to give them effect.[928] By trying to impose this condition Nasser was, it could be argued, violating public international law.[929]

It is, however, much more convincing to argue that full compensation was only owed once foreign assets had also been accepted as nationalized, as the shareholders/owners formally remained in possession of those foreign assets as long as they were not recognized as nationalized.[930] As Foighel stated in his analysis of state practice, compensation is owed for the "property affected by nationalization", [931] which obviously does not include property in states that do not give the foreign state's nationalization effect. Owners could certainly not expect to remain in possession of the foreign assets of a nationalized company and receive compensation on the basis of the share price, itself based on all of the company's assets.[932] It follows that Egypt's procedure, implied in the Decree, was in itself not a violation of public international law.

Only further developments would, of course, show whether Egypt would actually live up to its obligations. In 1958 Egypt did conclude an agreement with the Suez Canal Company on compensation. Egypt accepted that external assets remained in the

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[928] *Memorandum by the Assistant Legal Advisor for United Nations Affairs (Meeker). Egyptian Nationalization of the Suez Canal Company*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 16-18, 17; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; he clearly states that it was up to the United States whether it accepted Egypt's nationalization of company assets in America or not; Delson, "Nationalization", 768, 778.

[929] An argument also advanced by the Suez Canal Company; Huang, "Some", 304; Delson, "Nationalization", 768; Lloyd, *Suez*, 93 (he describes the compensation as "inadequate"); Johnson, "The Eden", 194.

[930] Delson, "Nationalization", 764-768; Delson describes the various positions adopted by different academics, judiciary bodies, and states, as far as "adequate" compensation is concerned: they ranged from no compensation, when a general expropriation is taking place, to the view that full compensation is always due.

[931] Foighel, "Nationalization, Part III", 187.

[932] Delson, "Nationalization", 768 (he argues that compensation for "local assets" is "sufficient", if foreign governments decide not to recognize the nationalization of foreign assets).

ownership of the original shareholders, who in return agreed to stand in for the foreign liabilities of the company.[933]

dd) Conclusion

When examined in detail it must be concluded that -as far as public international law is concerned[934]- there is little room to criticize the Egyptian act of nationalization, as far as the *Universal Company of the Suez Maritime Canal* is concerned.[935] The company was Egyptian and therefore subject to Egyptian laws. The overwhelming view, now and then, is that states are entitled to nationalize companies resident within their territory. As already mentioned, Britain and France were among the states that eagerly took advantage of that option after WW II. The procedure envisaged by the Egyptians as far as compensation was concerned was not in itself illegal either.

Finally, it could not be claimed that the nationalization violated the *Convention of Constantinople,* a view shared by the Legal Advisor at the Foreign Office.[936] Egypt had repeatedly declared it would continue to respect its obligations under the Convention. The Suez Canal Company itself was not protected under public

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[933] *Official Documents. Suez Canal*, AJIL, Vol. 54, 1960, 493-519, especially the "Heads of Agreement" of April 29, 1958 (493-495), followed by Egyptian Law No. 63 of 1958.

[934] That does not preclude an argument based on a violation of the Egyptian government's obligations towards the Suez Canal Company under the concessions, which might amount to a violation of *private* international law (a view taken by the Attorney-General and the Legal Advisor at the Foreign Office; Marston, "Armed Intervention", 780).

[935] In a private conversation with TIME Magazine's publisher H. Luce, French Prime Minister Mollet, admitted on August 10, 1956, that his legal advisors had still not come up with a legal argument to fault Nasser's nationalization of the company; Borowy, *Diplomatie*, 493 (incl. fn. 129); Bacevich, "A Hell", 4.

[936] Letter from the Legal Advisor at the Foreign Office to the Attorney-General of August 1, 1956: "...although the Egyptian Government are committing a number of illegalities, none of them amount,..., to a direct breach of the Suez Canal Convention" (FO 800/747); quoted by Marston, "Armed Intervention", 780; a view also shared by the American Assistant Legal Advisor: "...the Egyptian decree...does not indicate any design to impinge on obligations or rights under the Suez Canal Convention of 1888"; *Memorandum by the Assistant Legal Advisor for United Nations Affairs, Egyptian Nationalization of the Suez Canal Company*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 16-18, 18; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

international law, nor had the Canal been "internationalized" by international treaty, in the sense of having been removed from Egyptian jurisdiction and sovereignty.

Realizing the weakness of their arguments, [937] the opponents of Egypt's act of nationalization were forced to come up with an alternative line of argument: Egypt's conduct in running the Canal was -and had been in the past- contrary to its treaty obligations. This meant Egypt could not be trusted with managing the Suez Canal's affairs and some kind of "internationalization" was therefore required.

This accusation was based on Egypt's barring of Israeli shipping, and of ships heading towards and originating from Israel. Egypt's restrictions as far as Israel and the Canal are concerned will now be examined in more detail.

c) Egypt's conduct towards Israel in the Suez Canal- a violation of international law?

As of the 1948 Arab-Israeli War the Suez Canal was barred to Israeli shipping, an action which, according to the Israelis, amounted to a blockade.[938] Later, after the Armistice Agreement between Israel and Egypt had been concluded in February 1949 and international protests had mounted, Egypt somewhat eased these restrictions, only to tighten them again in September 1950.[939] Ships' captains had to confirm they were

[937] The CIA representative in London asserted in August 1956 that the British and the French "had already lost the game" by the end of July; "the world had already accepted the nationalization of the canal as a fait accompli"; Freiberger, *Dawn*, 166; see also: Eden's telegram to Eisenhower of July 27, 1956, already mentioned above (Eden, *Full Circle*, 428).
[938] Delson, "Nationalization", 759; Bowie, *Suez 1956*, 5; Obieta, *The International*, 85.
[939] *Egyptian Royal Decree* of February 9, 1950; extracts reprinted in E. van Raalte, "The Security Council and the Suez Canal", ICLQ, Vol. 1, 1952, 85-92, 86 fn. 1; Obieta, *The International*, 85; Lapidoth, "The Reopened", 16.

not delivering goods to Israel and ships that had called at Israeli ports were not allowed to purchase fuel or other goods at Egyptian ports.[940]

Israel and other states judged these Egyptian actions to be in violation of both the *Convention of Constantinople* and of the Israeli-Egyptian Armistice Agreement.[941] In 1951 the Security Council "called upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound".[942] Another draft resolution similarly condemning Egyptian conduct regarding the Suez Canal was vetoed by the Soviet Union in 1954.[943]

aa) Violation of the *Convention of Constantinople*

By banning Israel-related shipping, Egypt had, it was alleged, contravened Articles I and IV (1) of the Convention.[944]

According to Article I

> *The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.*

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[940] Van Raalte, "The Security", 86.

[941] During the debate in the Security Council that resulted in Resolution 95 (1951), Israel alleged that "Egypt had sought to establish a general blockade against Israel and had begun to visit and search ships of all nationalities passing through the Suez Canal, thus violating the freedom of the seas and contravening the Suez Canal Convention of 1888, under which Egypt is bound to keep the Suez Canal 'always... free and open in time of war as in time of peace' to all ships, without distinction of nationality. " Israel also claimed that Egypt's conduct was "jeopardizing" the Armistice Agreement (*Yearbook of the United Nations for 1951*, 293-294; available also at: http://unyearbook.un.org/unyearbook.html?name=1951index.html; accessed 17/08/2011); this legal view had been supported by the French Representative during a previous debate in the Security Council in 1950 on the Suez Canal (*Yearbook of the United Nations for 1950*, 319; also available at: http://unyearbook.un.org/unyearbook.html?name=1950index.html; accessed 17/08/2011); therefore it is not surprising that, on August 2, 1956, the French Assembly expressed "its indignation" at Nasser's violation of international law by "enforcing discrimination" against Israel "in Canal traffic"; quoted by Bowie, *Suez 1956*, 27; John Connell, *The Most Important Country*, London: Cassel & Company Ltd., 1957,110-111 (he also mentions the French Assembly resolution, and adds that it was passed by 422: 150 votes); Gainsborough, *The Arab-Israeli*, 64; Siegfried, "The Suez", 616; McClure, "The Law", 725.

[942] UN Security Council Resolution 95 (1951).

[943] *Yearbook of the United Nations for 1954*, 62-66; available also at: http://unyearbook.un.org/unyearbook.html?name=1954index.html; accessed 17/08/2011; McClure, "The Law", 727; Parsons, *From Cold War*, 11; Bowie, *Suez 1956*, 5.

[944] Corbett, "Power", 5.

This commitment is reaffirmed in Article IV (1):

> *The Maritime Canal remaining open in time of war as a free passage, even to ships of war of belligerents...*

As even the "ships of war of belligerents" could not be excluded from passage through the Canal, Egypt, it was frequently argued, had no right to hinder Israeli shipping, no matter what the precise nature of their bilateral relationship was.

Egypt, on the other hand, claimed to be acting within its rights under the Convention. As Israel was not a party to the *Convention of Constantinople* it did not benefit from its protection. Furthermore, notwithstanding the Armistice Agreement Egypt had concluded with Israel, the two countries were not in a state of peace. Egypt therefore was justified in treating Israel as a belligerent, especially in the light of the frequent "border" incidents.[945] Consequently, Egypt was entitled to protect itself under Article X of the Convention. [946]

Egypt also justified its interpretation of Article X -according to which its actions against Israel were justified- on the basis of British conduct in relation to the Suez Canal during WW I and WW II.[947] Another Egyptian argument was that, by barring Israeli shipping, Egypt was fulfilling its obligations under Articles VIII and IX in

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[945] *Yearbook of the United Nations for 1951*, 295; Corbett, "Power", 5; Gainsborough, *The Arab-Israeli*, 100.

[946] Bowie, *Suez 1956*, 5; Article X reads: "Similarly, the provisions of Articles IV, V, VII and VIII shall not interfere with the measures His Majesty the Sultan and His Highness the Khedive,..., might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order...It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to ensure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea."

[947] Bowie, *Suez 1956*, 5.

protecting the Canal against (Israeli) attack and therefore ensuring international free passage.[948]

Assessment

The Egyptian argument that Israel was not party to the Convention, and was therefore not entitled to its protection has little merit. Articles I and IV of the Convention guarantee free passage "without distinction of flag", which implies that this entitlement is not limited to the contracting parties.[949] This interpretation is affirmed by the fact that in other articles the rights and obligations are clearly limited to the "Signatory Powers" (Article VIII) or the "High Contracting Parties" (Article XII). The *Permanent Court of International Justice* also took this line when dealing with the Kiel Canal, [950] and it is generally assumed that the right of free passage through the Panama Canal was granted not only to Britain, the actual contractual partner of the USA, but to all states.[951] It must therefore be assumed that, generally speaking, Israel was entitled to free passage through the Suez Canal.

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[948] *Yearbook of the United Nations for 1954*, 72.

[949] The USA held this view, as far as American rights under the Convention of 1888 were concerned (the USA was not party to the *Convention of Constantinople*); *Memorandum by Warren E. Hewitt of the Office of the Assistant Legal Advisor for United Nations Affairs, United States Rights under the Suez Canal Convention*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 18-19; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Farnie, *East*, 337; Lapidoth, "The Reopened", 19-21.

[950] *Permanent Court of International Justice*, *Case of the S.S. Wimbledon*, Judgement, 17/08/1923, 28, 29. The court reiterated that "Article 380 of the Treaty of Versailles lays down that the Kiel Canal shall be maintained free and open to the vessels...of all nations at peace with Germany" (at 29), and, when discussing Germany's arguments, referred to the "general opinion" on "artificial waterways" which have been "permanently dedicated to the use of the whole world" (at 28).

[951] *Hay-Pauncefote Treaty* (November 18, 1901) between the USA and Great Britain (although some within the United States government seem to have taken the view that this treaty did not confer any rights on third parties); *Memorandum by Warren E. Hewitt of the Office of the Assistant Legal Advisor for United Nations Affairs, United States Rights under the Suez Canal Convention*, July 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 18-19, 19; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; however, this view is not in any way substantiated in the memo and cannot be reconciled with the *Hay-Pauncefote-Treaty* which states, in Article III, Rule 1(emphasis by author): "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, I888, for the free navigation of the Suez Canal, that is to say: 1.The canal shall be free and open to the vessels of

Due to the text's ambiguity, it is very difficult to come to a conclusion, as far as Egypt's claim of acting in a defensive manner in accordance with the Convention in respect of Israel is concerned.[952] While the free passage of belligerent ships was guaranteed, Egypt was entitled to take defensive measures in the Canal. On the other hand that right, granted in Article X, was itself limited by Article XI, which stated that

> *The measures which shall be taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal.*

Read literally Articles I, IV, X, and XI can hardly be reconciled. While the "free passage" guaranteed in Article IV (1) was not to interfere with defensive measures deemed necessary by the Egyptians under Article X, these defensive measures were - according to Article XI- not to interfere with the "free use of the Canal".

Having found the text of the Convention to be lacking in clarity, it is necessary to examine state practice in order to determine the interpretation of the Convention's obligations as adopted by the states concerned.[953] State practice, as exercised by the British in regard of the Suez Canal during WW I and WW II, does indeed prove illuminating in that respect.

First World War

Despite the *Convention of Constantinople* explicitly guaranteeing the right of free passage even to warships of belligerents, the British were quick to adopt a very expansive view of the articles allowing protective measures in respect of the Canal

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commerce and of war of all nations observing these Rules, on terms of entire equality so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

[952] Baxter, "Passage", 191; van Raalte, "The Security", 87; van Raalte disagrees. He believes Article X only applies if "Egyptian territory" was "invaded or directly threatened", an interpretation he does not elaborate and which certainly cannot be read into the text. Furthermore, the Suez Canal was, as has already been shown, Egyptian territory.

[953] Article 31 (3) (b) *Vienna Convention on the Law of Treaties*; Baxter, "Passage", 192.

once the Great War had erupted. Not only had the British, by the end of 1914, unilaterally declared Egypt to be a British Protectorate, but it had by then become virtually impossible for warships or merchant vessels of enemy origin to pass through the Canal.[954]

On August 5, 1914, the Egyptian Government issued a decree reaffirming that "commercial vessels" would be allowed to pass through the Canal, and at the same time authorizing the British to exercise the Egyptian Government's authority as far as the Canal was concerned.[955] At that point of time Egypt, still Ottoman, was neutral.

Contrary to this solemn undertaking on the part of the Egyptians, the commercial German liner "Bärenfels", on August 17, 1914, was barred from entering the Canal, a decision justified on the basis of preventing an attack.[956] Thus the right of free passage had survived the outbreak of hostilities by not even two weeks. [957]

Use of the Canal at night-time was banned on October 4, and on October 13, Egyptian troops entered the German vessels anchored along the Canal.[958] These vessels were forced to leave the Canal on October 15, 1914, and were subsequently seized by the British outside the three-mile-limit.[959] Altogether fifteen German and Austrian commercial vessels were seized in that fashion.[960] Again the British justified these actions on the basis of protecting the Canal, and on allegations of misuse of the Canal's facilities by the enemy vessels and their crew.[961] The British decision to seize

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[954] Bowie, *Suez 1956*, 5.
[955] Prior to that, the (nationalized) Suez Canal Company and the Egyptian Foreign Minister had also confirmed the validity of the *Convention of Constantinople*; Farnie, *East,* 530; Allain, *International*, 54.
[956] Farnie, *East*, 530.
[957] Bowie, *Suez 1956*, 5.
[958] Hoskins, "The Suez Canal as an International Waterway" (1943), 378; Farnie, *East*, 531, 548; Allain, *International,* 54.
[959] Farnie, *East*, 531.
[960] Farnie, *East*, 531.
[961] Farnie, *East*, 531.

the enemy vessels outside the three-mile-limit, after having forced them to leave the Canal, obviously made the infringement of the right of free passage no less.[962]

Furthermore, the German company *Deutsches Kohlendepot* in Port Said was closed on the first day of war, and its twelve merchant vessels were seized.[963] As Justice Cator of the Supreme Court for Egypt in Prize ruled on February 5, 1915, it "was not the court's duty to enforce the Convention of 1888".[964]

The British -in violation of Article XI- built fortifications along the Canal, with the clear aim of defending Egypt against the Turks, the actual sovereign power;[965] the primary goal of erecting these fortifications was therefore obviously not the protection of the canal itself as demanded by Article VIII.

Needless to say Turkish rights under the Convention were completely ignored, a situation not ameliorated by the unilaterally declared change in Egypt's status from being under Ottoman sovereignty to being a British Protectorate.[966]

British conduct in regard of the Suez Canal during the First World War has therefore correctly been summarized as follows:

> *The Canal became an Allied highway...the result was to exclude enemy ships from the Canal and to preserve its exclusive use to the Allies and to Britain in particular...*
>
> *In effect Britain treated the Canal as a territorial possession...Britain infringed almost every article of the Convention.*[967]

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[962] Baxter, "Passage", 206; McClure, "The Law", 725; Obieta, *The International*, 81.
[963] Farnie, *East*, 533.
[964] Farnie, *East*, 533-534.
[965] Halford L. Hoskins, "The Suez Canal in Time of War", Foreign Aff., Vol. 14, 1935-1936, 93-101, 98; Farnie, *East*, 533, 541-542, 548; Obieta, *The International*, 81.
[966] Farnie, *East*, 549.
[967] Farnie, *East*, 534, 548-549 (quotes); Turner, *Suez 1956*, 45; Turner describes the goal of British policy as being the "protection of the Canal as an exclusive preserve for Britain and her allies."; Hoskins, "The Suez"

Thus the contradictions evident in the Convention's text could easily be exploited by those in the position to exert control over the Canal.[968] Barring enemy vessels from the canal could always and plausibly be justified on the basis of the necessity of protecting the Canal.

Second World War

The right of free passage through the Canal fared no better in WW II, although Egypt, formally independent since 1936, remained neutral until early 1945.

Again the British tried to maintain the pretence of adhering to the *Convention of Constantinople* by conducting as many of their interception actions as possible outside the three-mile-limit:[969] in September 1939 the search of merchant vessels was introduced just outside the limit, and, in June 1940, the entry into the Canal of Italian ships carrying military equipment was purposefully delayed, so that these ships could then be seized once Italy had formally entered the war.[970] Furthermore, by June 1940, the Canal was again closed at night.[971]

"In defiance of the Convention of Constantinople", the British constructed large military bases along the canal, making it into a "great military highway." [972]

As the British were facing the Axis onslaught, and because the outcome of the war remained uncertain until at least 1941, the British and the Americans had also decided that they would destroy the Canal before letting the Axis powers take it over.[973]

(1935-1936), 98; he claims "the Suez Canal became *de facto* an Allied line of communication" and that "after 1914 the Suez Canal was in every essential a British waterway."; Allain, *International*, 54; Kyle, *Suez*, 17; Obieta, *The International*, 81-82.

[968] Farnie, *East*, 549.

[969] McClure, "The Law", 725; Farnie, *East*, 619; Smith, "Beyond", 21.

[970] Baxter, "Passage", 204; Farnie, *East*, 619.

[971] The ports had already been closed at night since September 1939; Farnie, *East*, 619.

[972] Farnie, *East*, 632 (quote); Baxter, "Passage", 207; Bowie, *Suez 1956*, 5 (Bowie cites further violations, especially of Articles IV, V, and VII); as does Obieta, *The International*, 84.

In another repetition of events during the Great War, the British justified their measures as defensive actions designed to defend the canal. Although it is true that the Canal came under repeated attack by the Axis powers during WW II (in violation of Article II), [974] it must be noted that the British measures were introduced before any such attack was made, or even possible. It has even been argued that the Axis attacks should be seen as retaliatory measures in response to the blockade of the Canal.[975]

Thus the Second World War proved to be a re-run of the First World War, as far as the *Convention of Constantinople* was concerned:[976] its provisions were "virtually suspended."[977] As long as the power in control of the Canal was itself party to a military conflict, the right of free passage guaranteed in the Convention was not worth the paper it was written on.

Summary

State practice regarding the application of the *Convention of Constantinople* in times of war therefore implies that the right of free passage will only survive if the state in actual control of the Canal is itself not party to the conflict.[978] While there have been many examples of the Canal staying open to the ships of belligerents when that is the

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[973] Farnie, *East*, 619, 625, 628; Allain, *International*, 56; Obieta, *The International*, 84.
[974] Bowie, *Suez 1956*, 5; Farnie, *East*, 621, 623, 624-625; Allain, *International*, 56.
[975] Allain, *International*, 56; Obieta, *The International*, 84.
[976] Hoskins, "The Suez Canal as an International Waterway" (1943), 385; McClure, "The Law", 724; Bowie, *Suez 1956*, 5; Allain, *International*, 56.
[977] Bowie, *Suez 1956*, 5; Obieta, *The International*, 82 (he describes British actions as "flagrant violations", and states that the Convention was, in his view, "a piece of paper to be put aside whenever military considerations demanded it"); Charles B. Selak, Jr., "The Suez Canal Base Agreement of 1954", AJIL, Vol. 49, 1955, 487-505, 491.
[978] Baxter, "Passage", 202, 208; Baxter extends this conclusion to all international waterways, and claims that state practice takes "increasing account of the need of the territorial sovereign to take defensive action." He concludes (at 205) that the Suez and Panama Canals are "defended by the interested parties in their own interest, and that freedom of passage ceases to exist in times of war"; McClure, "The Law", 724; Turner, *Suez 1956*, 33.

case,[979] both World Wars demonstrated that the right of free passage will not be granted to enemy ships, once the power in control of the Canal becomes involved.[980]

This state practice regarding the Suez Canal finds its equivalent in state practice as far as the Panama Canal is concerned. Although the Panama Canal is also subject to a right of free passage of merchant and war vessels,[981] the Americans, in control of the Canal, effectively blocked the entry of enemy vessels into the Canal in both World Wars.[982] Even Germany, subjected to a seemingly humiliating peace treaty at

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[979] The Suez Canal remained open to the belligerents during the *Franco-Prussian War* (1870/1871, prior to the *Convention of Constantinople*), the *Spanish-American War* (1898), and the *Russo-Japanese War* (1904/1905, although Britain, by now in control of the Canal, was allied with Japan); the Canal also remained open during the 1877 *Turkish-Russian War* (prior to the Convention) and the 1911 *Turkish-Italian War,* which would seem to contradict the assertion made in the text; however, in 1877, Britain "expressed its concern" to Russia and Turkey, as far as the Canal was concerned, and both declared they would not attack it (for more details, see: Farnie, *East,* 260-262). In 1911, of course, Britain was in control of the Canal and Egypt, so it was not up to the Ottoman rulers to decide whether the Canal would remain open or not. Controversially, the British also kept the Canal open for Italian warships which were on their way to conquer Abyssinia in 1936, a move criticized at the League of Nations, as Italy clearly was the aggressor in that conflict; Baxter, "Passage", 197; (as far as Italian ships in 1936 are concerned: for more details on the controversy surrounding Britain's decision, see: Baxter, "Passage", 208-210; also: Hoskins, "The Suez Canal as an International Waterway" (1943), 381-384; and Allain, *International*, 55-56); Hoskins, "The Suez" (1935-1936), 95, 97-98; Siegfried, "The Suez", 611; McClure, "The Law", 722-723; Bowie, *Suez 1956*, 3; Obieta, *The International*, 78-80.

[980] Baxter, "Passage", 215-216; Hoskins, "The Suez" (1935-1936), 101; Hoskins, writing in 1935/1936, concludes: "...whenever British imperial interests are in jeopardy she will find technical grounds for cutting the Suez artery (or even will dispense with grounds altogether) if such action is necessary to ward off an impending danger"; Andrews, "The Suez", 28 ("debatable infractions during World Wars I and II"); McClure, "The Law", 723; Bowie, *Suez 1956*, 5; Obieta, *The International*, 86-87.

[981] Article III, Rule 1 of the *Hay-Pauncefote- Treaty* (emphasis by author): "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, I888, for the free navigation of the Suez Canal, that is to say: 1.The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules. on terms of entire equality so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." In the *Hay-Bunau Treaty* of November 18, 1903 (between the USA and Panama), Panama granted the USA "in perpetuity" control of the Panama Canal Zone and the Canal; Baxter, "Passage", 191.

[982] On May 23, 1917, the USA issued a *Proclamation* generally barring enemy ships and enemy allies' ships from entering the Panama Canal (see *Permanent Court of International Justice, The Case of the S.S. Wimbledon*, Judgement, 17/08/1923, 27). This *Proclamation* remained in force and was again given effect in WW II (see Baxter, "Passage", 204 fn. 7, 207; and Corbett, "Power", 9). On entry into WW I, the USA seized six German ships in the Panama Canal, in WW II an Italian liner was similarly seized. In fact, in WW II the USA imposed "restrictions" on the use of the Canal, even before the USA entered the war (*Regulation,* approved by the President in July 1941; see: Baxter, "Passage", 207-208; Smith, "Beyond", 19-20; McClure, "The Law", 723). McClure claims the US has "consistently interpreted" Article III, Rule 1 of the *Hay-Pauncefote Treaty* "as allowing closure of the canal to ships of its enemies"; Smith, "Beyond", 12, 18; Smith points out the USA has -in war times- persistently violated the terms of the *Hay-Pauncefote-Treaty* by "exercising belligerent rights" and acting as the "sovereign" since 1904.

Versailles after WW I, was granted the right to bar enemy vessels from entering the Kiel Canal in that treaty.[983]

It must therefore be concluded that based solely on the provisions contained in the *Convention of Constantinople* it remains very difficult, if not impossible, to determine what measures can be undertaken in defence of the Canal. The British adopted a very expansive interpretation of these rights during both World Wars. Egyptian conduct in regard of Israeli shipping would therefore certainly be in the British tradition.[984] After all, following the Arab-Israeli War of 1948/1949, there had been numerous further incidents, including Israeli attacks on Egyptian territory, which had even resulted in casualties.

Furthermore, Egypt, as the territorial and sovereign power, could at least *claim* to be acting in accordance with Article X of the *Convention of Constantinople*, allowing defensive measures. The British, on the other hand, could hardly justify their conduct on that basis, as they were "defending" Ottoman territory against the Ottomans in WW I, and compromising Egypt's declared neutrality in WW II.

A further argument put forward in this context is that Egypt's claim of continued belligerency, as far as Israel was concerned, was in itself a violation of the UN Charter. This argument is based on the assumption that the use of force is only justified on the basis of self-defence, and that the concept of a continuing state of

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[983] Article 380 of the *Treaty of Versailles* (emphasis by author): "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany..."; McClure, "The Law", 724; McClure claims that Article 380 of the *Treaty of Versailles* "accurately reflects the practice in all international canals".

[984] Huang, "Some", 298; he points out that it was actually the British who -during the negotiation of the *Convention of Constantinople*- "would not permit any encroachment upon the powers of the territorial sovereign, and enforcement of transit of belligerent ships in times of war was also entrusted to the Khedive"; this policy was, of course, due to the fact that the British were at that time "temporarily occupying" Egypt, which meant that in reality they were making the decisions.

belligerency was therefore in violation of the Charter's basic principle of the peaceful settlement of disputes.[985]

This argument is not convincing. Barring Israeli shipping from the Canal cannot be equated with the use of force. Furthermore, Israeli-Egyptian relations at the time were governed by the Armistice Agreement of 1949, which was not equivalent to a peace treaty, so that the two states were not at peace.[986] Egypt could therefore rightfully claim to be in a state of belligerency as far as Israel was concerned.[987] The contrary argument would make armistice agreements obsolete, by forcing parties to a military conflict to immediately negotiate a peace treaty, once military conflict had ended. It is self-evident that this would make any cessation of open hostilities more, and not less, difficult, thereby endangering the Charter's goal of resolving conflicts peacefully.

Thus it would seem that Egypt's conduct in regard of Israeli shipping could hardly be successfully claimed to be in violation of the *Convention of Constantinople*. Due to the treaty's ambiguity, it is virtually impossible to pinpoint a treaty violation on the part of Egypt. The main proponents of Egypt's allegedly illegal conduct could at best be described as hypocritical: both the British and the Americans had had few qualms in denying enemy vessels the right of passage through the canals they controlled. This conclusion seems to be confirmed by the fact that the Security Council, when

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[985] Gainsborough, *The Arab-Israeli*, 101; Lapidoth, "The Reopened", 22-23; Rosenne, "Directions", 52.
[986] Howard S. Levie, "The Nature and Scope of the Armistice Agreement", AJIL, Vol. 50, 1956, 880-906, 881, 884-885; Levie (at 885), writing in 1956, refers to the British and American military manuals that "have uniformly taken the position that an armistice is merely a cessation of active hostilities and is not to be described as either a temporary or a partial peace."
[987] Levie, "The Nature", 881; he refers to armistice agreements as "war conventions". In fact, Levie -writing in 1956, obviously prior to the Suez conflict and referring to events in April 1956- points to the Israeli-Egyptian Armistice Agreement as a good example of an armistice that "did not create even a *de facto* termination of war between those states." While Foreign Secretary, the future British Prime Minister Eden had advised the British cabinet in January 1954 that the Egyptians "had quite a strong legal case...because their war with Israel had not been legally terminated" (Kyle, *Suez*, 38).

condemning Egypt's conduct in regard of Israel in 1951, only alleged a breach of the Armistice Agreement, and not of the *Convention of Constantinople*.

bb) Violation of the Armistice Agreement with Israel[988]

Israel repeatedly claimed that by interfering with Israel-related shipping Egypt had violated the Armistice Agreement of 1949. This view received international support, including from the UN Security Council.

Based on the Preamble of the Agreement, which stated that it was "to facilitate the transition from the truce to permanent peace in Palestine", and Article I (4), which concluded that "the establishment of an armistice by the armed forces of the two parties is accepted as an indispensable step toward the liquidation of armed conflict and the restoration of peace in Palestine", many argued that the Armistice Agreement outlawed any hostile act.[989] Thus the Security Council, in a Resolution of August 11, 1949, declared that "these agreements include firm pledges against any further acts of hostility between the parties".[990]

This Resolution was quickly followed by a decision by the *Mixed Armistice Commission* on August 29, 1949, which claimed it "had the right to demand from the Egyptian Government not to interfere with the passing of goods to Israel through the Suez Canal". [991]Although he disagreed with the *Mixed Armistice Commission's* view that it had any competency in the matter, General Riley, Chief of Staff of the *Truce Supervision Organization* and of the Israeli-Egyptian *Special Committee*, declared in

[988] For the text of the Egyptian-Israeli *General Armistice Agreement* of February 24, 1949, see: http://avalon.law.yale.edu/20th_century/arm01.asp; accessed 18/08/2011.
[989] Gainsborough, *The Arab-Israeli*, 95; Gainsborough adds that this view represented the "modern school"; van Raalte, "The Security, 89-90; Rosenne, "Directions", 53.
[990] UN Security Council Resolution 73 (1949).
[991] Van Raalte, "The Security", 87.

June 1951, that the Egyptian conduct in the Suez Canal amounted to "an aggressive and hostile action", which was "contrary to the spirit of the general armistice agreement".[992]

Based on its own interpretation, and on the further reports just mentioned, the Security Council, in its Resolution of September 1, 1951, "found" that the Egyptian practice was "inconsistent with the objectives of a peaceful settlement between the parties...set forth in the Armistice Agreement" and "called upon" Egypt to desist.[993]

Egypt, however, maintained that its actions were not in violation of the Armistice Agreement. By concluding the Armistice Agreement a truce had been established. The Agreement itself made it plain that the two states were not in a state of peace, as its aim was to "facilitate" the achievement of such a status. Egypt and Israel were still at war and, although military action had been terminated, the two states consequently remained in a state of belligerency.[994] The Armistice Agreement could therefore not be claimed to forbid a blockade, a measure anyway justified on the grounds of self-defence under Article 51 UN Charter.[995]

Assessment

As indicated by the vague statements just quoted, it is hardly arguable that Egypt violated the Armistice Agreement with Israel by barring Israeli vessels from entering the Suez Canal. The Armistice Agreement did not explicitly outlaw such an Egyptian

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[992] *Cablegram dated 12 June 1951 from the Chief of Staff of the Truce Supervision Organization addressed to the Secretary-General transmitting a Report to the Security Council*; available at: http://unispal.un.org/UNISPAL.NSF/0/033898FEB68C1D4B802564D60031DB02; last accessed 18/08/2011; *Yearbook of the United Nations for 1951*, 293-294; van Raalte, "The Security", 87-88.

[993] UN Security Council Resolution 95 (1951).

[994] *Yearbook of the United Nations for 1951*, 295; Gainsborough, *The Arab-Israeli*, 98.

[995] *Yearbook of the United Nations for 1951*, 295.

move. This is acknowledged in the formula adopted by the Security Council claiming Egypt's action "were inconsistent with the objectives of a peaceful settlement", which obviously is a very general statement in legal terms. The Chief of Staff of the *Truce Supervision Organisation* even resorted to alleging Egypt was violating the "spirit" of the Armistice Agreement.[996]

Not being able to claim that the barring of Israeli shipping amounted to an explicit treaty violation on the part of Egypt, it is necessary to examine whether the Egyptian action was implicitly prohibited by the Armistice Agreement.

As the Egyptians were able to demonstrate, this argument had one serious weakness: according to Articles I (2) and 2 (I) of the Armistice Agreement it only applied to actions taken by and between the two countries' "armed forces". Barring commercial shipping from entering the Suez Canal did therefore not fall within the remit of the armistice.[997] This was confirmed by the Chief of Staff of the *Truce Supervision Organization* in his Report to the Security Council:

> *He* [General Riley] *pointed out, however, that the interference was not being committed by the Egyptian armed forces and, therefore, was not specifically covered by the Armistice Agreement. For that reason, he had felt bound to vote with Egypt in the Special Committee that the Mixed Armistice Commission did not have the right to demand that the Egyptian Government should not interfere with the passage of goods to Israel through the Suez Canal.*[998]

Furthermore, it was at the time overwhelmingly assumed that only actions explicitly banned in an Armistice Agreement were prohibited.[999] Based on the fact that an

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[996] Van Raalte, "The Security", 89.
[997] Van Raalte, "The Security", 89.
[998] *Yearbook of the United Nations for 1951*, 294.
[999] Hirst, *The Gun*, 326-327; Gainsborough, *The Arab-Israeli*, 95, 97-98 (he calls this the "traditional school", in contrast to the Israeli/Security Council view, which supposedly represents the "modern school"); Levie, "The Nature", 886-888, esp. 888; with many examples of state practice (887, fn. 41); ironically, given Gainsborough's views, Levie refers to the approach taken here as the "modern rule", in contrast to the contrary "classical approach", which to him is of "historical significance only"; Lawrence, *The Principles*, 558; writing in 1923, Lawrence states that "There is a controversy as whether during an armistice a belligerent may do, in the

Armistice Agreement is not equivalent to a peace treaty, actions not involving the use of force were consequently viewed as being outlawed only if so agreed in the treaty. This is logical, as it cannot realistically be expected that two states, which were fighting each other until the Armistice Agreement was concluded, refrain from all unfriendly acts -short of the use of force- until such a time as a peace treaty is agreed.[1000] Desirable as such a state of affairs may be, it must necessarily be assumed that two sovereign states only agree to refrain from those acts mutually agreed upon in an Armistice Agreement.

In the case of the Israeli-Egyptian Armistice Agreement it must therefore be concluded that Egypt was not violating the agreement by barring Israeli shipping, and vessels travelling to and from Israel from entering the Suez Canal, as such action was not explicitly prohibited.[1001] That this was no mere oversight is confirmed by the fact that this Egyptian practice was in place when the Armistice Agreement was concluded, and could therefore have been explicitly banned had the two parties agreed to do so.[1002]

As far as a violation of the Armistice Agreement is concerned, the legal situation is also not modified by the Security Council's resolution in 1951. The Security Council

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actual theatre of war, only such things as the enemy could not have prevented him from doing at the moment when active hostilities ceased, or whether he may do whatever is not forbidden expressly,...The weight of authority is in favour of the former alternative; but the weight of reasoning seems on the side of the latter, which has the decisive support of recent practice. Beyond the zone of active operations parties may perform what acts of naval and military preparation they please."; Hershey, *The Essentials*, 608, fn. 58; he describes the rule "to permit what is not expressly prohibited" during armistices as "the only safe and satisfactory rule" (he is quoting Spaight) and as "more in accord with modern practice." Similar to Levie, Hershey goes on to describe the contrary view as "the older doctrine".

[1000] Levie, "The Nature", 887; he also points out how dangerous the contrary view is, in that it gives the contracting parties unlimited scope to claim a violation of the armistice agreement by over-extending the obligations apparently agreed to, and thus possibly causing a new outbreak of hostilities.

[1001] Hirst, *The Gun*, 326-327.

[1002] Levie, "The Nature", 904; he refers explicitly to naval blockades "which had been previously established and concerning which the armistice agreement makes no provision."

is not a judicial organ, and is not called upon to determine the legal situation.[1003] This was also the view taken by the Representative of China in a subsequent debate on the Suez Canal in 1954:

> *The representative of China considered that, while the Egyptian representative had put forward some very impressive arguments concerning the general rules of international law relating to belligerency and the right of visit and search, the Council, by its very nature, was not qualified to deal with the complicated legal issues involved in the dispute. It should explore the possibilities of finding a political solution, ...*[1004]

When determining whether a "threat to the peace" exists, the Security Council has wide discretion and many factors must be considered. Its decisions are binding,[1005] but any *legal* arguments put forward within these decisions do not have any judicial effect, but rather must be seen as *obiter dicta*.[1006] In fact, the statements made by the representatives of the three co-sponsors of the Resolution in 1951, the UK, the USA and France, implied they wanted to avoid the legal issues as much as possible:

> *The sponsors could not agree with the representative of Egypt that full belligerent rights could reasonably be exercised between the cessation of hostilities and the final peace treaty. What mattered, however, was not whether the restrictions had some technical basis, but whether their maintenance was reasonable, just and equitable.*[1007]

The weakness of this reasoning was immediately raised by the Indian representative:

[1003] Article 36 (3) UN Charter; Articles 36 (1), 33 UN Charter; Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", AJIL, Vol. 64, 1970, 1-18, 4-5, 16; Halderman, "Some", 86.

[1004] *Yearbook of the United Nations for 1954*, 65.

[1005] Article 25 UN Charter; see also: ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Incident at Lockerbie*, Libya v. USA, Provisional Measures, Order of April 14, 1992, I.C.J. Rep. 1992, 114, paras. 36-44.

[1006] Levie, "The Nature", 885-886; he considers it "more likely that the Security Council's action was based upon a desire to bring to an end a situation fraught with potential danger to peace than that it was attempting to change a long established rule of international law."; Higgins, "The Place", 16; she categorically states: "It is for the Council to make political decisions which are in accordance with international law, not to find legal answers."

[1007] *Yearbook of the United Nations for 1951*, 296; Arthur Larson, "Peace through Law: The Role and Limits of Adjudication", Am. Soc'y Int'l L. Proc. Vol. 12, 1960, 8-14, 12; he quotes the UK Representative as saying, during the debate in the Security Council on Resolution 95: "...these legal issues are no doubt debatable, but I do not consider that it is necessary for the Security Council to go into them"; he also points out that Israel later rejected the option of involving the ICJ, because the Security Council had already dealt with the matter.

> *It had been said that the problem was not whether there was a basis for the rights claimed by Egypt, but whether those rights should actually be exercised. But, if there was a basis for the rights, their exercise could not very well be described as hostile and aggressive.*[1008]

It is also interesting to note that the British subsequently never sought to enforce the Security Council Resolution, although they were in a position to do so between 1951 and 1956.[1009] This inaction was perhaps also due to the British government's *true* appraisal of the legal situation: in January 1954 the British Foreign Secretary (and future Prime Minister) Eden had advised the Cabinet that Egypt "had quite a strong legal case", as its "war with Israel had not been legally terminated".[1010]

Needless to say the Armistice Agreement had repeatedly been violated by both states in the past,[1011] as evidenced by the repeated cross-border use of force which led the Israeli Prime Minister to declare that the Armistice Agreement with Egypt was "dead and buried".[1012] This assessment, of course, also serves to undermine the seriousness of Israel's protest as far as international law is concerned.

[1008] *Yearbook of the United Nations for 1951*, 298; the Chinese Representative (at 297-298) made a similar point: "The representative of China considered that it still remained to be proved that the measures adopted by Egypt were in violation of general international law, the Suez Canal Convention and the Armistice Agreement. Armistice was the first step to peace, but that did not mean the termination of a state of war."

[1009] Turner, *Suez 1956*, 259; McClure, "The Law", 717; Bowie, *Suez 1956*, 6; he claims Britain "acquiesced" in Egypt's conduct in regard of Israeli shipping; Farnie, *East*, 716; Farnie claims that Egypt's conduct towards Israeli shipping was accepted by the USA and Britain "on practical grounds"; Kyle, *Suez*, 38, 79; Obieta, *The International*, 86; Borowy, *Diplomatie*, 43.

[1010] Kyle, *Suez*, 38; the official British justification for not enforcing the Security Council Resolution was that the issue had become a matter for the UN, and therefore was not subject to unilateral enforcement (E. Lauterpacht, "The Contemporary Practice of the United Kingdom in the Field of International Law- Survey and Comment, 7. Disputes and War", ICLQ, Vol. 5, 1956, 435-438, 435). This justification was rather ironic, given the fact that Britain was later to justify its unilateral "police action" in the Suez War on the basis of the ineffectiveness of the UN, which apparently justified unilateral action.

[1011] Following the Gaza Raid of February 1955, the UN Security Council found Israel in violation of UN Security Council Resolution 54 (1948), of the Israeli-Egyptian Armistice Agreement, and of the UN Charter (see UN Security Council Resolution 106 of 1955). In its Resolution 997 of November 2, 1956, the General Assembly "noted the disregard on many occasions by parties to the Israel-Arab armistice agreements of 1949 of the terms of such agreements."

[1012] *Statement to the Knesset*, November 7, 1956, by Prime Minister Ben-Gurion; available at: http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/8+Statement+to+the+Knesset+by+Prime+Minister+Ben-G.htm; last accessed 18/08/2011; a summary can also be found in United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 1038; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

As has already been pointed out, Egypt proceeded to ignore the Security Council Resolution, which was binding as far as its request to Egypt to desist from its actions was concerned.[1013] Egypt thus did violate Article 25 UN Charter, the only clear violation of public international law that Egypt could be accused of. This was, of course, a violation of the UN Charter Israel had also been repeatedly found guilty of by the Security Council.[1014]

d) Egypt's conduct: a summary

As has been shown the attacks on Egypt by the USA, France, and, especially, Britain because of the nationalization of the Suez Canal Company and its conduct towards Israeli shipping were largely unfounded and hypocritical.

By nationalizing the *Universal Company of the Suez Maritime Company,* the Egyptian Government may have violated the concessions granted to that company, but did not violate public international law. It was and is generally accepted that a sovereign state can nationalize domestic companies, and the Suez Canal Company was, in law, Egyptian. Furthermore, the Egyptian Government repeatedly confirmed it would adhere to the *Convention of Constantinople.* As has been shown the company was not protected by the Convention, so that it could not be claimed that its nationalization amounted to a treaty violation.

[1013] Higgins, "The Place", 4-5; Halderman, "Some", 87; that the resolution was binding in that respect, as far as Egypt was concerned, was certainly the view taken by the majority of states represented on the Security Council in subsequent years, as debates in 1954 and 1955 evidenced (see: *UN Yearbook for 1954*, 64-65; *UN Yearbook for 1955*, 31).

[1014] UN Security Council Resolution 106 (1955) accused Israel of having violated Security Council Resolution 54 (1948) when it attacked Egypt in February 1955; Security Council Resolution 101 (1953) had also found Israel to be in violation of Security Council Resolution 54 (1948) when it attacked Jordan in October 1953, as had Security Council Resolution 111 (1956) in regard of an Israeli attack on Syria in December 1955.

Realizing the weakness of their arguments to the contrary, Britain and France primarily tried to show a consistent pattern of Egyptian treaty violations by emphasising its treatment of Israeli shipping. Although these arguments had more merit, they were again marred by the advocates' hypocrisy. Not only had the British refrained from enforcing the alleged Israeli rights, when they had had the ability to do so, but British conduct during both World Wars in respect of the Suez Canal was difficult to reconcile with British demands on how Egypt should treat Israel. The Americans, realizing this and not wanting to subject their conduct in respect of the Panama Canal to similar scrutiny, therefore were unenthusiastic about this line of argument. [1015] The problematic nature of the argument was further reinforced by the fact the *Convention of Constantinople* is ambiguous as far as defensive rights are concerned. In its Resolution of 1951 the Security Council therefore also refrained from alleging an Egyptian breach of the Convention.

The argument that Egypt was violating the Armistice Agreement with Israel, put forward mainly by Israel, received prominent support. Nevertheless, the fact that barring Israeli shipping was not explicitly banned in the treaty makes it difficult to argue that Egypt was in violation of treaty provisions. The Israeli argument was further undermined by the fact that its Prime Minister had declared the Armistice Agreement "dead", and by the fact that Israel itself had repeatedly been found in violation of the various Arab-Israeli Armistice Agreements by the Security Council.[1016]

[1015] Eden, *Full Circle*, 435, 437; he claims the Americans "were nervous" about the Panama Canal while discussing the Suez Crisis; Bowie, *Suez 1956*, 34; Borowy, *Diplomatie*, 462, 491-492.

[1016] UN Security Council Resolution 101 (1953), Israeli violation of Armistice Agreement with Jordan; UN Security Council Resolution 106 (1955), Israeli violation of Armistice Agreement with Egypt: UN Security Council Resolution 111 (1956), Israeli violation of Armistice Agreement with Syria; Corbett, "Power", 9; he

There is little doubt that Egypt violated Article 25 UN Charter by persisting in its actions contrary to the UN Security Council Resolution. Nevertheless, it must be noted that other states, including Israel, had by then also repeatedly ignored such resolutions.

B. The use of force by Britain, France, and Israel

Having concluded that Egypt's only clear violation of international law was acting contrary to its obligations under Article 25 UN Charter, it becomes obvious why the three allies did not officially base their intervention on alleged Egyptian treaty violations. France and Britain instead maintained that the use of force was necessary to protect nationals and vital property in Egypt, and amounted to no more than a "police action" in order to protect the Suez Canal from the Israeli-Egyptian fighting. Israel claimed it was exercising its right of self-defence.

It has already been mentioned that these justifications were no more than a charade, as the exact sequence of events had been previously agreed at Sèvres, even before Israel launched its attack on Egypt. Nevertheless, it is of interest to examine whether at least these official justifications could be reconciled with international law.

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views Israel's attack on Egypt in 1956 as being "by no means the first time that the young nation had been found in bold violation of the armistice".

1. Britain and France

a) Official justification

As the documents circulating within the British Government demonstrate, a heated search was on to find a legal justification for attacking Egypt.[1017] As far as the international legal situation was concerned, a split opened up between the Prime Minister and the majority of the Cabinet on the one hand, and the government's law officers and legal advisors on the other. The one notable exception among the government lawyers was the Lord Chancellor, who aligned himself with the majority view within the Cabinet.

This split was caused by the differing approaches towards the issue: while the law officers analysed the law and tried to ascertain under which -speculative- circumstances Britain may be able to legally resort to force, Eden and his supporters were intent on attacking Egypt, and simply required an at least superficially plausible legal justification.[1018] McDermott, at the time a civil servant in the Foreign Office who was responsible for dealing with the Suez crisis, later described this development as follows:

> *An inner Cabinet committee of Eden's more amenable supporters was set up, and this became known as the 'pretext committee'.*[1019]

Early hopes within the British government that Nasser could be provoked to commit an illegal act -besides nationalizing the Canal Company and barring the Canal to Israeli shipping- were soon disappointed, as the Egyptians demonstrated that they

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[1017] Marston, "Armed Intervention", 773-817; Marston offers a comprehensive collection of official documents, dealing with the legal issues, from which he quotes extensively.
[1018] Eden's attitude is best summarized by a message written to Lloyd, once he had heard of Nasser's rejection of the 18-Powers'-Plan in August 1956: "Foreign Secretary, this may give us the pretext for which we are looking"; quoted in Turner, *Suez 1956*, 248; Marston, "Armed Intervention", 779.
[1019] McDermott, *The Eden*, 132.

were willing to live up to their obligations under the *Convention of Constantinople.*[1020] Furthermore, the hope that, once the European members of staff had left Egypt, the operation of the Canal would break down was also disappointed. Supported by the Soviets, the Egyptians were able to run the Canal smoothly.[1021]

The British then tried to justify their intervention on the basis of the events surrounding the nationalization of the Suez Canal Company. Once Nasser had used the pre-arranged codeword in his speech in Alexandria announcing the nationalization of the Suez Canal Company, Egyptian troops occupied the company buildings. The Lord Chancellor tried to argue that the British use of force could be justified on the basis of self-defence, as this Egyptian action could be viewed as an "armed attack" on "international territory" under Article 51 UN Charter. [1022] Prime Minister Eden was eager to take up his line of argument. In a telegram to the Soviet Prime Minister Bulganin of October 6, 1956, he wrote, referring to Nasser: "...he has resorted to force by occupying with troops the premises of the Universal Suez Canal Company."[1023]

This argument was deeply flawed and -as the Lord Chancellor acknowledged-[1024] found virtually no support within the international legal community.[1025] After all,

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[1020] Cabinet Minutes of August 14, 1956; "In discussion it was suggested that, although it could be argued that Colonel Nasser's seizure of the Suez Canal ...justified the use of force, such action would be unlikely to obtain general support without some further cause being provoked by the Egyptian Government" (CAB 128/130, Part 2, 501 (C.M. 59 (56); quoted by Marston, "Armed Intervention", 781; Turner, *Suez 1956*, 227; Allen, *Imperialism*, 455; Bowie, *Suez 1956*, 42, 45; Allain, *International*, 58; Borowy, *Diplomatie*, 547; Keay, *Sowing*, 436-437; Trevelyan, *The Middle East*, 102 (Trevelyan was the UK Ambassador in Cairo at the time of the Suez Crisis).

[1021] Even Eden acknowledges this in his memoirs (*Full Circle*, 468); Salt, *The Unmaking*, 173; Allen, *Imperialism*, 455; Bowie, *Suez 1956*, 42, 45; Allain, *International*, 58; Freiberger, *Dawn*, 166; Borowy, *Diplomatie*, 560-561; McDermott, *The Eden*, 143; Woollacott, *After Suez*, 41; Keay, *Sowing*, 435, 436-437; Trevelyan, *The Middle East*, 100.

[1022] Marston, "Armed Intervention", 777.

[1023] FO 371/119158 (JE 1421/2221); quoted by Marston, "Armed Intervention", 788.

[1024] Marston, "Armed Intervention", 777-778.

[1025] His position was, however, supported by Professor Goodhart (Law, Oxford). In a letter of August 10, 1956, to *The Times,* he wrote: "a State... may use force to protect a vital national interest which has been imperilled. In such a case it is the State that has altered the status quo by force which is guilty of aggression." Although this was a lengthy letter, Professor Goodhart provides no evidence of state practice or *opinio juris* in support of his

Egyptian troops were actually occupying buildings belonging to an Egyptian company on Egyptian, not "international", territory.[1026] To construe that to be equivalent to an "armed attack" on Britain, or the international community, because of its vital interest in the Canal, is beyond serious legal argument. [1027]

Finally, as the months dragged on without any British military intervention, that delay made it impossible to argue that any military intervention in the autumn of 1956 was a reaction to the act of nationalization in July 1956.[1028] The Lord Chancellor, self-confessed "great believer" in international law's dynamism,[1029] subsequently toyed with the idea that the parties to the *Convention of Constantinople* had the right to enforce its provisions by force if necessary. [1030] This was a proposition that again failed to find noteworthy support among international lawyers even within the government.[1031]

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opinion (see *The Times*, 11/08/1956, 7); Marston, "Armed Intervention", 778; despite this lack of academic support, the Cabinet at first latched onto Professor Goodhart's letter, which was discussed by the Cabinet on August 28, 1956 (CAB 128/30, Part 2, 527 (C.M. 62 (56); quoted in Marston, "Armed Intervention", 778.

[1026] Trevelyan, *The Middle East*, 80-81; the UK Ambassador in Cairo at the time of the Suez Crisis later described the legal situation as follows: "The act of nationalisation was, in our opinion, a clear infringement of Egyptian 'municipal' law... But to raise this contention would be tantamount to admitting it was a question of Egyptian law, which could be amended by the Egyptian Government."

[1027] This was also pointed out by the Legal Advisor at the Foreign Office on October 9, 1956; as the company was "not even British", he concluded that "what Colonel Nasser has done...does not constitute the use of force at all" (FO 800/747); quoted by Marston, "Armed Intervention", 789; similarly, a draft memorandum of October 19, 1956, originating from the Attorney-General's Office, points out that "there is therefore no basis for the argument that the forcible seizure of the Company's assets constituted such an attack on international territory as would justify the use of force..." (LO 2/825); quoted by Marston, "Armed Intervention", 795.

[1028] The Legal Advisor at the Foreign Office concluded on August 29, 1956: "the position is that except under very limited circumstances, resort to force in the sense of armed force is now illegal" (FO 800/748); quoted by Marston, "Armed Intervention", 784; a view shared by Woollacott, *After Suez*, 41; and the UK Ambassador in Cairo at the time, Trevelyan (in: *The Middle East*, 102); the Australian Prime Minister Menzies, on the other hand, maintained that the lapse of time was not relevant, as using force immediately "was out of harmony with modern thinking"; quoted by Lloyd, *Suez*, 240.

[1029] Letter to the Attorney-General and the Solicitor-General of October 15, 1956. Replying to their concerns about the illegality of the use of force by the UK, he goes on to state: "I therefore think that one must, in applying the doctrine of self-defence to international entities, make the logical changes" (LO 2/825); quoted by Marston, "Armed Intervention", 792.

[1030] Letter from Lord Kilmuir, the Lord Chancellor, to Prime Minister Eden, dated September 6, 1956 (PREM 11/1100); extracts quoted in Marston, "Armed Intervention", 778.

[1031] The Legal Advisor at the Foreign Office responded to the Lord Chancellor's views regarding enforcement in a letter to the Attorney-General of September 17, 1956: "Such a doctrine would... be rejected instantly by every

So another line of argument had to be found.[1032] The protection of nationals was found to be a possible solution to the problem. After all, there had been events as recently as 1952, when Egyptians had attacked and even killed foreigners.[1033] Agitated by Nasser's rhetoric, and further enraged by the Israeli attack launched on October 29, the Egyptians might, it could be argued, start attacking British citizens. This was an imminent danger allowing anticipatory self-defence on the part of Britain,[1034] as the right to protect nationals abroad was an aspect of self-defence.

Furthermore, the Lord Chancellor put forward the argument that the traditional right of self-defence, which had been preserved in Article 51 UN Charter, included the right to protect vital property in the event of the "breakdown of law and order", a situation akin to the one created by the Israeli invasion.[1035] An example the Lord Chancellor used to explain his position was that of protecting a "hydro-electric power station" that served two countries, an idea he had borrowed from Waldock.[1036] Correspondingly, the Lord Chancellor also claimed the use of force in defence of "vital national interests" was justified.[1037]

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system of domestic law, and I do not believe that international law is any different..." (FO 800/747); quoted by Marston, "Armed Intervention", 788.

[1032] As the Legal Advisor at the Foreign Office remarked on August 10, 1956: "We are already on an extremely bad wicket legally as regards using force in connexion with the Suez Canal" (FO 371/119728 (JT 1053/100G); quoted by Marston, "Armed Intervention", 783.

[1033] In a telegram to Soviet Prime Minister Bulganin of October 6, 1956, British Prime Minister Eden had already referred to these incidents: "...a number of European civilians were brutally massacred in Cairo only four years ago and there is an obvious danger that under the stimulus of Colonel Nasser's deliberate incitement the Egyptian mobs may once more resort to violence" (FO 371/119158 (JE 14211/2221); quoted by Marston, "Armed Intervention", 788-789.

[1034] Memo by the Lord Chancellor, entitled "The Right of Intervention", presented to the Cabinet on October 29, 1956, para. 3 (PREM 11/1129); quoted by Marston, "Armed Intervention", 800.

[1035] Memo by the Lord Chancellor, entitled "The Right of Intervention", presented to the Cabinet on October 29, 1956, para. 5 (PREM 11/1129); quoted by Marston, "Armed Intervention", 800.

[1036] C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", *Recueil des Cours*, Vol. 81, 1952, 451-515, 503, fn. 1.

[1037] A view supported by Connell, *The Most*, 118.

Lastly, and most popularly, the military action was justified as a "police action".[1038] The Israeli-Egyptian fighting threatened the Canal, which affected the "vital interests of many nations", thereby justifying the use of force to protect the international community's interest in preserving the right of passage.[1039]

These arguments came together in a series of statements issued by the British government and its officials. In a Foreign Office telegram of October 30, 1956, to the British Embassy in Jordan it was stated that

> *The policy of Her Majesty's Government is to take the most decisive steps open to them to bring hostilities to an end. They are advised on the highest legal authority that they are entitled under the Charter to take every measure open to them within and without the United Nations to stop the fighting and to protect their nationals and their interest which are threatened by these hostilities.*[1040]

On the same day the Foreign Secretary, Selwyn Lloyd, declared in the House of Commons:

> *There is a fundamental point which this House and other countries will have to face. We have created a system of international law and order in which we have to face the fact that the Security Council is, first, frustrated by the veto and, secondly, that it cannot act immediately. In a sense, the policeman has his hands tied behind his back. He has to wait a long time before he is allowed to play his part.*
>
> *I myself believe that, if you have accepted that system, you are only safe if you also retain the rights of individual countries to defend their own nationals and their own interests...*
>
> *We say in the present international system, where the Security Council is subject to the veto, there must be the right for individual countries to intervene in an emergency to take action to defend their own nationals and their own interests.*[1041]

On November 1, 1956, the Lord Chancellor added before the House of Lords:

[1038] Woollacott, *After Suez*, 75.
[1039] Connell, *The Most*, 209.
[1040] PREM 11/1129 (emphasis by author); quoted by Marston, "Armed Intervention", 802.
[1041] Foreign Secretary Lloyd, Hansard, Egypt and Israel, HC Debate 30 Oct 1956 vol 558, cc1341-1382, c1377; available at: http://hansard.millbanksystems.com/commons/1956/oct/30/egypt-and-israel-2: accessed 18/08/2011.

> *We have therefore three good grounds of intervention: the danger to our nationals (for example, to those at Ismailia); the danger to shipping in the Canal, which shipping carries many hundreds, at least, if not thousands, of people in their crews; and the danger to the enormously valuable installations of the Canal itself and the incalculable consequential effect on many nations if the Canal were blocked.* [1042]

In similar vein, Prime Minister Eden wrote to President Eisenhower on October 30, 1956:

> *We consider that, in view of the massive interests involved, the first thing to do is to take effective and decisive steps to halt the fighting. ...and we have felt it right to act, as it were, as trustees to protect the general interest as well as to protect our own interests and nationals...* [1043]

The nature of the Anglo-French intervention as a "police action" was re-emphasized by Eden in a statement to the House of Commons on November 1, 1956:

> *Israel and Egypt are locked in conflict in that area. The first and urgent task is to separate these combatants and to stabilise the position. That is our purpose. If the United Nations were then willing to take over the physical task of maintaining peace in that area, no one would be better pleased than we. But police action there must be to separate the belligerents and to prevent a resumption of hostilities.* [1044]

Months of internal debate had resulted in an official legal justification that -even on the face of it- did not seem very convincing.[1045] Not only could these arguments hardly be reconciled with the facts on the ground, but they could also not be readily reconciled with international law.

[1042] The Lord Chancellor, Hansard, Egypt, HL Deb 01 Nov 1956, vol 199 cc1243-1365, c1350; available at: http://hansard.millbanksystems.com/lords/1956/nov/01/egypt; accessed 18/08/2011.

[1043] *Message from Prime Minister Eden to President Eisenhower*, October 30, 1956 (emphasis by author); United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 871-872; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1044] Prime Minister Eden, Hansard, Egypt and Israel, HC Deb 01 November 1956, vol 558 cc1631-1744, c1649; available at: http://hansard.millbanksystems.com/commons/1956/nov/01/egypt-and-israel; accessed 12/08/2011.

[1045] George F. G. Stanley, "Failure at Suez", Int'l J., Vol. 12, 1956-1957, 90-96, 95; Johnson, "The Eden", 197 ("best available excuse for conducting political intervention"); Wm. Roger Louis, "The Suez Crisis and the British Dilemma at the United Nations" in *The United Nations Security Council and War, Evolution of Thought and Practice since 1945*, Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (eds.), Oxford: Oxford University Press, 2008, Ch. 12, 280-297, 282.

b) Protection of nationals

As the author has already argued elsewhere,[1046] forcible rescue missions to protect nationals could, certainly in 1956, not be reconciled with international law: such an intervention was not compatible with the UN Charter, and no new authorization had been created in post-WW II customary international law. It does therefore not need to be examined whether the even wider interpretation adopted by the British, whereby intervention was allowed even when nationals "only" faced an "imminent threat", had any basis in international law.

Irrespective of the view taken on the legality of forcible rescue missions, even advocates of a state's right to protect nationals abroad faced one insurmountable difficulty: there was no danger to British or French nationals in Egypt, except for the general danger caused by the Israeli-Egyptian fighting.[1047] The situation of British nationals in Egypt during the Suez crisis is perhaps best described by the British Ambassador, who remained in Cairo until November 2, 1956:

> *We were concerned with the possible breakdown of public security...Only once was the situation uncertain...However, the crowd eventually dispersed and otherwise all was peaceful. Not even extra police were posted. The passers-by showed no interest in us. I had been out in my conspicuous car with the flag flying on 1*

[1046] To put it very briefly, the author takes the following view as far as forcible rescue missions are concerned: 1) forcible rescue missions violate Article 2 (4) and therefore require justification; 2) they are not justified under Article 51; 3) there has been no resurrection of pre-Charter rules on the use of force due to the malfunctioning of the UN system; and 4) certainly by 1956 no new customary international law had developed allowing the forcible protection of nationals. For a more detailed justification of the author's views, please see: Patrick Terry, "International Law Strikes Back or Suez 1956- A forerunner of the Iraq Fiasco in 2003", *Journal of African and International Law*, Vol. 4, No. 2, 2011, 327-370, 336-353; and *US-Iran Relations in International Law since 1979: Hostages, Oil Platforms, Nuclear Weapons and the Use of Force*, Rangendingen: Libertas Verlag, 2009, 24-33. However, as is pointed out in the main text, this discussion is essentially irrelevant as far as the Suez War of 1956 is concerned, as the true situation of British and French nationals in Egypt would in any case not have justified a forcible rescue mission.

[1047] A point also made by the Attorney-General in a letter to the Foreign Secretary on November 1, 1956 (FO 800/749); and by the former President of the ICJ, Lord McNair, in a letter of November 4, 1956, to the Lord Chancellor (LO 2/825); quoted in Marston, "Armed Intervention", 804, 813.

> *November, and on foot on 2 November, just before we shut up, and no one even appeared to notice me.*[1048]

As to the general danger to nationals in a time of war, Hershey, writing in 1927, had already concluded that the

> *mere danger of injury to the lives or property of foreigners affords no grounds for intervention, inasmuch as aliens, unless in case of discrimination against them, can claim no special exemption from the ordinary risks run by nationals during times of riot, insurrection, or civil war.*[1049]

It was therefore not acceptable to claim danger to nationals in 1956, based on the riots of 1952, or to justify a forcible -alleged- rescue mission, based on the general state of war in the host country, a point also made by the British government's legal advisors.[1050] This official justification therefore lacked merit not only on legal, but also on factual grounds.

c) Protection of property

Based on the author's view that military intervention in order to protect nationals was illegal, it consequently follows that the use of force to protect property also violated international law. Even the Lord Chancellor, the only lawyer within the British Government to advocate the contrary view, acknowledged that he could not find much support for his position in academia or elsewhere.[1051]

[1048] Trevelyan, *The Middle East*, 120-121.
[1049] Hershey, *Essentials*, 239.
[1050] Minutes of November 1, 1956, drawn up by the Legal Advisor at the Foreign Office (FO 371/119164 (FE 14211/2357); and Letter by the former President of the ICJ, Lord McNair, to the Lord Chancellor of November 4, 1956 (LO 2/825); both quoted in Marston, "Armed Intervention", 805, 813.
[1051] Professor Goodhart (Law, Oxford) was at the time one of those rare exceptions. He claimed that Article 51 did not "preclude action when an act of force threatens to deprive the States of the Western world of the essential oil on which their economic life depends"; extract of "notes" he wrote for the Lord Chancellor on September 10 or 11, 1956 (LCO 2/5760); quoted by Marston, "Armed Intervention", 779; the Lord Chancellor could, however, have pointed to a British tradition of claiming a right to intervene to protect British property; in

In his reasoning, the Lord Chancellor relied exclusively on a passage in an article written by Professor Waldock, which he repeatedly quoted *verbatim*:[1052]

> *Logic would suggest that if very valuable property was in danger of irretrievable injury through the breakdown of law and order, entry by the foreign state for the sole purpose of securing the safety of that property might be excusable.*[1053]

The other legal advisors in the employ of the British Government were unanimous in their rejection of the validity of such a justification.[1054] As Hershey had already pointed out in 1927, the general danger to foreigners' property created by a war-like situation could not justify intervention in another state.[1055] This assessment is implicitly confirmed by the ICJ's rejection of the wider concept of "national interest" as a justification for using force.[1056] After all, the protection of "vital property" is definitely an aspect of the "national interest", as evidenced by the fact that the Lord Chancellor's justification alternated between these two concepts when referring to the Suez Canal.[1057]

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response to the riots in Iran in 1946 the British government had claimed a right to forcibly "safeguard Indian and British interests in Southern Persia", and in response to the riots in Cairo in 1952 it had also claimed a right to "safeguard the lives and property of its nationals"; Thomas C. Wingfield, "Forcible Protection of Nationals Abroad", *Dickinson Law Review*, Vol. 104, 1999-2000, 439-469, 445-446.

[1052] Marston, "Armed Intervention", 796; see also: memo by the Lord Chancellor, entitled "The Right of Intervention", presented to the Cabinet on October 29, 1956, para. 5 (PREM 11/1129); quoted in Marston, "Armed Intervention", 800.

[1053] Waldock, "The Regulation", 503, fn. 1.

[1054] The Legal Advisor at the Foreign Office concluded on August 29, 1956, that as far as the right to protect property by force in self-defence was concerned, there was "not a single modern authority that supports so wide an interpretation of the idea" (FO 800/748); quoted by Marston, "Armed Intervention", 785; the Attorney-General and the Solicitor-General, in replying to a memo from the Lord Chancellor of October 21, 1956, in which he had explicitly relied on the right to use force to protect property, concluded on October 31, 1956: "It cannot, in our opinion, be said that Egypt has so far committed any act which would justify the use or threat of force by the United Kingdom in self-defence" (LO 2/825); quoted by Marston, "Armed Intervention", 797; in a letter of November 1, 1956, they declared that "it is not true to say that under international law we are entitled to take any measures open to us 'to protect our interests which are threatened by hostilities'" (FO 800/749); quoted by Marston, "Armed Intervention", 803-804.

[1055] Hershey, *Essentials,* 239.

[1056] ICJ, *Armed Activities on the Territory of the Congo* (DRC v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, paras. 113, 119; the court observed that Uganda's High Command had justified its actions in the DRC (Operation "Safe Haven") on the basis of "securing Uganda's legitimate security interests". The ICJ described these objectives as "not consonant with the concept of self-defence as understood in international law".

[1057] As does Connell, who is supportive of the British government's arguments; in *The Most*, 118.

The Lord Chancellor's reliance on Professor Waldock's article was also self-defeating. He had quoted from a footnote, but ignored the relevant text passage. In the article, Waldock had actually pointed out, referring to Iran, that

> *if British troops had been landed to 'protect' the oil installations against being taken over by the Iranian Government, that to-day would have been a difficult case to bring under self-protection, however valuable the property which was at stake.*[1058]

He then went on to state that, if the British at Abadan, Iran, had been "faced with almost certain death or serious injury", Britain would have been justified to intervene. Waldock's often-quoted footnote referred to the phenomenon that protecting nationals was legal, but protecting property was not, and was inserted in the following sentence:

> *If the distinction in principle between protection of property and life is not absolutely logical, the humanitarian consideration seems to me a determining factor.*[1059]

Waldock's legal analysis in fact clearly contradicted the Lord Chancellor's claims.[1060] In his article he describes international law as allowing the use of force to protect nationals, while prohibiting it to protect property, a principle he -based on humanitarian considerations- seems to implicitly accept.[1061]

Besides finding no basis in the UN Charter, customary international law,[1062] or Professor Waldock's article, the argument had another irredeemable weakness: neither the Suez Canal Company, nor the Suez Canal itself was British property. The British

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[1058] Waldock, "The Regulation", 503.
[1059] Waldock, "The Regulation", 503.
[1060] A point also made by the Legal Advisor at the Foreign Office on November 1, 1956; Marston, "Armed Intervention", 805-806.
[1061] Waldock, "The Regulation", 503.
[1062] Derek William Bowett, *Self-Defence in International Law*, Manchester: Manchester University Press, 1958, 100-101; Bowett lists a few cases where a right to protect property was claimed; he concludes: "It is submitted that protection in the sense of the use of military force or the threat of such use can rarely, if at all, be extended to the property rights of nationals abroad"; Wright, "Intervention", 273; in 1984, the British Foreign Office, explicitly referring to the British justification put forward in 1956, simply states that "it would not generally be accepted as lawful today."; in: "Is intervention ever justified?", British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in BYIL, Vol. 57, 1986, 614-624, 618.

Government was justifying its intervention on the basis of protecting an Egyptian company charged with running an Egyptian Canal -albeit subject to international usage- on Egyptian territory against the Egyptian-Israeli fighting.

Although British shareholders held a considerable stake in the Suez Canal Company, it was nevertheless, as has already been pointed out, an Egyptian company which had recently been nationalized. As far as the Suez Canal itself was concerned, treaty after treaty had confirmed Egyptian sovereignty, and Egypt had been living up to its obligations under the *Convention of Constantinople*. It was also very likely that the Anglo-French intervention would turn out to be much more dangerous to the Canal and to international free passage than the Egyptian-Israeli war.

Any justification of the military intervention based on the protection of non-host-state property must consequently be rejected.

d) Police action

The argument that the Anglo-French intervention amounted to no more than a "police action" -intent on protecting the vital trade link via the Suez Canal from the Israeli-Egyptian fighting in the interest of the international community- was the most frequently aired justification.[1063]

Supporters of this argument, of course, quickly ran into difficulties: the overwhelming majority of states disapproved of the "police action", and of the Anglo-French

[1063] Corbett, "Power", 1; Stanley, "Failure", 95; Salt, *The Unmaking*, 175; McDermott, *The Eden*, 155; Woollacott, *After Suez*, 75; Connell, *The Most*, 209; Turner, *Suez 1956*, 346; he points out that the conduct of a "police action", based on the failure of the UN, was the only justification put forward by Britain's UN Ambassador during the debates in the General Assembly.

ultimatum that had preceded it. Any claim to be protecting the interests of the international community therefore quickly became embarrassing.

Furthermore, this justification had no basis in international law. Even in internal memos the main proponent of the argument, the Lord Chancellor, failed to provide an in-depth analysis of the legal arguments.[1064]

This is perhaps also due to the embarrassing nature of some of the arguments in favour of such a proposition. The Leader of the House of Lords, the Marquess of Salisbury, one of Eden's most trusted advisors,[1065] had made his opinion regarding the United Nations quite clear; in a letter to the then Foreign Secretary he wrote on October 18, 1953:

> *The United Nations has become little more than a machine for enabling backward nations to press claims against the greatest powers to which they would normally not be entitled...*[1066]

Besides arguing that the stronger state was always right there was, however, no legal argument to justify an Anglo-French "police action" on the behalf of the international community.[1067] That was, and is the function of the collective organs, the General

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[1064] See, for example, his memo entitled "The Right of Intervention", presented to the Cabinet on October 29, 1956, para 5; in it he argues that the "danger to the Canal" justified intervention due to the "damage and suffering" caused "to a number of nations" should the Canal be blocked; no further analysis is provided (PREM 11/1129); quoted by Marston, "Armed Intervention", 800.

[1065] Louis, "The Suez", 286.

[1066] Salisbury to Eden, Personal, 18 Oct. 1953, Salisbury Papers; quoted by Louis, "The Suez", 286, fn. 20; (it should, however, be added that Salisbury did advocate the necessity of turning to the UN, before resorting to the use of force; Louis, "The Suez", 286); Geoffrey Murray, Senior Counsellor at Canada's UN mission during the Suez Crisis, describes the Anglo-French attitude towards the UN as viewing that institution as having been affected by the "influx from the communist and non-aligned states", which were seen as a "threat to the comfortable control the non-communist states had exercised since 1945"; in: "Glimpses of Suez 1956", Int'l J., Vol. 29, 1973-1974, 46-66, 51.

[1067] The Attorney-General, in a letter to the Foreign Secretary of November 1, 1956, stated categorically: "It is just not true to say that we are entitled under the Charter to take any measures open to us 'to stop the fighting'. Nor would it be true to say that under international law apart from the Charter we are entitled to do so." (FO 800/749); quoted by Marston, "Armed Intervention", 803; a point also made in a letter by the former President of the ICJ, Lord McNair, to the Lord Chancellor of November 4, 1956 (LO 2/825); Marston, "Armed Intervention", 813; Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Oxford University Press, 1963 (reprint 1968), 344-345; Connell, *The Most*, 209-210 (although a staunch defender of the British

Assembly and the Security Council, created by the UN Charter. These organs were entrusted with representing -however imperfectly- the international community of states' interests. Only when the Security Council -under Articles 42 or 53 UN Charter- has authorized it, can states -individually or collectively- resort to the use of force on behalf of the community of states/regional states. Regarding Suez that authorization was not forthcoming.

Some have tried to circumvent this clear legal position by arguing that the Security Council, which was entrusted with these duties, had been rendered ineffective due to the use of the veto by some of the permanent members of the Council.[1068] The British Foreign Secretary seems to have thinking along these lines, when he advocated an individual state's rights to intervene during an "emergency", due to the fact the Security Council was "subject to the veto". Tony Blair, in the run-up to the Iraq War in 2003, was also eager to take up this argument by claiming that an "unreasonable veto" could not bar individual states from taking legitimate action.[1069]

These arguments have no basis in law. No principle, whereby some vetoes are less valid than others, has been established, nor is it at all clear who is authorized to judge whether a veto falls in one or the other category. The suggestion of ignoring vetoes that are "unreasonable" is tantamount to suggesting the abolition of the Security Council, as any vote would be meaningless. In the *Corfu Channel Case* the ICJ had

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policy on Suez and Egypt, the former Head of British propaganda in the Middle East during WW II, claims that the way the "police action" was carried out aroused "almost universal distaste". He points out that "the essence of a good policeman is not the amount of physical force he can deploy, but the authority with minimum of force behind it which he exerts", and claims the psychological aspects of the operation had been "woefully ill-considered, ... in accordance neither with sound principles nor with clear directives").

[1068] Eden, *Full Circle*, 536.

[1069] Tony Blair, as quoted in *The Guardian*, "Iraq attack very close, says Bush", Duncan Campbell, Michael White, Patrick Wintour, 07/03/2003, available at: http://www.guardian.co.uk/Iraq/Story/0.,909201.00.html; last accessed 18/08/2011; Tony Blair is quoted as saying: "If there was a veto applied by one of the countries with a veto, or by countries that I thought were applying the veto unreasonably, in those circumstances we would (go ahead)."; Rudolf Dolzer, "Lecture Commentary: Regime Change and the Changing Universe of Values in Contemporary International Law", Am. Soc'y Int. L. Proc., Vol. 98, 2004, 299-303, 301 (he supports this view).

also already rejected the notion that the "present defects in international organization" justified unilateral action beyond the Charter.[1070]

The issue of an unacceptable veto was, of course, also a distraction from the real issue: neither Tony Blair, nor Anthony Eden was likely to muster the required number of votes on the Security Council in support of their respective positions, any possible veto notwithstanding.[1071]

Without explicit authorization by the UN Security Council, the Anglo-French "police action" was clearly illegal under international law.

e) Further violations of international law

Ironically, the Anglo-French use of force also violated the provisions of the *Convention of Constantinople*, the very treaty the two states were supposedly upholding against Egyptian violations.[1072]

By attempting to occupy the Canal Zone, a result only to be achieved by a massive military assault, both states threatened the free passage through the Canal. This was a violation of Articles I and IV of the *Convention of Constantinople*. In fact this danger was soon to materialize, as the Egyptians blocked the Canal.

The Anglo-French claim of defending the Canal had no basis in the *Convention of Constantinople*, as Egypt was responsible for the Canal's protection according to

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[1070] ICJ, *Corfu Channel Case*, Judgement (Merits), 09/04/1949, I.C.J. Rep. 1949, 4, 35.
[1071] Article 27 (2) UN Charter: nine votes are required; however, in 1956, seven votes would have been sufficient.
[1072] A conclusion also reached by the Attorney-General and the Solicitor-General in a letter of March 5, 1957, presented to the Cabinet (CAB 129/86, 53-54, (C. (57) 55); Marston, "Armed Intervention", 816; Allain, *International*, 67.

Article X, and there had been no Egyptian request for assistance, as possible under the procedure in Article IX.

It should also be mentioned that the official Anglo-French reaction to the Israeli attack on Egypt was, of course, in contravention of the solemn promises made by Britain, France, and the USA in the *Tripartite Declaration* of 1950.[1073] After all, the three states had declared their intention of "immediately taking action both within and without the United Nations to prevent" a "violation" of the frontiers and armistice lines between Israel and the Arab states,[1074] something only Israel could be accused of at this point of time.

Eden justified this violation on the basis that Britain was freed from its obligations under the *Tripartite Declaration* due to Nasser's denunciation of it.[1075] On October 20, 1956, Eden wrote to Eisenhower:

> *But we feel under no obligation to come to the aid of Egypt. Apart from the feelings of public opinion here, Nasser and his press have relieved us of any obligation by their attitude to the Tripartite Declaration.*[1076]

On November 1, 1956, he made a similar statement before the House of Commons:

> *Let me take the question of our attitude to the 1950 Declaration. The right hon. Gentleman asked me just now about it and our position so far as Egypt was concerned. The argument that I have put to the House, and the only argument, in*

[1073] McDermott, *The Eden*, 157; Mc Dermott, a civil servant in the Foreign Office, who was directly responsible for dealing with the Suez Crisis, later accused Eden of "flouting" the Tripartite Declaration.

[1074] *Tripartite Declaration Regarding the Armistice Lines* (May 25, 1950), Art. 3; see: http://unispal.un.org/UNISPAL.NSF/3d14c9e5cdaa296d85256cbf005aa3eb/3ef2baa011ad818385256c4c0076e724?OpenDocument; last accessed 19/08/2011.

[1075] Eden, *Full Circle*, 528; Turner, *Suez 1956,* 281; apparently Eden also justified ignoring the Tripartite Declaration on the basis of Egypt's violation of the Security Council Resolution regarding Israeli shipping (Turner, *Suez 1956*, 285). There is, however, no basis for this justification, as the violation of a UN Security Council Resolution (something Israel could also be accused of) had nothing to do with the guarantee of the armistice lines laid down in the Tripartite Declaration. British UN Ambassador Dixon is said to have told his American counter-part that the Tripartite Declaration was "ancient history and without current validity"; Turner, *Suez 1956*, 310; Borowy, *Diplomatie*, 606; Connell, *The Most*, 191-192.

[1076] *Message from Prime Minister Eden to President Eisenhower*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 856-857, 857; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

> *connection with the 1950 Declaration was that we did not feel that Egypt was in a position to call for the fulfilment of the 1950 Declaration on her behalf when she herself had so often denounced or renounced the Tripartite Declaration and made it so apparent that she did not want it to apply for Egypt.*[1077]

That was an extraordinary position to take, since Egypt had never been a party to the Declaration, but only one of its objects. Any possible legal obligations on the part of Britain, resulting from the Declaration, would primarily have been towards France and the USA.[1078]

The French had, however, already repeatedly ignored the *Tripartite Declaration* in the past, by clandestinely exporting weapons to Israel, without any consideration of Israel's motives.[1079] Furthermore, the recurrent clashes along the armistice lines between Israel and its Arab neighbours had for years been conveniently overlooked by the three signatories.[1080]

f) Summary: Legality of the Anglo-French justifications

None of the official justifications put forward by Britain and France were reconcilable with international law. The Attorney-General therefore predicted that Britain would

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[1077] Prime Minister Eden, Hansard, Egypt and Israel, HC Deb 01 November 1956 vol 558, cc1631-1744, cc1651-1652; available at: http://hansard.millbanksystems.com/commons/1956/nov/01/egypt-and-israel: accessed 12/08/2011.

[1078] A view obviously shared by President Eisenhower who wrote to Eden on October 30, 1956: "Without arguing the point as to whether the tri-partite statement is or should be outmoded, I feel very seriously that whenever any agreement or pact of this kind is in spirit renounced by one of its signatories, it is only fair that the other signatories should be notified...We have had no thought of repudiating that statement and we have none now."; *Message From President Eisenhower to Prime Minister Eden*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 848-850, 849-850; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1079] Allen, *Imperialism*, 449-50; Allen also points out the unfairness of Britain and the USA denying Egypt weapons on the basis of the Tripartite Declaration, while France was more or less openly flouting the Declaration and exporting modern weaponry to Israel; Turner, *Suez 1956*, 260-262; Gainsborough, *The Arab-Israeli*, 72; Bowie, *Suez 1956*, 55.

[1080] *Tripartite Declaration Regarding the Armistice Lines* (May 25, 1950), Art. 1; see: chttp://unispal.un.org/UNISPAL.NSF/3d14c9e5cdaa296d85256cbf005aa3eb/3ef2baa011ad818385256c4c0076e724?OpenDocument; last accessed 19/08/2011; Turner, *Suez 1956*, 131.

"be unable to avoid a decision that" it had "acted illegally and in breach of the Charter", should the case come before the ICJ,[1081] a view shared by the legal advisor to the French Foreign Ministry.[1082]

The forcible protection of nationals had been outlawed by the UN Charter. Such a right had not been "resurrected" on the basis of the failure of UN institutions, nor had "new" customary international law allowing such rescue missions developed by 1956. Forcible protection of foreign property was clearly illegal, an argument that could anyway hardly be applied in relation to an Egyptian company and an Egyptian canal, both situated in Egypt. The most favoured argument -that of an Anglo-French "police action" in the interest of the international community- was undermined by that community's opposition to the intervention, and was also contrary to international law. This illegality is compounded by the fact that none of the justifications put forward could be reconciled with the facts on the ground.[1083]

More recently it has been argued that the prohibition on the use of force has been violated so often since WW II that the ban on the use of force no longer reflects international law as it currently stands.[1084] Even proponents of this theory would, however, not claim that this was the case in 1956, only eleven years after the UN Charter had come into force. This theory also has another fatal weakness: it has no

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[1081] Letter from the Attorney-General to the Prime Minister, November 8, 1956; (PREM 11/1129); quoted by Marston, "Armed Intervention", 810.
[1082] Minutes from a meeting of the British and French legal advisors on December 5, 1956 (LO 2/825); quoted by Marston, "Armed Intervention", 817.
[1083] McDermott, *The Eden*, 132, 151; McDermott, a civil servant in the Foreign Office at the time, later accused Eden of lying to Parliament: "Eden fended them [questions by the opposition about collusion] off with statements that, in everyday parlance, can only be called lies."
[1084] Michael J. Glennon, "The UN Security Council in a Unipolar World", *Virginia Journal of International Law*, Vol. 44, 2003-2004, 91-112.

support in state practice and *opinio juris*. Even now states often go to extraordinary lengths to justify their use of force on the basis of UN Charter law, even when the legality of their action is very much in doubt. No state has so far claimed that the ban on the use of force no longer applies. Certainly, in 1956, the ban on the use of force was very much reflective of international law.

Besides violating Article 2 (4) UN Charter, the Anglo-French use of force also violated the *Convention of Constantinople,* and made a mockery of the pledges made by Britain and France in the 1950 *Tripartite Declaration.*

The magnitude of the Anglo-French violation of international law is significantly enhanced when the true facts are considered. As we now know, the Israeli-British-French assault on Egypt had been pre-arranged secretly.[1085] Thanks to the Israeli Prime Minister, the results of these unofficial consultations between the three allies were laid down in the *Protocol of Sèvres.*

All the official justifications just analysed in depth were based on one premise: the Israeli-Egyptian War had created an "emergency": nationals and property had to be protected, and the economic future of the Free West had to be secured, by guaranteeing free passage through the canal and by protecting the canal itself against the fighting troops.

The obvious problem with that justification was that the Israeli attack, to be followed by an Anglo-French ultimatum, which was to be accepted by Israel and was certainly going to be rejected by Egypt, followed by an Anglo-French attack on Egypt had been pre-arranged, with exact dates, and recorded in the *Protocol of Sèvres.* The only

[1085] Trevelyan, *The Middle East*, 105-130, especially 121-122; the UK Ambassador in Cairo at the time describes in some detail how surprised he was by the turn of events, because he had no knowledge of the agreements reached at Sèvres.

emergency that could be claimed to exist had been caused by the British and French, in collusion with the Israelis. Needless to say any justification based on such an "emergency" was a clear violation of international law.

g) Anglo-French motivation

What motivated the British and the French Governments to commit such an obvious and clear breach of international law? By the time the Suez War came about, the British and the French had concluded that the Egyptian President Nasser had to be removed from office.[1086] If that were not possible by military intervention, he was supposed to be humiliated to such an extent that it would only be a question of time before other military officers would accomplish the task.[1087]

For the British, Nasser was a trouble-maker, costing them influence and prestige in the Middle East.[1088] The nationalization of the Suez Canal Company was the last straw in the eyes of many British (and French) politicians, vital as the Canal was for the oil trade.[1089] Nasser could not "be allowed to have his thumb on our windpipe".[1090]

[1086] Fullick/Powell, *Suez*, 191; Turner, *Suez 1956*, 186, 255; Ulfkotte, *Kontinuität*, 47; Gainsborough, *The Arab-Israeli*, 71; Parsons, *From Cold War*, 12; Bowie, *Suez 1956*, 21-22, 26, 102-103; Farnie, *East*, 725; Allain, *International*, 48, 63; Kyle, *Suez*, 148-149; Freiberger, *Dawn*, 144; Borowy, *Diplomatie*, 461, 569; Wright, "Intervention", 272; Richardson, "Avoiding", 370, 373; McDermott, *The Eden*, 133-134, 136; Woollacott, *After Suez*, 38; Mansfield, *A History*, 255.

[1087] Allen, *Imperialism*, 453; Gordon, "Trading", 94, 95; Corbett, "Power", 10; Murray, "Glimpses", 57; Bowie, *Suez 1956*, 21-22; Stanley, "Failure", 92-93; Stanley -implausibly- claims that only the French wanted to achieve Nasser's downfall; Borowy, *Diplomatie*, 471; Woollacott, *After Suez*, 38.

[1088] Shwadran, "Oil", 18; he (in 1956) claims that Nasser was to the UK "the greatest danger to their very existence"; Freiberger, *Dawn*, 144; Scott, "Commentary", 207.

[1089] Eden wrote to Eisenhower on July 27, 1956, in reaction to the nationalization of the Suez Canal Company: "The immediate threat is to the oil supplies of Western Europe, a great part of which flows through the canal"; quoted in Eden, *Full Circle*, 427 (also at 426); Martel, "Decolonisation", 404; Stanley, "Failure", 91; Turner, *Suez 1956*, 184-185; Shwadran, "Oil", 15-18; he points out that Britain received 80 % of its oil for "home consumption" from the Middle East, and France 43 % (at 16) leaving them without "any alternative resources" (at 18); the USA only received about 25 % of its oil from the region, and itself exported the same amount;

As was the case when Iran had nationalized the Anglo-Iranian Oil Company in 1953, the British were worried that other states, inspired by nationalism and their thirst for full independence, might follow suit, and nationalize other British imperial possessions.[1091] Therefore the lessons of Iran had to be re-applied.[1092] Britain had fought Iran's nationalization of the Anglo-Iranian Oil Company by encouraging the CIA-inspired coup against the Iranian Prime Minister Mossadegh in 1953, albeit with mixed results.[1093] This time the Americans were less willing to help, so that the British had to act on their own, if necessary.

But Nasser's reputation in Britain had already touched base-level before he nationalized the Suez Canal Company. He was regularly compared to Hitler or Mussolini.[1094] Nasser had proved to be a near insurmountable obstacle to British efforts to create a *Middle Eastern Defence Organization* against the perceived Soviet threat. This was particularly frustrating for the British, as the Americans had -until the Suez Crisis- "entrusted" the region to a Britain that was finding it ever more difficult to influence the countries there. [1095]

Gainsborough, *The Arab-Israeli*, 71; Siegfried, "The Suez", 611-613 (in 1952, 74 % of the total tonnage passing through the Canal was oil); McClure, "The Law", 717; Parsons, *From Cold War*, 11.

[1090] Eden, *Full Circle*, 426.

[1091] Shwadran, "Oil", 21; Gordon, "Trading", 93; Turner, *Suez 1956*, 182.; McClure, "The Law", 717; Borowy, *Diplomatie*, 476; Walter J. Levy, "Issues in International Oil Policy", Foreign Aff., Vol. 35, 1956-1957, 454-469, 459; Wright, "Intervention", 272.

[1092] Turner, *Suez 1956*, 113, 117, 170.

[1093] For a detailed account of the coup in Iran in 1953, see: Stephen Kinzer, *All the Shah's Men, An American Coup and the Roots of Middle East Terror*, Hoboken: John Wiley & Sons, Inc., 2008 (2003); Gordon, "Trading", 88.

[1094] Eden, *Full Circle*, 430-432, 465, 543; in his memoirs the former Prime Minister repeatedly compares Nasser and "Nasserism" with the Nazis; as does the former British Foreign Secretary in his account of the Suez Crisis; Lloyd, *Suez*, 103, 247; as does Connell, *The Most*, 36 (the former Head of British propaganda in the Middle East during WW II); Gordon, "Trading", 93; Turner, *Suez 1956*, 224, 231 (he also quotes Labour leader Gaitskell comparing the nationalization to "the territorial snatches of Hitler and Mussolini"); Allen, *Imperialism*, 452; Bowie, *Suez 1956*, 20; Richardson, "Avoiding", 387-388.

[1095] Gordon, "Trading", 93; Bowie, *Suez 1956*, 29; he claims the USA "followed" Britain's lead in the region after WW II; a claim also made by Kyle, *Suez*, 44; and Freiberger, *Dawn*, 19, 39; Devereux, "Britain", 331, 336; Woollacott, *After Suez*, 38.

Not only did the Egyptians refuse to join any military alliance Britain was a member of, but they were actively torpedoing British efforts to create an alternative alliance without Egypt. [1096] Everything that went wrong for the British in the Middle East was blamed on Nasser's devious influence: the sacking of the British Chief of Staff Glubb by the young King Hussein of Jordan being the most important example. Unable to believe that any other reason -such as Glubb's overbearing personality- could be to blame, it had to be the treacherous Nasser who had instigated his removal.[1097] Nasser was therefore seen as a major threat to British -and Western- interests in the region;[1098] Prime Minister Eden wrote to President Eisenhower on July 27, 1956:

> *If we take a firm stand over this now we shall have the support of all the maritime powers. If we do not, our influence and yours throughout the Middle East will, we are convinced, be finally destroyed.*[1099]

British and French politicians could also not accept the notion that Nasser was trying to safeguard Egypt's independence from Britain and was an Arab nationalist.[1100] As Woollacott has remarked, Nasser, in rejecting the British proposals for a regional defence pact, was merely demonstrating that he was "not interested in a new version of the old swindle."[1101]

The British and the French, however, suspected darker, ulterior motives behind Nasser's often proclaimed view that the Arabs should not again align themselves with

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[1096] F. R. C. Bagley, "Egypt Under Nasser", Int'l J., Vol. 11, 1955-1956, 193-204, 203; Fullick/Powell, *Suez*, 5, 12; Freiberger, *Dawn*, 143; Mansfield, *A History*, 248-249; Keay, *Sowing*, 431-432.

[1097] Allen, *Imperialism*, 450; Bagley, "Egypt", 204; Bowie, *Suez 1956*, 11-12, 19; Fullick/Powell, *Suez*, 9-10; they claim that the sacking of Glubb was "the turning point", as of which Eden had decided that Nasser must be removed; Eden is quoted as having said Nasser was the "enemy", and that he had to be "destroyed" (at 10) after the Glubb incident; Turner, *Suez 1956*, 166-169; he claims Glubb's dismissal was the point at which "Eden completely lost his touch ", and based his decisions no longer on facts but on his obsession with Nasser; Freiberger, *Dawn*, 143-144; Keay, *Sowing*, 430-432; McDermott, *The Eden*, 127-128; Woollacott, *After Suez*, 35; Mansfield, *A History*, 255; Trevelyan, *The Middle East*, 64-69.

[1098] Martel, "Decolonisation", 408; Shwadran, "Oil", 19, 21; McClure, "The Law", 717; Bowie, *Suez 1956*, 18; Lloyd, *Suez*, 59-60, 247; Freiberger, *Dawn*, 190; Borowy, *Diplomatie*, 473; Connell, *The Most*, 74, 80, 145; Eden, *Full Circle*, 421.

[1099] Eden, *Full Circle*, 427.

[1100] Fullick/Powell, *Suez*, 5; Woollacott, *After Suez*, 15, 36.

[1101] Woollacott, *After Suez*, 36.

foreign powers, be they capitalist or socialist. His espousal of neutralism was seen as a mere cover for his true intention of aligning himself with the Soviet bloc.[1102] These Anglo-French suspicions, later partly shared by the Americans,[1103] were seemingly confirmed when Egypt agreed the Soviet arms deal and decided to recognize communist China.[1104] The Soviet danger was repeatedly raised with the Americans; on August 27, 1956, Eden wrote to Eisenhower:

> *I have no doubt the bear is using Nasser, with or without his knowledge, to further his immediate aims. These are,..., first to dislodge the West from the Middle East, and second to get a foothold in Africa so as to dominate that continent...This policy is clearly aimed at ...our Middle East oil supplies.*[1105]

Internal British politics also played an important role in the aggressive stance towards Egypt. Having compared Nasser to Mussolini and/or Hitler, it was only logical that there were to be no more "Munichs" as in 1938. Appeasement had been wrong then, and would be wrong now.[1106] On August 8, 1956, Eden declared in a TV address:

> *We all know this is how fascist governments behave and we all remember, only too well, what the cost can be of giving in to fascism.*[1107]

The accusation of appeasing Nasser was dangerous to the new British Prime Minister. Eden, generally viewed as a very successful Foreign Secretary, had in 1955 become Churchill's successor. To the amazement of many, he turned out to be a "ditherer", a

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[1102] Corbett, "Power", 4; Shwadran, "Oil", 19, 21; Connell, *The Most*, 23, 28, 82; they share these suspicions; Fullick/Powell, *Suez*, 5, 12, 190; Allen, *Imperialism*, 450; Martel, "Decolonisation", 407-408; Borowy, *Diplomatie*, 654-655; Wright, "Intervention", 272; Devereux, "Britain", 334; Rustow, "Defense", 284; McDermott, *The Eden,* 143; Mansfield, *A History*, 255-256; Keay, *Sowing*, 427-428.

[1103] Turner, *Suez 1956*, 228; Allen, *Imperialism*, 450; Freiberger, *Dawn*, 43 (he also mentions the US rejection of the general concept of neutralism).

[1104] Turner, *Suez 1956*, 173-174.

[1105] *Message From Prime Minister Eden to President Eisenhower*, August 27, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 304-305, 304; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1106] Gordon, "Trading", 93; Bowie, *Suez 1956*, 19; Connell, *The Most*, 47, 145; McDermott, *The Eden*, 135, 142; Trevelyan, *The Middle East*, 7.

[1107] Prime Minister Eden; quoted in Turner, *Suez 1956*, 224; and Connell, *The Most*, 117.

weak Prime Minister, who had, by the time the Suez Crisis developed, installed an equally weak Foreign Secretary, Selwyn Lloyd.[1108]

The conclusion of the 1954 Suez Canal Base Treaty -derided by many on the Tory right- had already led to accusations of surrender against Eden, who had been the Foreign Secretary at the time.[1109] Threatened by the Tory right, gathered in the increasingly influential "Suez Group", which advocated an unrealistic return to aggressive imperialist policies,[1110] he soon became beholden to their extreme views, which made compromise with Egypt virtually impossible.[1111] This inability was also caused by widespread British hostility towards Egypt in general, based on the feeling that the Egyptians had not been sufficiently supportive during the World Wars, and on the notion that they had no right to interfere with British policies in the Middle East.[1112] These feelings are summarized succinctly by the British Ambassador in Cairo at the time of the Suez crisis:

> *To the average Englishman Egypt had become the symbol of the decline of the British Empire, although it never was part of the Empire, and the feeling of impotence and frustration natural in this period of transition, found expression in*

[1108] Stanley, "Failure", 95; Fullick/Powell, *Suez*, 8-9, 191; Turner, *Suez 1956*, 142-144 (Eden), 147-149 (Lloyd), 226; Kyle, *Suez*, 67-69 (Eden), 86-87 (Lloyd).

[1109] One of the leaders of the "Suez Group" was Captain Waterhouse, M.P., who, in the House of Commons, stated during the debate on the 1954 treaty: "This is not a sell-out. It is a give-away. Instead of having physical control of a great base, instead of having troops on the major waterway of the world, we have got this piece of paper in our hands. It is indeed a hard day for anybody on this side of the House to have to sit and support this Government which has, as we believe, not taken a wise decision on the Suez Canal."; Hansard, Suez Canal Zone Base (Anglo-Egyptian Agreement), HC Deb 29 July 1954 vol 531 cc724-822, c739; available at: http://hansard.millbanksystems.com/commons/1954/jul/29/suez-canal-zone-base-anglo-egyptian; accessed 19/08/2011; during the same debate, the former (Labour) Prime Minister Attlee declared: "Now we come down to this Agreement that we have got, and we all hope that it will be carried out, but its terms are worse than any I have ever seen. The right hon. Gentleman knows this could have been settled on better terms, and in fact on these very terms two years ago, if he had stood up to his own back benchers." (at c737); Fullick/Powell, *Suez*, 4; Freiberger, *Dawn*, 81; (they also make the point that the oppositional Labour Party was no less critical of the treaty than the Tory right); Turner, *Suez 1956*, 126; Selak, "The Suez Canal", 498-499; Connell, *The Most*, 50-51, 55-56.

[1110] Turner, *Suez 1956*, 91-95; Kyle, *Suez*, 137-138; McDermott, *The Eden*, 164; Trevelyan, *The Middle East*, 13, 84-85.

[1111] Turner, *Suez 1956*, 145, 157-158; Bowie, *Suez 1956*, 19; Kyle, *Suez*, 554; Freiberger, *Dawn*, 143; Trevelyan, *The Middle East*, 96.

[1112] Fullick/Powell, *Suez*, 3, 191.

> *attacks on any Minister who could be represented as weak in dealing with Nasser.*[1113]

The French also had their "internal" problem with Egypt, namely Algeria.[1114] Similar to the British in being unable to accept the fact that the vast majority of the population in this North African country wanted the French out, external forces had to be blamed for the ever-escalating crisis there. Nasser, with his version of Arab nationalism, was soon found to be the culprit who instigated and supported Algerian resistance against French rule.[1115] Although Egyptian propaganda was decidedly anti-French, and there was some evidence that Nasser did provide the rebels with weapons,[1116] his role in the Algerian uprising was almost certainly vastly over-estimated.[1117] Nevertheless, Algeria became the prime French motivation behind their wish to remove Nasser. As Eden recalled, the French Foreign Secretary had told him that "if Egypt were allowed to succeed in grabbing the canal, the Algerian nationalists would take fresh heart."[1118]

In France, too, comparisons between Hitler and Nasser were being made;[1119] French Prime Minister Mollet declared that France was battling an "alliance between Pan-Slavism and Pan-Islam" in North Africa,[1120] and that

> *All this is in the works of Nasser, just as Hitler's policy was written down in Mein Kampf. Nasser has the ambition to recreate the conquests of Islam.*[1121]

[1113] Trevelyan, *The Middle East*, 7.
[1114] Gordon, "Trading", 91-92; Turner, *Suez 1956*, 62, 66, 190-192; McDermott, *The Eden*, 136.
[1115] Gordon, "Trading", 93; Stanley, "Failure", 92; Shwadran, "Oil", 19; Fullick/Powell, *Suez*, 191; Turner, *Suez 1956*, 193, 254; Gainsborough, *The Arab-Israeli*, 71; Bowie, *Suez 1956*, 12, 26; Kyle, *Suez*, 554; Freiberger, *Dawn*, 190; Borowy, *Diplomatie*, 586; Wright, "Intervention", 272; Scott, "Commentary", 207; Eden, *Full Circle*, 435; McDermott, *The Eden*, 136; Woollacott, *After Suez*, 12-13, 39-40, 42; Connell, *The Most*, 104; Mansfield, *A History*, 255; Keay, *Sowing,* 434-435; Trevelyan, *The Middle East*, 71.
[1116] On October 18, 1956, the French boarded the *Athos,* which was transporting a large amount of weapons from Alexandria to Algiers, obviously intended for the Algerian rebels; Turner, *Suez 1956*, 287; Connell, *The Most*, 177; Trevelyan, *The Middle East*, 71.
[1117] Fullick/Powell, Suez, 7; Turner, *Suez 1956*, 193, 194-195; Woollacott, *After Suez*, 42; Trevelyan, *The Middle East*, 71.
[1118] Eden, *Full Circle*, 435.
[1119] Fullick/Powell, *Suez*, 12; Turner, *Suez 1956*, 187; Turner describes Nasser as a "hate-figure" in France; Allen, *Imperialism*, 452; Bowie, *Suez 1956*, 26, 28; Woollacott, *After Suez*, 42.
[1120] Kyle, *Suez*, 115.

Thus the decision by Britain and France to use force against Egypt was based on what was seen as their respective national interest, a motivation that the ICJ has explicitly rejected as a justification for the use of force.[1122] The nationalization of the Suez Canal Company was certainly not the only, or even main reason for the Anglo-French intervention. Both countries were determined to teach Nasser, Egypt, and the Arabs at large a lesson: Britain and France, both Great Powers, would not be humiliated by an Arab state.[1123]

Legal arguments were simply put forward to create at least a semblance of legitimacy before the international community.[1124] Both states' politicians, certainly the British, realized that their actions were contrary to international law, which is why the real motives were not revealed to the public or close allies.[1125] On October 30, 1956, after Israel had launched its pre-arranged attack, Eden was still telling Eisenhower that the British government did "not wish to support or even condone the action of Israel."[1126]

[1121] French Prime Minister Mollet; quoted in Kyle, *Suez*, 115.

[1122] ICJ, *Armed Activities on the Territory of the Congo* (DRC v. Uganda), Judgement, 19/12/2005, I.C.J. Rep. 2005, 168, paras. 113, 119; the court observed that Uganda's High Command had justified its actions in the DRC (Operation "Safe Haven") on the basis of "securing Uganda's legitimate security interests". The ICJ described these objectives as "not consonant with the concept of self-defence as understood in international law".

[1123] Gordon, "Trading", 94; McDermott, *The Eden*, 164; McDermott, at the time a civil servant in the Foreign Office, partly blames the escalation of the Suez crisis on "the traditional desire to show that the 'lion still had teeth' and 'to teach the wogs a lesson'".

[1124] This is also evidenced by the Attorney-General's and Solicitor-General's complaints at not having been properly consulted on the legal issues involved, as far as Suez is concerned. In fact, after the conflict was over, they raised the matter as a constitutional issue, as they deemed it unacceptable that the government had been relying on the Lord Chancellor's advice, a task they deemed to be beyond his constitutional remit; Marston, "Armed Intervention", 791-792, 809-812; Suez, *Bowie 1956*, 102; Finch, "Post-Mortem", 379.

[1125] The US Ambassador to London during the Suez Crisis, Aldrich, describes how he, on October 28, 1956 (the day before the Israelis launched their pre-arranged attack), repeatedly asked British Foreign Secretary Lloyd, whether he knew why the Israelis were mobilizing. Lloyd denied any such knowledge, and re-iterated a pledge to defend Jordan. Asked by the US Ambassador whether an Israeli attack on Egypt may be possible, Lloyd claimed to be in the dark as far as Israeli actions were concerned. This charade continued when the Israeli attack became known on October 29, 1956, and Lloyd told the US Ambassador that the United Kingdom would "cite Israel before the Security Council as an aggressor" (in: "The Suez", 545-546); the Senior Counsellor at Canada's UN mission during the Suez Crisis, Murray, also claims Canada had not been forewarned of the tripartite "collusion" (in: "Glimpses", 48).

[1126] *Message from Prime Minister Eden to President Eisenhower*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 871-872, 871; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Similarly, the British Foreign Secretary declared before the General Assembly on November 23, 1956: "I deny emphatically the allegation

Defending a -by that time already illusory- Great Power status trumped any legal concerns raised by allies and by those annoying lawyers. The British Ambassador in Cairo at the time of the Suez crisis later concluded:

> *The legal arguments were never important. It was a political issue.*[1127]

Eden had confirmed this assessment on October 16, 1956:

> *The lawyers are always against us doing anything. For God's sake, keep them out of it. This is a political affair.*[1128]

2. Israel

a) Official justification

Israel provided a separate legal justification for its decision to launch an attack on Egypt. According to Israel's UN Ambassador Eban, Israel was simply exercising its "inherent right of self-defence" against Egyptian aggression.[1129] The repeated attacks on Israel by the *fedayeen,* based in the Sinai, justified the Israeli incursion onto Egyptian territory in order "to eliminate the bases from which Egyptian units invade Israel's territory."[1130]

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that Her Majesty's Government in the United Kingdom instigated the Israeli attack or that there was an agreement between the two countries about it"; quoted by Marston, "Armed Intervention", 799.

[1127] Trevelyan, *The Middle East*, 81.

[1128] Prime Minister Eden to Sir Anthony Nutting, Under-Secretary of State at the Foreign Office; quoted by Marston, "Armed Intervention", 798; in a conversation with the Law Officers after the Suez Crisis the Prime Minister declared that "the Government's decision was taken on grounds of policy, not of law" (FO 800/749); quoted by Marston, "Armed Intervention", 812.

[1129] Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011.

[1130] Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011.

The Israeli Ambassador's job was complicated by the fact that he knew the USA would not accept that line of argument. During a conversation at the US Department of State on October 28, 1956, he had been informed that

> *The Secretary thought that at no previous time had Israel been as safe as it is today.*[1131]

Nevertheless, according to Eban's statement, Israel had had no choice as the *fedayeen* raids had been supported and even organized by the Egyptian government and the international community had failed to resolve the problem. Furthermore, the *fedayeen* attacks carried out from Jordan and Syria were also attributable to Egypt, following those three states' alliance agreed in October 1956; Nasser was trying "to swamp Israel from three sides".[1132] Based on Egypt's hostility towards Israel, it was impossible to achieve a negotiated settlement. Therefore Israel had acted in accordance with Article 51 UN Charter, when its troops had crossed the Armistice line, as it had been subject to an "armed attack".[1133]

Needless to say, France,[1134] and, after some prevarication, Great Britain supported the Israeli line of argument. British Foreign Secretary Lloyd told the US Ambassador that

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[1131] *Memorandum of a Conversation, Department of State, October 28, 1956, 5:57 p.m.*; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 808-810, 809; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1132] Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011; a point he also repeatedly made in conversations at the US Department of State; *Memorandum of a Conversation, Department of State, October 28, 1956, 5:57 p.m.*, and *Memorandum of a Conversation, Department of State, October 29, 1956*; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 808, 821; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Bowie, *Suez 1956*, 60 (as far as Jordan is concerned); the Israeli claims are supported by Eden in his memoirs, *Full Circle*, 515-516.

[1133] Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011.

[1134] The French Representative at the UN accepted Israel's justification of its attack on Egypt, claiming that Nasser was, after all, out to "annihilate" Israel (Bowie, *Suez 1956*, 67).

Israel's actions were "a clear case of self-defence" against the barring of Israeli shipping and the *fedayeen* attacks.[1135]

b) Article 51 UN Charter

aa) "Armed Attack"

Various legal problems arise when Israel's official justification is considered under Article 51 UN Charter. While it seems plausible to argue that the attacks carried out by the *fedayeen* -mainly Palestinian refugees living in Egypt- could be attributed to the Egyptian Government,[1136] at least since the massive Israeli reprisal of 1955,[1137] it is less certain whether the *International Court of Justice* would accept Israel's argument that the *fedayeen* raids amounted to an "armed attack".

[1135] *Telegram from the Embassy in the United Kingdom to the Department of State*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 846-847, 846; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1136] The ICJ has in the past had to deal with state responsibility in regard of actions undertaken by irregular groups; in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* the Court had to decide, at what point the seizure of the US embassy and the taking of hostages became attributable to the Iranian Government; in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua* the ICJ had to decide, whether the US support given to the Contra rebels in their military campaign against the government of Nicaragua amounted to an armed attack on Nicaragua by the United States.

[1137] Egypt's President Nasser has been quoted as saying, on August 31, 1955, in respect of the *fedayeen*: "Egypt has decided to dispatch her heroes, the disciples of Pharaoh and the sons of Islam and they will cleanse the land of Palestine....There will be no peace on Israel's border because we demand vengeance, and vengeance is Israel's death"; available at: http://www.jewishvirtuallibrary.org/jsource/History/Suez_War.html; last accessed 19/08/2011; Israel's UN Ambassador Eban also quoted this statement in his speech before the General Assembly on November 1, 1956; Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011; according to the Ambassador, there had also been an Egyptian broadcast on August 30, 1955, referring to *fedayeen* attacks on Israel which stated: "Egyptian forces have penetrated into the territory of occupied Palestine and pursued the attackers"; the Nasser-speech of August 31, 1955, is also quoted by Eden, *Full Circle*, 515; Salt, *The Unmaking*, 171; Salt claims the *fedayeen* attacks were "launched" by Egypt as of August 1955; Hirst, *The Gun*, 326; he argues that, following the Gaza raid of February 1955, the "hitherto discouraged" insurgency by the *fedayeen* was then turned "into an instrument of Egyptian policy"; Gainsborough, *The Arab-Israeli*, 64-65, 69, 86; he claims that Egypt was organizing the *fedayeen* raids as of October 1954; Parsons, *From Cold War*, 12-13; Bowie, *Suez 1956*, 10, 54; Allain, *International*, 65; Kyle, *Suez*, 65-66; Connell, *The Most*, 167-168; Eden, *Full Circle*, 512, 515.

Based on the ICJ's restrictive interpretation of the term "armed attack" -outlined in the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua,*[1138] and confirmed in the *Case Concerning Oil Platforms-*[1139] it seems doubtful whether the individual events referred to by the Israelis amounted to the "most grave forms of the use of force", justifying the use of force in self-defence.[1140] On the other hand -based on the "accumulation of events" theory-[1141] the repeated attacks by the *fedayeen* could in their totality be seen as amounting to an "armed attack",[1142] a proposition the ICJ may be willing to accept.[1143]

As the author has argued elsewhere,[1144] an attack carried out with weapons on another state's territory and resulting in fatalities should always be viewed as sufficiently grave to be seen as an "armed attack", if that attack is carried out by a state's conventional forces, or by other groups whose actions can be attributed to that

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[1138] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27/06/1986; I.C.J. Rep. 1986, 14, para. 191.
[1139] ICJ, *Case Concerning Oil Platforms*, Judgement, 06/11/2003, I.C.J. Rep. 2003, 161, para. 64.
[1140] Gainsborough, *The Arab-Israeli*, 85.
[1141] According to this theory, a sufficient number of attacks below the threshold of an armed attack can in their totality nevertheless amount to an armed attack.
[1142] Gainsborough, *The Arab-Israeli*, 87.
[1143] ICJ, *Case Concerning Oil Platforms*, Judgement, 06/11/2003, I.C.J. Rep. 2003, 161, para. 64; ICJ; *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27/06/1986, I.C.J. Rep. 1986, 14, para. 231 (in both cases the court points out that even the series of events listed by the claimant did not amount to an armed attack, a conclusion that is only relevant if the "accumulation of events theory" is accepted); Gainsborough, *The Arab-Israeli*, 87 (he supports the "accumulation of events theory"); the Security Council has, however, in the past rejected this theory, for example in Resolution 101 (1953).
[1144] To put it briefly, the author takes the view that the ICJ's equation of "armed attacks" with the "most grave forms of the use of force" is unconvincing. It has remained unclear at what point this threshold is met, besides the ICJ's similarly nebulous statement that "mere frontier incidents" are not sufficient. The court has so far also refrained from explaining the practical application of its "gravity" criterion -based on the scale and effect of an attack- and has omitted to provide any evidence of supportive state practice and/or *opinio juris* confirming its interpretation of Article 51. Adopting the gravity criterion when deciding whether an "armed attack" has occurred, may invite aggressive states to take their chances by launching repeated "pin-prick" attacks in the hope of remaining under the threshold of an "armed attack". The victim of such attacks, however, is left with no means to defend itself, except for appealing to the international community. Not only does such an interpretation seem unsatisfactory, it also seems unrealistic, demanding, as it does, that the victim state tolerates "moderately" aggressive behaviour by another state. The author also rejects the "accumulation of events" theory as impractical and dangerous, as well as not confirmed by state practice and *opinio juris*. For a more detailed justification of the author's view, please see: Patrick Terry, *US-Iran Relations in International Law since 1979: Hostages, Oil Platforms, Nuclear Weapons and the Use of Force*, Rangendingen: Libertas Verlag, 2009, 43-48; this research was originally undertaken for the author's dissertation, which he submitted for the degree of Master of Laws at the University of Kent. As shown in the main text, these issues are, finally, not relevant here, as the Israeli attack on Egypt was in any case not "necessary" to end an ongoing attack.

state.[1145] Should the armed raids carried out by the *fedayeen* since 1955 have been attributable to Egypt -which seems a reasonable position to take- it should be concluded that each individual raid amounted to an "armed attack" on Israel.[1146]

Having suffered an "armed attack" attributable to Egypt, Israel would therefore basically have been entitled to resort to the use of force in self-defence under Article 51 UN Charter.

bb) Necessity[1147]

For the use of force in self-defence against an armed attack to be legal it must, however, also have been "necessary".[1148] Military action is deemed necessary, when there were no peaceful means to resolve the conflict,[1149] and the self-defence

[1145] Dominic Raab, "'Armed Attack' after the Oil Platforms Case", *Leiden Journal of International Law*, Vol. 17, 2004, 719-735, 724; Raab describes the court's reasoning in the *Nicaragua Case* as "novel"; William H. Taft IV, "Self-Defense and the Oil Platforms Decision", *The Yale Journal of International Law*, Vol. 29, 2004, 295-306, 301-302; Thomas M. Franck, "Some Observations on the ICJ's Procedural and Substantive Innovations", AJIL, Vol. 81, 1987, 116-121, 118-119; Natalia Ochoa-Ruiz/Esther Salamanca-Aguado, "Exploring the limits of international law relating to the use of force in self-defence", EJIL, Vol. 16, 2005, 499-524, 513; James A. Green, "The Oil Platforms Case: An Error in Judgment?", *Journal of Conflict and Security Law*, Vol. 9, 2004, 357-386, 379; Taft, "Self-Defense", 300-301; John Lawrence Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-Defense", AJIL, Vol. 81, 1987, 135-143, 139; for a contrary view see: Jörg Kammerhofer, "Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case", *Leiden Journal of International Law*, Vol. 17, 2004, 695-718, 706-708.

[1146] Rosenne, "Directions", 54.

[1147] The author has previously discussed the criterion of "necessity" and the legality of "armed reprisals" in *US-Iran Relations in International Law since 1979*, 48-51; some of the research was originally undertaken for the author's dissertation, which he submitted for the degree of Master of Laws at the University of Kent.

[1148] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 08/07/1996, I.C.J. Rep. 1996, 226, para. 41; *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27/06/1986, I.C.J. Rep. 1986, 14, para. 194; Caroline E. Foster, "The Oil Platforms Case and the Use of Force in International Law", *Singapore Journal of International and Comparative Law*, Vol. 7, 2003, 579-588, 579; Elizabeth Wilmshurst, "The Chatham House principles of International law on the use of force in self-defence", ICLQ, Vol. 55, 2006, 963-972, 966; Stewart M. Young, "Destruction of Property (on an International Scale): The Recent Oil Platforms Case and the International Court of Justice's Inconsistent Commentary on the Use of Force by the United States", *North Carolina Journal of International Law & Commercial Regulation*, Vol. 30, 2004-2005, 335-377, 340.

[1149] Andreas Laursen, "The Judgment by the International Court of Justice in the Oil Platforms Case", *Nordic Journal of International Law*, Vol. 73, 2004, 135-160, 150-151; Wilmshurst, "The Chatham House", 966.

measures were required to respond to the armed attack.[1150] According to the ICJ, "necessity" is to be judged objectively, with "no room for...discretion".[1151]

This is where the official Israeli justification fails to convince. The use of force under Article 51 UN Charter can only be justified if it is employed to end an ongoing attack.[1152] Some want to extend Article 51 UN Charter to include incidents covered by the "Caroline formula", whereby anticipatory self-defence is allowed when an attack is "instant, overwhelming, leaving no choice of means, and no moment for deliberation".[1153]

As far as the *fedayeen* raids are concerned neither scenario applied. The Israelis launched their attack many months after the last major *fedayeen* attack on Israel from Egypt, which took place in the spring of 1956.[1154]

This seems to have been realized by the Israelis, who tried to circumvent the problem by blaming more recent attacks, carried out from Jordan, on the Egyptians. The

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[1150] Foster, "The Oil Platforms", 579; Wilmshurst, "The Chatham House", 966-967.
[1151] ICJ, *Case Concerning Oil Platforms*, Judgement, 06/11/2003, I.C.J. Rep. 2003, 161, para. 73.
[1152] Wilmshurst, "The Chatham House", 964-965.
[1153] Wilmshurst, "The Chatham House", 964-965, 967-968; ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27/06/1986, I.C.J. Rep. 1986, 14, para. 237; the ICJ explicitly agreed with the view that a non-imminent reaction does not qualify as self-defence. The court found the relevant US activities not to be "necessary", because "these measures were only taken...several months after the major offensive...had been completely repulsed."
[1154] In any case, Israel had already launched a massive reprisal in response to these attacks, carried out in April 1956 (among other measures, four Egyptian military aircraft were shot down); Salt, *The Unmaking*, 172; Eden, in his memoirs, also refers to *fedayeen* activity in the spring of 1956, and then states that "the seizure of the Suez Canal in July brought a marked relaxation of raids across the Israeli frontier"; he mentions renewed activity in October, though without giving any details; Eden, *Full Circle*, 511-512; 515 (quote); the American Ambassador Aldrich also pointed this out to the UK Foreign Secretary in a conversation on October 30, 1956, after the Israelis had launched their attack on Egypt. Lloyd had taken the line that Israeli actions had been justified as "self-defence" against the *fedayeen*. The US Ambassador responded that Israel's reaction had been wholly disproportionate, especially considering the fact that the "*fedayeen* raids...had been largely negligible in recent months"; *Telegram from the Embassy in the United Kingdom to the Department of State*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 846-847, 847; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Parsons, *From Cold War*, 12; he points out that "between 1949 and 1956 the bulk of the Armistice violations" he attributes to the *fedayeen* "had been on the Syria/Israel and Jordan/Israel frontiers." Gainsborough, *The Arab-Israeli*, 69 (*fedayeen* most active in summer 1955 and spring 1956), 88; Bowie, *Suez 1956*, 54 (especially summer 1955 and spring 1956); Kyle, *Suez*, 107. There were, however, "minor" incidents on October 21 and 25, 1956, which were over in a matter of a few hours.

problem with that argument was, of course, that Jordan was a sovereign state, and that attacks had been carried out from Jordan before Nasser had come to power.[1155] Israel's reference to Jordan becomes even less credible, when it is considered that Israel had already launched a massive attack on Jordan on October 10, 1956, in retaliation for attacks emanating from there. During the Israeli raid on Qalquiliya about 100 Jordanians had been killed.[1156]

There was no ongoing attack on Israel which could be attributed to Egypt and had to be brought to an end. There was also no evidence of an imminent attack on Israel by the *fedayeen*, possibly justifying measures in anticipatory self-defence, a claim the Israelis also did not advance.[1157] Even if the "accumulation of events" theory were generally accepted as reflecting the law -as Israel implicitly claimed in its official justification-[1158] there can be no doubt that Israel reacted many months after the last major attack, launched by the "Egyptian" *fedayeen,* had occurred.

Accepting Israel's definition of an "armed attack" with its wide discretion on when defensive measures are launched would also result in having to examine whether Egypt's decision to support the *fedayeen* after the -universally condemned and

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[1155] In fact, on October 28, 1956, the Israeli Ambassador Eban still maintained that Israel feared an attack by Jordan; *Memorandum of Conversation, Department of State, October 28, 1956, 5:57 p.m.;* United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 809; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.
[1156] Fullick/Powell, *Suez*, 76; Borowy, *Diplomatie*, 571.
[1157] Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011.
[1158] Speech by Ambassador Eban (Israel) to the UN General Assembly, November 1, 1956; available at: http://www.jewishvirtuallibrary.org/jsource/History/ebansinai.html; last accessed 19/08/2011; in his speech the Ambassador mentioned events that occurred in1948 in order to justify Israel's attack on Egypt on October 29, 1956.

illegal[1159]- Gaza Raid, carried out by Israel in February 1955, might in itself have been justified as self-defence.[1160]

Attacking Egypt can therefore not be deemed "necessary" under Article 51 UN Charter. Based on Israel's *official* justification it can only be concluded that Israel's intent was to punish Egypt for its previous behaviour, and to ensure that state's future compliance with the law as interpreted by Israel. This intent on Israel's part[1161] therefore allows the qualification of the Israeli attack on Egypt as an "armed reprisal".[1162]

As the author has argued previously,[1163] there is, however, general agreement that "armed reprisals" were outlawed by the UN Charter and have remained illegal to this day, [1164] a view shared by the ICJ,[1165] and confirmed by state practice and *opinio juris*.[1166]

[1159] UN Security Council Resolution 106 (1955).
[1160] Wright, "Intervention", 271.
[1161] Based on Israel's official justification.
[1162] This view was obviously shared by the later Israeli Prime Minister Ariel Sharon, then a commando officer involved in the fighting. He commented as follows: "...we heard the Israeli military spokesman announcing a 'raid to eliminate terrorist bases in the Sinai', part of the ruse to paint what was happening as a reprisal rather than the opening moves of a fully-fledged war (in fact there were no terrorist bases in the Sinai)"; quoted by Turner, *Suez 1956*, 306; Gainsborough, *The Arab-Israeli*, 62; he calls Israel's attack a "reprisal", as Israel was "seeking revenge" (it should, however, be pointed out that Gainsborough -contrary to these sweeping judgements- later (at 91) implies that the Israeli attack was an armed reprisal only if seen out of context of the whole situation, which had lasted for many years; this is a wholly unconvincing argument). For a general definition of "armed reprisal", see: Khanya Motshabi, "International Law and the United States Raid on Libya", *The South African Law Journal*, Vol. 104, 669-683, 675; Anthony Clark Arend, Robert J. Beck, *International law and the use of force, Beyond the UN Charter paradigm*, Routledge: London, 1995 (reprint), 42.
[1163] The author has previously discussed the criterion of "necessity" and the legality of "armed reprisals" in *US-Iran Relations in International Law since 1979,* 48-51; some of the research was originally undertaken for the author's dissertation, which he submitted for the degree of Master of Laws at the University of Kent.
[1164] Security Council Resolution 188 (1964); *Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations*, GA Resolution 2625 (XXV), at 1; Gainsborough, *The Arab-Israeli*, 81, 87; Andrew Garwood-Gowers, "Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Did the ICJ Miss the Boat on the Use of Force? ", *Melbourne Journal of International Law*, Vol. 5, 2004, 241-255, 250; Wilmshurst, "The Chatham House", 969; Motshabi, "International Law", 681; Jeffrey Allen McCredie, "The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?", *Case Western Reserve Journal of International Law*, Vol. 19, 1987, 215-242, 238-239; he concludes that US actions must therefore in future "attempt to avoid a situation whereby a use of force in peacetime even appears as a reprisal", but goes on to state "that nations such as the United States have no choice but to resort to such actions" in the current international situation (at 241); Michael

cc) Armistice Agreement

The attack on Egypt, launched on October 29, 1956, was also a clear violation of the Armistice Agreement concluded in February 1949. There can be no doubt that the

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Byers, *War Law, International Law and Armed Conflict*, London: Atlantic Books, 2005, 59; Tarcisio Gazzini, *The changing rules on the use of force in international law*, Manchester: Manchester University Press, 2005,168-169; Arend, Beck, *International law*, 42-43; Bowett, *Self-Defence*, 13-14; Brownlie, *International Law*, 265, 281-282; Wright, "Intervention", 269; Michael J. Kelly, "Time Warp to 1945- Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law", J. Transnat'l L. & Pol'y, Vol. 13, 2003-2004, 1-39, 2, 12; see also: Statement by the British Foreign Office of September 26, 1956 (quoted by Brownlie, *International Law*, 282) and Statement by the Office of the Legal Advisor to the US State Depratment of 1979 (quoted by W. Michael Reisman, "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications", EJIL, Vol. 5, 1994, 120-133, 126).

[1165] ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27/06/1986, I.C.J. Rep. 1986, 14, para. 191, in which GA Res. 2625 (XXV) is quoted -including the prohibiton on reprisals- and described as an expression of *opinio juris* in regard of customary international law; the Security Council has also repeatedly condemned "armed reprisals"; see, for example, Resolutions 101 (1953), 106 (1955), 111 (1956), 188 (1964).

[1166] Only Israel has so far openly invoked a right of armed reprisal (Israel's attack on the airport of Beirut in 1968 was justified as "retaliation" for the Lebanese government's alleged support of terrorism; see: Richard A. Falk, "The Beirut Raid and the International Law of Retaliation", AJIL, Vol. 63, 1969, 415-443). Whenever states have nevertheless still been suspected of resorting to armed reprisals they have invariably been condemned.

Israel: Israel's attack on Beirut in 1968 was condemned by the Security Council in a 15:0 vote (Resolution 262 (1968). The 1982 Israeli invasion of Lebanon was officially based on self-defence, but seen by many as retaliation for an attack on the Israeli Ambassador in London carried out by the PLO, which was based in Lebanon. The invasion was widely condemned; in June 1982 the Security Council voted 14:1 in favour of condemning the Israeli actions. Only an American veto blocked the adoption of the resolution. The 1985 Israeli raid on the PLO Headquarters in Tunis, which was claimed to have been an act of self-defence after three Israeli civilians had been killed on a yacht in Cyprus in a terrorist attack, was condemned by the Security Council in a 14:0:1 vote (Resolution 573 (1985).

USA: the US raid on Libya in 1986, in response to various terrorist attacks allegedly masterminded by Libya (the best-known example being the attack on a discotheque in West Berlin, frequented by American servicemen), was seen as an "armed reprisal" by many. Although the USA officially claimed it had acted in self-defence, senior officials in the Reagan Administration used language reminiscent of "armed reprisals". Reagan described Gaddafi as a "mad dog", and on one occasion declared he had ordered the strikes "in retaliation" for the Berlin attack. Secretary of State Shultz announced -prior to the incident in Berlin- that the next act of terrorism "would bring the hammer down". Nevertheless, the USA claimed to be acting during an ongoing armed conflict with Libya. Only the United Kingdom, Israel, and South Africa openly supported the US position (for details on the Libya raid, see: Motshabi, "International Law", 669-683; and McCredie, "The April", 215-242).

These three states have themselves in the past been judged to have carried out armed reprisals in the guise of self-defence: UK action in the Yemen in 1964, which was condemned by the Security Council in a 9:0:2 vote, Resolution 188 (1964); South Africa's actions against ANC bases in four neighbouring countries, which were condemned by the majority of states on the Security Council in a 12:2:1 vote in May 1986. The proposed resolution was vetoed by the UK and the USA. Both states, however, emphasized that their opposition was due solely to the inclusion of mandatory sanctions in the resolution. The more recent missile attack on Iraq in 1993, carried out by the USA, in retaliation for an assassination plot against former President Bush Snr. two months earlier, was seen as an "armed reprisal" by many. The USA, however, claimed to be acting in self-defence, as the assassination attempt had allegedly been master-minded by the Iraqi security services. Even Reisman, often a steadfast supporter of US policies, states that the "raid fits at least as comfortably, if not more so, under the classic rubric of reprisal", and concludes that "the notion of reprisal is generally reviving". International criticism of the US action was more muted, with China being the only member of the Security Council to openly object to the US action. Most western countries and Russia supported the USA. However, the Arab League expressed "extreme regret" in relation to the US missile attack, and many states remained silent or offered only lukewarm support, including France (for details on the Iraq missile attack, see: Reisman, "The Raid", 120-133).

full-scale invasion of the Sinai Peninsula violated Articles I (2) and II (2) of the Armistice Agreement.[1167] According to Article II (2), no part of the military was allowed to commit a "warlike or hostile act" against the other state's military (or civilians); it was also prohibited for any part of either party's military to "advance beyond or pass over for any purpose whatsoever" the Armistice lines.[1168] On November 2, 1956, the General Assembly, by an overwhelming majority, consequently noted that "the armed forces of Israel have penetrated deeply into Egyptian territory in violation of the General Armistice Agreement between Egypt and Israel of 24 February 1949."[1169]

As has already been pointed out, both states repeatedly violated the Armistice Agreement. However, it was contradictory for Israel to claim that Egypt was in violation of the agreement by closing the Suez Canal and the Straits of Tiran to Israeli shipping, while, when justifying its attack on Egypt, its Prime Minister claimed that the Armistice Agreement was "dead and buried", and therefore no longer applied;[1170] an irony compounded by the fact that Israel had by then itself already been condemned by the Security Council for having violated the Armistice Agreement with Egypt.[1171]

[1167] Corbett, "Power", 9.
[1168] Article II (2) of the Israel-Egypt Armistice Agreement of February 24, 1949; available at: http://avalon.law.yale.edu/20th_century/arm01.asp; accessed 18/08/2011.
[1169] Resolution 997 of November 2, 1956 (vote: 64:5:6).
[1170] *Statement to the Knesset*, November 7, 1956, by Prime Minister Ben-Gurion; available at: http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/8+Statement+to+the+Knesset+by+Prime+Minister+Ben-G.htm; last accessed 18/08/2011; a summary can also be found in: United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 1038; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Bowie, *Suez 1956*, 86.
[1171] UN Security Council Resolution 106 (1955).

dd) Summary: Legality of Israel's justification

Israel's official justification -just as the British and French justifications- fails to meet the standard of international law.

While it could possibly be argued that *fedayeen* attacks on Israel that occurred since 1955 amounted to armed attacks on the part of Egypt, it is clear that Israel's response -many months after the last major attack- did not meet the "necessity" criterion of the right to self-defence. Needless to say Israeli actions were also not proportional, a further requirement of the legal use of force in self-defence.[1172] In this context it should also again be pointed out that it is generally assumed that Egypt's support of the *fedayeen* was a consequence of the widely condemned harsh reprisal launched by Israel on Egypt in 1955, during which 39 Egyptians were killed. Based on Israel's official justification it must be concluded that Israel launched an illegal armed reprisal against Egypt, which was also contrary to the bilateral Armistice Agreement.

Israel's claim of self-defence is, of course, further undermined by the agreements reached between France, Britain, and Israel at Sèvres. Any pretence that Israeli actions were a necessary means of defending itself against an Egyptian attack is shattered by the fact that the whole military campaign had been pre-arranged by the three states.

[1172] For the requirement of proportionality, see: ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. USA, Judgement, 27/06/1986, I.C.J. Rep. 1986, 14, para. 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 08/07/1996, I.C.J. Rep. 1996, 226, para. 141.

c) Israel's motivation

In truth Israel's decision to attack Egypt had little to do with self-defence in the conventional meaning of the word. Israel's leaders saw the Egyptian President Nasser as a grave threat to Israel. His refusal to accept the State of Israel made it impossible for other, perhaps more pliable Arab leaders, like Jordan's King Hussein, to make peace with Israel. Israel's leaders, intent on securing peace only on their terms, were aware of the fact that Arab national feeling was being invigorated by Nasser's rhetoric so that it seemed necessary to remove him from office.[1173]

Egypt's refusal to allow Israeli shipping to pass through the Suez Canal or the Straits of Tiran was severely hampering Israel's economic development.[1174] Israel realized that the international community, in truth, had little interest in enforcing the UN Security Council Resolution demanding Israeli access to the Suez Canal. It was hoped that a new leader in Egypt might prove more conciliatory.

But the main reason for Israel's military intervention in Egypt seems to have been a forerunner of the concept of "pre-emptive self-defence". [1175]Although Israel had managed to establish arms superiority over the Arab states -thanks to Soviet support in the early years, and mainly French support in the 1950s-[1176] it was becoming increasingly worried about Egyptian efforts to acquire more sophisticated weaponry. The Egyptian-Soviet arms deal brought these concerns to the forefront of Israeli

[1173] Ulfkotte, *Kontinuität*, 47; Gainsborough, *The Arab-Israeli*, 69; Bowie, *Suez 1956*, 10.
[1174] Fullick/Powell, *Suez*, 67; Turner, *Suez 1956*, 257; Gainsborough, *The Arab-Israeli*, 63-64; Bowie, *Suez 1956*, 54; Allain, *International*, 65; Eden, *Full Circle*, 537.
[1175] Fullick/Powell, *Suez*, 67; Ulfkotte, *Kontinuität*, 47; Woollacott, *After Suez*, 39.
[1176] Fullick/Powell, *Suez*, 68; Gilbert, *Israel*, 312.

strategic plans. Egypt had to be attacked before it was able to create an effective military force, which might in future be tempted to attack Israel.[1177]

This is confirmed by Chaim Herzog, who would later become President of Israel:

> *The Egyptians would very rapidly absorb the weapons supplied by the Soviet bloc. It was clear that Israel could not allow Nasser to develop his plans with impunity. Accordingly, in July 1956, David Ben-Gurion decided that he had no option but to take a pre-emptive move, and gave instructions to the Israeli General Staff to plan for war in the course of 1956, concentrating initially on the opening of the Straits of Tiran.*[1178]

The concept of "preventive self-defence"[1179] -which has only in recent years received some, mainly American[1180] and Israeli,[1181] official support- is generally viewed as applicable only to "rogue states" harbouring weapons of mass destruction. As far as eliminating the danger of conventional weapons is concerned, this concept, even nowadays, has no basis in international law and no support in *opinio juris.* [1182]

Based on diary entries made by Ben-Gurion's predecessor as Prime Minister, Moshe Sharett, it also seems likely that Israel was actively trying to extend its territory by

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[1177] Fullick/Powell, Suez, 67; Lloyd, *Suez*, 248; Allain, *International*, 65; Kyle, *Suez*, 78-79; Borowy, *Diplomatie*, 726; Eden, *Full Circle*, 537; Gilbert, *Israel*, 308-309; Herzog, *The Arab-Israeli*, 112-114; Connell, *The Most*, 127-128, 167-169, 177.

[1178] Herzog, *The Arab-Israeli*, 113.

[1179] Preventive or pre-emptive self-defence should not be equated with anticipatory self-defence. Anticipatory self-defence traditionally requires "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation", the so-called *Caroline* formula (Letter from D. Webster to Lord Ashburton, 27/07/1842, Enclosure 1, Extract from Note of 24/04/1841; available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp; last accessed 19/08/2011). It is contentious whether anticipatory self-defence is allowed under Article 51 UN Charter. In contrast, the concept of "preventive" or "pre-emptive" self-defence does not require an attack to be imminent. This is argued to be justified by the dangers inherent to modern weapons of mass destruction. Because of the destructiveness of these weapons, states cannot be required to wait until an attack is imminent, it is argued, as any reaction at that point of time might be too late, with disastrous consequences. Needless to say, this concept is still extremely controversial.

[1180] *The National Security Strategy of the United States of America*, September 2002, 14-15.

[1181] Israel's attack on Iraq's nuclear reactor in June 1981 was officially justified on the grounds of "anticipatory self-defence." However, based on the fact that Israel was trying to prevent Iraq from acquiring nuclear weapons with which it could threaten or attack Israel sometime in the future it was an attack more suitably categorized as "pre-emptive" self-defence; Anthony D'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor", AJIL, Vol. 77, 1983, 584-588, 587-588 (official justification).

[1182] Wright, "Intervention", 269.

attacking Egypt.[1183] According to the entry for January 28, 1955, the USA had offered Israel a security guarantee if it did not "extend" its borders "by force".[1184] Discussing these proposals on May 26, 1955, Sharett recalls the Israeli Chief of Staff Dayan remarking that there was no need for such a "security pact with the U.S.", as such a pact would only be an "obstacle". After all, Israel "in reality" faced "no danger at all from Arab military force", and would "maintain" its "military superiority" for another "8-10 years".[1185] Sharett concludes that Dayan hoped "for a new war with the Arab countries so that" Israel "may finally acquire" its "space".[1186]

That gaining land could have been an important goal of Israel's attack on Egypt is confirmed by Ben-Gurion's remarks before the Knesset on November 7, 1956, when he declared that the "armistice lines" no longer had any "validity". Furthermore, he claimed that the Israeli army -which was occupying large sections of the Sinai- had "not attacked Egypt proper", and that he would not consent to foreign troops being stationed in Israel "or in any area held by Israel."[1187] Certainly, the USA expressed its "great shock" at these comments, and reminded the Israeli government of Ben-Gurion's assurances that Israel wanted no "territorial gains".[1188]

[1183] Woollacott, *After Suez*, 6, 39; Eden, however, disputes this in his memoirs; *Full Circle*, 537.
[1184] Moshe Sharett, diary entry for January 28, 1955; quoted in Livia Rokach, *Israel's Sacred Terrorism, A Study Based on Moshe Sharett's Personal Diary and other Documents*, 3rd. ed., Belmont: AAUG Press, 1986, 38; Salt, *The Unmaking*, 169.
[1185] Moshe Sharett, diary entry for May 26, 1955; quoted in Rokach, *Israel's*, 41.
[1186] Moshe Sharett's diary entry for May 26, 1955; quoted in Rokach, *Israel's*, 41; Salt, *The Unmaking*, 169-170; Dayan's views were shared by future Prime Minister Begin; in a speech before the Knesset on October 12, 1955, he had argued in favour of a "preventive war against the Arab states" in order to achieve, among other things, "the expansion of our territory"; quoted in Hirst, *The Gun*, 327-328.
[1187] *Statement to the Knesset,* November 7, 1956, by Israeli Prime Minister Ben-Gurion; available at: http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/8+Statement+to+the+Knesset+by+Prime+Minister+Ben-G.htm; last accessed 19/08/2011; also quoted in United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 1038; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Ben-Gurion himself, however, denies any territorial aspirations; in: *Israel*, 119-120.
[1188] *Memorandum of a Conversation, Department of State, Washington, November 7, 1956, 6:15 p.m.;* United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 1065-1067, 1066; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

Therefore it is very probable that Israel sought to increase its territory by waging war, which would certainly go a long way towards explaining Israel's extreme reluctance to withdraw its troops from Egyptian soil, once the ceasefire had entered into force. Needless to say, it is completely uncontroversial that conquest by means of war was illegal in 1956.

Although Israel's official justification seemed on the face of it more acceptable than its Anglo-French counterpart it, too, could not be reconciled with international law. The "unofficial" motives which convinced Israel it was in its national interest to conclude the agreement at Sèvres and attack Egypt were in clear breach of Israel's obligations under international law, and therefore had to be kept secret.

3. The world's reaction to the intervention

It was the international community's reaction to the events unfolding in Egypt once the Israeli attack had been launched that led many commentators to later declare the episode a triumph for international law and international institutions.

Once the Israelis had launched their attack on October 29, 1956, the USA immediately called for an emergency session of the Security Council. There it proposed, on October 30, 1956, a resolution demanding an immediate ceasefire. To the dismay of the Americans, who were beginning to suspect some kind of collusion,[1189] this resolution, despite being supported by the required seven (now nine)

[1189] This is confirmed by a telegram from the Joint Chiefs of Staff of October 29, 1956, in which they state that "Franco-Israeli collaboration probably exists in connection with the Israeli move against Egypt with at least the tacit approval of the British"; *Telegram from the Joint Chiefs of Staff to Certain Specified and Unified Commanders*, October 29, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-

members on the Council, was vetoed by Britain and France.[1190] The Soviet Union then proposed a resolution which was identical to the American draft without, however, containing any reference to sanctions. Again the resolution would have passed but for the British and French vetoes. [1191]

Anglo-French actions at the UN were in stark contrast to their actions back in Europe: on October 30, 1956, the same day the British and French representatives at the UN were busy blocking the Security Council's efforts to establish a cease-fire, both governments issued a joint ultimatum to both sides of the Egyptian-Israeli conflict demanding a cessation of hostilities and the withdrawal of Egyptian and Israeli troops to points ten miles away from the Suez Canal. In the case of either side not accepting the ultimatum's terms, military intervention was threatened.

The Israelis, at that time much further away than ten miles from the Suez Canal, and expecting the ultimatum since it had been agreed at Sèvres, accepted the ultimatum's terms.[1192] To nobody's surprise, the Egyptians rejected it: not only were they being asked to stop acting in self-defence with foreign troops occupying part of their territory, but they were told to withdraw from an area that was indisputably under Egyptian sovereignty.[1193]

1957, 844-846, 845; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Corbett, "Power", 9.

[1190] Anglo-French behaviour at the UN led President Eisenhower to ask "dear Anthony" for his "help in clearing up" his "understanding as to what exactly is happening between us and our European allies- especially between us, the French and yourselves"; *Message from President Eisenhower to Prime Minister Eden*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 848-850, 849; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Turner, Suez 1956, 314; Gainsborough, *The Arab-Israeli*, 74; Borowy, *Diplomatie*, 610.

[1191] Gordon, "Trading", 95; Murray, "Glimpses", 49; at the time Senior Counsellor at Canada's UN mission, he describes there was some speculation that UN Secretary General Hammarskjöld might resign in protest at the Anglo-French vetoes; Turner, *Suez 1956*, 314; Gainsborough, *The Arab-Israeli*, 74; Borowy, *Diplomatie*, 610.

[1192] Fullick/Powell, *Suez,* 93; Turner, *Suez 1956*, 313; Allen, *Imperialism*, 455; McDermott, *The Eden*, 150.

[1193] Fullick/Powell, *Suez*, 93; Turner, *Suez 1956*, 313; Allen, *Imperialism*, 455; McDermott, *The Eden*, 150.

To the disappointment of the British and the French, no other state besides the three colluding allies backed this transparent attempt at finding a justification for military intervention.[1194] US Secretary of State Dulles described the ultimatum, as far as Egypt was concerned, as "crude", "brutal" and "utterly unacceptable",[1195] and President Eisenhower felt it necessary to express his "deep concern at the prospect of this drastic action".[1196]

The two European allies were further rattled by events at the UN. Not prepared to accept efforts at blocking the UN, the Yugoslav representative suggested proceeding on the basis of the "Uniting for Peace Resolution" of 1950.[1197] Ironically, this Resolution had been passed in order to deal with what was seen as Soviet intransigence during the Korea Crisis.[1198] Under the resolution the Security Council could call an emergency session of the General Assembly to deal with an issue of "international peace", which the Security Council was unable to deal with, due to the "lack of unanimity of the permanent members". The decision to call the emergency session was not subject to a veto. The Security Council acted as suggested by Yugoslavia, and decided to hand over the responsibility for dealing with the Suez Crisis to the General Assembly, where decisions were not subject to any veto.[1199]

[1194] The Attorney-General pointed out that he "was unable to devise any argument which could purport to justify" the ultimatum "in international law"; Letter of November 1, 1956, to the Foreign Secretary (FO 800/847); quoted by Marston, "Armed Intervention", 804; the US Ambassador to London during the Suez Crisis, Aldrich, describes his reaction on having been informed of the ultimatums' content by the Permanent Under Secretary of the Foreign Office, Sir Ivone Kirkpatrick, as telling him that "Egypt could not possibly accept the conditions addressed to her"; in "The Suez", 546.

[1195] *Memorandum of a Telephone Conversation Between the President and the Secretary of State, Washington, October 30, 1956, 2:17 p.m.*; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 863; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1196] *Message from President Eisenhower to Prime Minister Eden and Prime Minister Mollet*, October 30, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 866; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1197] *Uniting for Peace Resolution*, UN General Assembly Resolution 377 (V) A (November 3, 1950); Turner, *Suez 1956*, 314.

[1198] Parsons, *From Cold War*, 13; Connell, *The Most*, 198.

[1199] Security Council Resolution 119 (1956).

Despite the ultimatum causing uproar in the House of Commons, and despite the exceptionally strong resistance by the international community to Anglo-French and Israeli actions, the British and French decided to proceed militarily. On October 31, 1956, once the ultimatum had expired, British and French planes bombed Egyptian airfields.

Meanwhile, Britain and France were becoming ever more isolated.[1200] The *First Emergency Special Session* of the General Assembly was held on November 1, 1956. Both the American and the Soviet representatives condemned the military action against Egypt.[1201] An American proposal to demand a cease-fire was adopted by the General Assembly by an overwhelming majority on November 2, 1956.[1202]

Faced with this hostility, especially on the part of the United States, Britain was beginning to feel the strain. Britain's financial situation was deteriorating rapidly, and there were fears of a run on the currency.[1203] Furthermore, the main official reason for intervening in the conflict -the protection of the Canal to ensure Europe's supply with oil- had already proved elusive. Not only had the Egyptians effectively blocked the Suez Canal early on,[1204] but Syrian army officers had -in an act of solidarity with Egypt- blown up the oil pipelines running through their country.[1205] In its desperation Britain turned to the United States for support. It was hoped that the USA would

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[1200] Turner, *Suez 1956*, 366; Mansfield, *A History*, 257.
[1201] Winthrop H. Aldrich, "The Suez Crisis, A Footnote to History", Foreign Aff., Vol. 45, 1966-1967, 541-552, 547; Turner, *Suez 1956*, 345.
[1202] General Assembly Resolution 997 (vote: 64:5:6); Gordon, "Trading", 95; Turner, *Suez 1956*, 346; Connell, *The Most*, 206; McDermott, *The Eden*, 152.
[1203] Gordon, "Trading", 95; he claims the Americans "instigated" the run on the currency; Aldrich, "The Suez", 547; Fullick/Powell, *Suez*, 159; Turner, *Suez 1956*, 315; Freiberger, *Dawn*, 191; McDermott, *The Eden*, 154.
[1204] Aldrich, "The Suez", 547; Turner, *Suez 1956*, 327; Bowie, *Suez 1956*, 64; McDermott, *The Eden*, 155; Keay, *Sowing*, 440-441.
[1205] Levy, "Issues", 454-455; Levie outlines the consequences: Western Europe required 3,000,000 barrels of oil/day, of which 2,100,000/day originated in the Middle East; 1,350,000 barrels/day came via the Suez Canal and 530,000 barrels/day via Syria, meaning Western Europe was nearly 1,900,000 barrels/day short; Fullick/Powell, *Suez*, 159; Salt, *The Unmaking*, 177; Turner, *Suez 1956*, 328; Freiberger, *Dawn*, 193; Borowy, *Diplomatie*, 634; Keay, *Sowing*, 441.

support a British loan application to the IMF and might supply oil in order to make up the short-fall. However, the Americans proved to be very reluctant on both counts as long as the conflict was continuing.[1206]

This dire situation was further complicated by the fact that the British public was no longer overwhelmingly in favour of the government's policy.[1207] The oppositional Labour Party, which had so far supported the government's uncompromising stance towards Egypt,[1208] performed something of a u-turn in denouncing the ultimatum of October 30, 1956.[1209] In a broadcast on November 4, 1956, Labour leader Gaitskill declared:

> *We're doing all this alone, except for France. Opposed by the world, in defiance of the world. It is not a police action; there is no law behind it. We have taken the law into our own hands. That's the tragic situation we British people find ourselves tonight.*[1210]

Nevertheless, the British Government decided to soldier on for the time being, a foregone conclusion, as far as France and Israel were concerned. As agreed between the three allies at short notice, the Israelis rejected the UN demands for a ceasefire, thereby seemingly providing legitimacy for the continued Anglo-French attack on Egypt.[1211] The British Prime Minister went on TV and tried to explain British policy to the public. Britain and France announced conditions that had to be met before a ceasefire could be implemented.

[1206] Fullick/Powell, *Suez*, 159; Salt, *The Unmaking*, 178; Turner, *Suez 1956*, 397; Bowie, Suez 1956, 64; Freiberger, *Dawn*, 194; Borowy, *Diplomatie*, 628; Scott, "Commentary", 212.
[1207] Salt, *The Unmaking*, 178; Bowie, *Suez 1956*, 75; McDermott, *The Eden*, 154; Trevelyan, *The Middle East*, 129; Turner, *Suez 1956*, 354; Turner offers a brief review of the British press' changing attitude towards the conflict.
[1208] Fullick/Powell, *Suez*, 13-14.
[1209] Aldrich, "The Suez", 547; Fullick/Powell, *Suez*, 158.
[1210] Leader of the Opposition Gaitskill; as quoted in Turner, *Suez 1956*, 351.
[1211] Turner, *Suez 1956*, 347; Borowy, *Diplomatie*, 643.

Events at the UN were, however, further increasing the pressure on the three allies. On November 4, 1956, the General Assembly approved a Canadian-sponsored Resolution calling for a United Nations Emergency Force to be deployed to Egypt.[1212] This was followed by another Resolution -proposed by India- giving the parties to the conflict twelve hours to implement the ceasefire.[1213] In the face of, and despite all this opposition, Anglo-French paratroops were dropped into Egypt on November 5, 1956.

The Israelis had meanwhile already stopped fighting. By November 4, 1956, they had achieved everything they had set out to accomplish: most of the Sinai Peninsula was occupied by Israeli troops, Gaza was under Israeli control, and free passage through the Straits of Tiran for Israeli shipping had been made possible.[1214]

These events again caused international uproar. The USA warned Britain that there was an acute danger the General Assembly would approve a resolution recommending the imposition of sanctions on the three states.[1215] This threat was accompanied by Soviet threats to intervene if the fighting did not stop.[1216] Soviet Premier Bulganin even sent the British and French Prime Ministers messages warning that the Soviets were "filled with determination to use force to crush the aggressors and to restore peace in the East." [1217] Meanwhile, the British economy was seemingly in freefall, the currency could no longer be supported for any length of time, and Arab states were threatening to impose a complete oil boycott.[1218] Opposition to the government's

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[1212] General Assembly Resolution 998 (1956).
[1213] General Assembly Resolution 999 (1956).
[1214] Bowie, *Suez 1956*, 85.
[1215] Turner, *Suez 1956*, 397.
[1216] Corbett, "Power", 10; Bacevich, "A Hell", 5.
[1217] Eden, *Full Circle*, 553-554 (quote); Fullick/Powell, *Suez*, 140; Salt, *The Unmaking*, 178; Turner, *Suez 1956*, 367; Ulfkotte, *Kontinuität*, 47; Borowy, *Diplomatie*, 638-641; Scott, "Commentary", 211; Louis, "The Suez", 291; Connell, *The Most*, 221-222; Bacevich, "A Hell", 5.
[1218] Eden, *Full Circle*, 556-557; Salt, *The Unmaking*, 178; Turner, *Suez 1956*, 397-400; Parsons, *From Cold War*, 13; Bowie, *Suez 1956*, 64, 75; Allain, *International*, 68; Kyle, *Suez*, 464-468; Freiberger, *Dawn*, 194-195;

chosen course of action was mounting in Britain, and even close allies, such as Canada and Australia, were finding it extremely difficult to support the British position.[1219] All this finally proved too much for the British government: on November 6, 1956, the British Cabinet decided to announce a ceasefire as of midnight.[1220]

The British informed the French who asked for a delay before the decision was made public.[1221] The Anglo-French goal of occupying the Suez Canal Zone was tantalizingly close to being achieved, so the French saw no reason to stop fighting at such an inopportune moment.[1222] Once the British had rejected the French request to continue, France, however, also announced its acceptance of a ceasefire. On November 7, 1956, the UN reacted by actually setting up the UN Emergency Force.[1223]

Now a ceasefire had finally been agreed, the next question that arose was whether and when the foreign troops would withdraw from Egypt. Again, all three states tried to drag their feet.[1224] After many rounds of negotiations and pressure exerted by the USA, the British Foreign Secretary, on December 3, 1956, finally announced the

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Levy, "Issues", 455; Scott, "Commentary", 212; Louis, "The Suez", 290; Connell, *The Most*, 219-220; Woollacott, *After Suez*, 45; Keay, *Sowing*, 441; Mansfield, *A History*, 257; McDermott, *The Eden*, 154.

[1219] Fullick/Powell, *Suez*, 192; Salt, *The Unmaking*, 177-178; Bowie, *Suez 1956*, 75.

[1220] Turner, *Suez 1956*, 401.

[1221] Fullick/Powell, *Suez*, 160; Turner, *Suez 1956*, 402; Eden, *Full Circle*, 557 (he does not mention a specific request, but acknowledges Britain's allies would have liked "a slightly longer period of action").

[1222] Turner, *Suez 1956*, 395-396, 401; Woollacott, *After Suez*, 45.

[1223] Turner, *Suez 1956*, 402.

[1224] General Assembly Resolution 1002 of November 7, 1956, called for the withdrawal of the Anglo-French and Israeli troops; Resolution 1120 of November 24, 1956, called for a withdrawal "forthwith"; Murray, "Glimpses", 54; Turner, *Suez 1956*, 404; Borowy, *Diplomatie*, 668-671.

Anglo-French withdrawal from Egypt.[1225] By Christmas 1956 that withdrawal had been completed.[1226]

The Israelis proved much more reluctant to give up their gains.[1227] On November 7, 1956, Israeli Prime Minister Ben-Gurion held a speech before the Knesset, in which he seemed to indicate that Israel would be taking a very hard line.[1228] There could be no return to the *status quo ante,* when Israeli shipping was barred from both the Suez Canal and the Straits of Tiran, and Israel was being attacked from Gaza.[1229]

Under immediate American and international[1230] pressure, the Israelis subsequently somewhat modified their position, and Israeli troops were redirected towards the eastern edge of the Sinai.[1231] By January 22, 1957, the Israelis had, however, gained the impression that they might not be able to achieve their minimum war aims, and the withdrawal of Israeli troops was halted. UN Secretary-General Hammarskjöld was proving reluctant to conduct negotiations before all Israeli troops had been withdrawn, arguing that an aggressor should not be rewarded.[1232] A resolution to this impasse was not in sight.

This led to mounting anger within the international community, and on February 2, 1957, the General Assembly passed a Resolution demanding an unconditional Israeli

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[1225] Turner, *Suez 1956*, 411; Bowie, *Suez 1956*, 84.
[1226] Turner, *Suez 1956*, 437; Bowie, *Suez 1956*, 84.
[1227] Allen, *Imperialism*, 456; Gainsborough, *The Arab-Israeli*, 78-79; Murray, "The Glimpses", 54; Murray points out that Israel wanted to hang on to Gaza and Sharm-el-Shaikh; Bowie, *Suez 1956*, 85.
[1228] *Statement to the Knesset*, November 7, 1956, by Prime Minister Ben-Gurion; available at: http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/8+Statement+to+the+Knesset+by+Prime+Minister+Ben-G.htm: last accessed 19/08/2011; a summary can be found in United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 1038; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Salt, *The Unmaking*, 179; Hirst, *The Gun*, 328; Bowie, *Suez 1956*, 86; Borowy, *Diplomatie*, 672-673.
[1229] Gainsborough, *The Arab-Israeli*, 79; Bowie, *Suez 1956*, 87.
[1230] GA Resolution 1002 (1956) was adopted on November 7, 1956; Borowy, *Diplomatie*, 673.
[1231] Salt, *The Unmaking*, 180; Hirst, *The Gun*, 328; Bowie, *Suez 1956*, 86.
[1232] Gainsborough, *The Arab-Israeli*, 79; Bowie, *Suez 1956*, 87-89.

withdrawal from Egyptian territory.[1233] Again the USA was trying -though not as forcefully as had been the case with Britain-[1234] to exert pressure on Israel, warning of the consequences of a continued refusal to withdraw.[1235] Furthermore, President Eisenhower issued a statement supporting Israeli rights as far as free passage through the Straits of Tiran was concerned.[1236] Israel, however, was still not satisfied.[1237]

That changed when a draft resolution was circulated in the General Assembly obliging all member states to boycott Israel.[1238] The USA warned Israel that it was likely the Resolution would receive widespread support, while its officials were ambivalent as to whether the USA would adhere to such a resolution.[1239] Under this mounting pressure, Israel gave way: on March 1, 1957, Golda Meir announced the withdrawal of Israeli troops from Egypt. On March 7 and 8, 1957, the last Israeli troops left Gaza in regard of which a vague agreement had been reached, whereby UNEF, not the Egyptians, would take over the territory "in the first instance".[1240] The Suez War had come to an end.

[1233] General Assembly Resolution 1124 (1957).
[1234] Borowy, *Diplomatie*, 689; she makes the point that while the USA had supported the UN in relation to Britain and France, it developed an independent policy on Israel that was partly at variance with UN policy.
[1235] Salt, *The Unmaking*, 181; Turner, *Suez 1956*, 411-412; Hirst, *The Gun*, 328; Gainsborough, *The Arab-Israeli,* 78-79; Mansfield, *A History*, 257-258.
[1236] Bowie, *Suez 1956*, 93; Borowy, *Diplomatie*, 690.
[1237] Bowie, *Suez 1956,* 93.
[1238] Salt, *The Unmaking*, 182; Bowie, *Suez 1956*, 94.
[1239] Salt, *The Unmaking*, 181; Turner, *Suez 1956*, 412; Bowie, *Suez 1956*, 95; Borowy, *Diplomatie*, 691; Mansfield, *A History*, 257-258.
[1240] Bowie, *Suez 1956*, 95.

4. Results of the intervention

The Suez War had one clear victor, which was Egypt's President Nasser. He emerged from the conflict as an Arab hero.[1241] He had stood up to the powerful, but unpopular British and French, not to mention the Israelis, and was still standing. Although the Egyptian military had proved to be woefully inadequate in the face of the Israeli attack, and nearly all of Egypt's sophisticated weaponry had been destroyed, the fact that Nasser had remained in office and had not given way on the issue of the Suez Canal Company made him a potent symbol of resurgent Arab nationalism.[1242]

Despite having resorted to war, Israel failed to achieve its main aims which had been deposing Nasser, opening up the Suez Canal, and enlarging its territory.[1243] Egypt quickly regained effective control also over Gaza.[1244] Israel had, however, won a consolation prize: it had managed to permanently open up the Straits of Tiran to its shipping, thereby gaining access to the high seas.[1245] Bearing in mind that Israel was to fight two further wars in the next seventeen years, it must, nevertheless, be concluded that the Suez War had not been worth it. Israel was as far away from securing peace on its terms as it had been before the conflict.[1246] As Woollacott has pointed out, Egypt's second defeat by Israel in 1956, actually "reinforced the

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[1241] Gordon, "Trading", 95; Fullick/Powell, *Suez,* 195; Turner, *Suez 1956*, 439-440; Ulfkotte, *Kontinuität*, 48; Parsons, *From Cold War*, 14; Farnie, *East*, 741; Kyle, *Suez,* 549; Borowy, *Diplomatie*, 649, 733-734; McDermott, *The Eden*, 159; Woollacott, *After Suez*, 8; Bacevich, "A Hell", 6; Mansfield, *A History*, 257; Keay, *Sowing*, 442-443.
[1242] Fullick/Powell, *Suez*, 196; Allen, *Imperialism*, 456; Woollacott, *After Suez*, 46; Mansfield, *A History*, 257.
[1243] Woollacott, *After Suez*, 46.
[1244] Within a week of the Israeli withdrawal, Egypt sent a Governor to Gaza; Bowie, *Suez 1956*, 95-96.
[1245] Salt, *The Unmaking*, 182; Hirst, *The Gun*, 328; Gainsborough, *The Arab-Israeli*, 111; Bowie, *Suez 1956,* 109; Kyle, *Suez*, 551; Borowy, *Diplomatie*, 731; Woollacott, *After Suez*, 46.
[1246] McDermott, *The Eden*, 159; Woollacott, *After Suez*, 6, 8.

conviction [in Egypt] that there would have to be a massive accounting with Israel."[1247]

Britain and France had nothing at all to show for their military campaign. [1248] Instead of deposing or humiliating Nasser, he had become more powerful and more popular than before the conflict.[1249] British and French prestige in the region had received a heavy blow: they had not been able to impose their will on an Arab state in the Middle East.[1250] Predictably, France was not able to hold on to Algeria, which gained independence in 1962. Especially for the British, however, the developments at Suez bode ill for the future as they had retained considerable influence in the region, in contrast to the French, who by 1956 no longer played a major role in the Middle East.[1251] This ill-fated mission had demonstrated that it was possible to resist British demands and remain in power -a conclusion that threatened pro-British, and encouraged anti-British rulers in the area.[1252] Furthermore, the war had left the British economy, already in decline, in tatters, for everybody to see.[1253]

Not even the immediate, short-term war aims had been achieved. Far from securing the Canal, and thereby securing Europe's oil supply, the Canal had been blocked almost immediately once the conflict had erupted.[1254] This disaster was further compounded by the destruction of the Syrian oil pipelines, leaving Britain with no

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[1247] Woollacott, *After Suez*, 8.
[1248] Aldrich, "The Suez", 549; Stanley, "Failure", 93-94; Salt, *The Unmaking*, 183.
[1249] Murray, "Glimpses", 57; Stanley, "Failure", 94; Turner, *Suez 1956,* 440; McDermott, *The Eden*, 155; Mansfield, *A History*, 257.
[1250] Martel, "Decolonisation", 403; Ulfkotte, *Kontinuität*, 48; Allen, *Imperialism*, 456; Borowy, *Diplomatie*, 733; Scott, "Commentary", 212; Mansfield, *A History*, 258.
[1251] Salt, *The Unmaking*, 183; Bowie, *Suez 1956*, 27; Farnie, *East,* 741; Freiberger, *Dawn*, 159; Borowy, *Diplomatie*, 722; Levy, "Issues", 458; Louis, "The Suez", 296-297.
[1252] Corbett, "Power", 11; Martel, "Decolonisation", 403; Salt, *The Unmaking*, 179; Ulfkotte, *Kontinuität,* 49; Allen, *Imperialism*, 456; Woollacott, *After Suez*, 105; Keay, *Sowing*, 443.
[1253] Freiberger, *Dawn*, 196; Levy, "Issues", 455; Louis, "The Suez", 290.
[1254] Aldrich, "The Suez", 547; Turner, *Suez 1956*, 439; McDermott, *The Eden*, 155; Keay, *Sowing*, 440-441.

option but to ask the USA for support.[1255] The Suez Canal Company, meanwhile, remained nationalized.

Last, but not least, transatlantic relations were at an all-time low in the face of the perceived Soviet threat.[1256] Britain and France had been unable to gain American support, without which they were demonstrably powerless.[1257] Relations had soured to a point where President Eisenhower viewed Britain as an "unworthy and unreliable ally".[1258] Anglo-French actions had also deprived the West of an easy propaganda victory: the Soviets must have been very grateful for the distraction the Suez War offered during the almost simultaneous Soviet invasion of Hungary.[1259]

Finally, for the British Prime Minister the Suez War resulted in the end of his political career.[1260] Already having to cope with poor health, his performance during the Suez Crisis, which in many influential quarters was seen as erratic and unpredictable,[1261] meant that he was forced out of office. In January 1957 he resigned, officially on health grounds.

[1255] Salt, *The Unmaking*, 177; Turner, *Suez 1956*, 439.
[1256] Corbett, "Power", 1; Murray, "Glimpses", 55, 61; Borowy, *Diplomatie*, 649.
[1257] Fullick/Powell, *Suez,* 198-199.
[1258] *Memorandum of a Conversation With the President, White House, Washington, October 30, 1956, 10:06-10:55 a.m.;* United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 851-855, 854; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.
[1259] Turner, *Suez 1956*, 367; Trevelyan, *The Middle East*, 129; McDermott, *The Eden*, 155; Woollacott, *After Suez*, 22.
[1260] Freiberger, *Dawn,* 150; Scott, "Commentary", 213; Woollacott, *After Suez*, 21-22.
[1261] The US Ambassador to London during the Suez Crisis, Aldrich, describes Eden as seeming "incapable of coping with the situation"; in "The Suez", 547; Fullick/Powell, *Suez*, 160; Turner, *Suez 1956*, 205, 234; Turner claims that the feeling in Whitehall during the Suez Crisis was that the Prime Minister "had taken leave of his senses", and quotes an interpreter (Richard Freeborn) for the Soviet delegation that visited London in August 1956 as follows (referring to a meeting with Eden): "The Soviet delegates were beginning to glance at each other, aware that they were in the presence of someone whose behaviour was abnormal"; Freiberger, *Dawn*, 150, 199; he claims that the Canadian Foreign Secretary Pearson had questioned Eden's "mental stability" after a meeting on March 27, 1956; and that on a visit to his Secretary of State, Dulles, on November 17, 1956, Eisenhower is claimed to have said that "he had started 'with an exceedingly high opinion of (Eden) and then (had) to downgrade this estimate after succeeding contacts with him.'"

Thus what had begun as a crusade to topple Nasser had ended in Eden's resignation; what had begun as an attempt to preserve British influence in the Middle East had ended in humiliation and retreat. For that reason the Suez episode is often seen as symbolizing the end of British imperialism, and the dawn of American hegemony in the Middle East.[1262] Geoffrey McDermott, a civil servant in the Foreign Office during the Suez crisis and responsible for dealing with it, later concluded:

> *This was the final fling before we acknowledged there were two super-powers in the world. In reality they had been there for a dozen years.*[1263]

5. American and Soviet motives

Against the backdrop of the events just outlined, it has been concluded that the Suez Crisis of 1956 was one of the rare triumphs of international law in international relations.[1264] Three states had illegally gone to war and had not gained anything by doing so. The international community had forced them to back down.

Although this conclusion is in line with the thesis' argument that following the rules of international law usually is the most rational choice political leaders can make, it

[1262] Woollacott, *After Suez*, 6, 8, 22.
[1263] McDermott, *The Eden*, 165.
[1264] Gainsborough, *The Arab-Israeli*, 109; Bowie, *Suez 1956*, 98-99, 111-112, 114-115 ("qualified success", as far as international law is concerned. He bases that on the USA's strong support for the UN and international law and the UN's success (General Assembly and UNEF); Finch, "Post-Mortem", 380 (he sees Eden's fate as serving a "constructive purpose", as far as international law is concerned).

cannot be overlooked that the USA and the USSR had their own, not necessarily legal, reasons for opposing the three allies' actions in Egypt.[1265]

a) USA

In the USA the legal situation was indeed examined in some detail. There is sufficient evidence of analyses on an international law basis.[1266] However, there are many indications that suggest that the real motives for opposing the military action against Egypt were not primarily, or even secondarily, legal, but based on strategic considerations.

It seems very likely that President Eisenhower actually agreed with Eden as far as the necessity of removing Nasser from office is concerned.[1267] There is some evidence that the USA was in favour of organizing a coup against Nasser, an event that could

[1265] That also applies to other states' motives for opposing the intervention in Egypt, as evidenced by Murray's descriptions of the proceedings at the UN during the Suez Crisis in "Glimpses"; he was at the time the Senior Counsellor at Canada's UN mission. Canada was very active in finding a solution during the General Assembly deliberations, and is widely credited for having done so. He points out that discussions on UNEF were overshadowed by worries that any decision adopted could possibly apply to Kashmir, resulting in frequent Indian and/or Pakistani objections (at 58). He also points out that Canada did not have the intention "of settling questions of legal right, questions which were highly controversial, but to bring about conditions of practical stability" (at 64). He also mentions the fact there were worries that, in the event of Britain and France being treated "too harshly", the United Nations "would go the way of the League" (at 62).

[1266] Gordon, "Trading", 93; Bowie, *Suez 1956*, 9, 61-62, 70.

[1267] In a Message of September 2, 1956, to Eden Eisenhower states (emphases by author): "We have two problems, the first of which is the assurance of permanent and efficient operation of the Suez Canal...The second is to see that Nasser shall not grow as a menace to the peace and vital interests of the West. In my view, these two problems need not and possibly cannot be solved simultaneously and by the same methods, though we are exploring further means to this end. The first is the most important for the moment and must be solved in such a way as to not make the second more difficult. Above all, there must be no grounds for our several peoples to believe that anyone is using the Canal difficulty as an excuse to proceed forcibly against Nasser. And we have friends in the Middle East who tell us they would like to see Nasser's deflation brought about...even though this procedure may fail to give the setback to Nasser he so much deserves, we can better retrieve our position subsequently..."; *Message from President Eisenhower to Prime Minister Eden*, September 2, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 355-358, 357; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Eisenhower's view of Nasser is confirmed in a message to the US Secretary of State Dulles of December 12, 1956, who was attending a NATO conference: "I am sure that they [the NATO partners] know that we regard Nasser as an evil influence. I think also we have made it abundantly clear that while we share in general the British and the French opinions of Nasser, we insisted that they chose a bad time and incident on which to launch corrective measures."; *Message from the President to the Secretary of State*, December 12, 1956, *ibid*, 1296-1298, 1297; Bacevich, "A Hell", 2.

officially be blamed on internal Egyptian problems.[1268] The US government was, however, simply convinced that doing so by waging war was a blunder that would not achieve its goal and would inflame Arab public opinion.[1269] Furthermore, Eisenhower believed the Europeans were overestimating Nasser's importance. In a message of September 8, 1956, Eisenhower told Eden: "...you are making of Nasser a much more important figure than he is." [1270]

The main reason the USA opposed the allied attack on Egypt, however, seems to have been that it could only benefit the Soviets.[1271] By 1956 the Cold War had escalated and tensions were rising. It seemed obvious that the Arabs might be inclined to align themselves with the Soviets who were sure to oppose the Anglo-French-Israeli intervention.[1272] Furthermore, the Suez Crisis provided an annoying distraction from the crisis in Eastern Europe, which ultimately resulted in the Soviet invasion of Hungary.[1273] Any propaganda gain the West could have achieved was undermined by

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[1268] Lloyd, *Suez*, 248-249; in his account of the Suez crisis, the former British Foreign Secretary claims that "Dulles said afterwards that the objective of bringing down Nasser was agreed. The only difference was over method."; Turner, *Suez 1956*, 173; he claims there was cooperation between the CIA and British intelligence in looking for suitable candidates to replace Nasser; Kyle, *Suez*, 150; Kyle describes discussions between MI6 and the CIA concerning Nasser's overthrow, although he claims there was no significant outcome; Freiberger, *Dawn*, 149; in a conversation between US Secretary of State Dulles and the British High Commissioner in Pakistan on March 7, 1956, Dulles is supposed to have said that it would become necessary "to ditch" Nasser if he did not change his attitude; Borowy, *Diplomatie*, 468.

[1269] Gordon, "Trading", 95; Fullick/Powell, *Suez*, 196; Richardson, "Avoiding", 375; Connell, *The Most*, 176; Woollacott, *After Suez*, 10.

[1270] *Message from President Eisenhower to Prime Minister Eden*, September 8, 1956; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 435-438, 435; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1271] Gordon, "Trading", 93; Shwadran, "Oil", 19-20; Fullick/Powell, *Suez*, 196; Bowie, *Suez 1956*, 99; Borowy, *Diplomatie*, 622; Richardson, "Avoiding", 396, 399.

[1272] Shwadran, "Oil", 20; Bowie, *Suez 1956*, 32, 62; Freiberger, *Dawn*, 188.

[1273] Dulles' attitude is aptly summarized by the following memo: "The Sec. thinks it is a mockery for them to come in with bombs falling over Egypt and denounce the SU for perhaps doing something that is not as bad." This had been Dulles' response on being informed that Britain and France wanted to coordinate a response at the UN to the Soviet Union's actions in Hungary; *Memorandum of a Telephone Conversation Between the Secretary of State in Washington and the Representative at the United Nations (Lodge) in New York, November 2, 1956, 4:11 p.m.*; United States Department of State, FRUS, 1955-1957, Volume XVI, 1955-1957, 938; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Woollacott, *After Suez*, 22.

having to deal with what was generally seen as European imperialism at its worst.[1274] As Secretary of State Dulles told Eisenhower on October 30, 1956, it was "a great tragedy" that "just when Soviet policy was collapsing the Br[itish] and the Fr[ench] are doing the same thing in the Arab world."[1275]

These misgivings were enhanced by the scepticism of many American officials as to whether the British and the French had realized that times had changed, that they were no longer able to enforce "obedience" by force in the developing world in the old imperial style.[1276] In a press conference on October 1, 1956, Dulles had referred to "differences of approach" between the USA and "the colonial powers".[1277] Many within the US Administration believed the time had come for the Americans to take over the role the British had played in the Middle East, the French already no longer being very relevant.[1278] During the election campaign in 1956 US Vice-President Nixon referred to the American role in the Suez Crisis as follows:

> *For the first time in history we have shown independence of Anglo-French policies towards Asia and Africa which seemed to us to reflect the colonial tradition. This*

[1274] Corbett, "Power", 11; Turner, *Suez 1956*, 367; Bowie, *Suez 1956*, 63; Borowy, *Diplomatie*, 611; Richardson, "Avoiding", 376-377; Louis, "The Suez", 292-293.

[1275] *Memorandum of a Telephone Conversation Between the President and the Secretary of State, Washington, October 30, 1956, 4:54 p.m.*; United States Department of State, FRUS, 1955-1957, Volume XXV, 1955-1957, 346; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011.

[1276] Under-Secretary Murphy of the US State Department commented: "United States policy opposed the type of eighteenth century strategy which was in the minds of our friends"; quoted in Turner, *Suez 1956*, 218; Turner also describes US Foreign Secretary Dulles as having an "innate distrust of British foreign policy, which he saw as motivated almost entirely by a hopeless and dangerous desire to interfere in matters that were beyond the country's capacity to control" (at 106); this American attitude is also confirmed by Eden, *Full Circle*, 498-499, 541-542; Aldrich, "The Suez", 552; Shwadran, "Oil", 19-20; Fullick/Powell, *Suez*, 196; Bowie, *Suez 1956*, 62; Kyle, *Suez*, 49-50; Freiberger, *Dawn*, 44-45, 48, 50, 75; Borowy, *Diplomatie*, 622; Richardson, "Avoiding", 398-399; Woollacott, *After Suez*, 31; Bacevich, "A Hell", 2.

[1277] Eden, *Full Circle*, 498.

[1278] This American attitude was foreshadowed in the *Statement of Policy by the National Security Council, United States Objectives and Policies with Respect to the Near East (NSC 155/1)*, July 14, 1953; in it the NSC came to the conclusion that "in particular, the influence of the United Kingdom has been weakened, with distrust and hatred replacing the former colonial subservience...France is also disliked and distrusted..."; United States Department of State, FRUS, 1952-1954, Volume IX, Part I, 1952-1954, 399-406, 399-400; available at: http://digicoll.library.wisc.edu/FRUS/Browse.html; accessed 26/07/2011; Freiberger, *Dawn*, 26, 160, 206; Borowy, *Diplomatie*, 660.

> *declaration of independence has had an electrifying effect throughout the world.*[1279]

Meanwhile, the USA, in other cases, was not hesitant to violate international law. Not only did the CIA instigate and organize the coup against the Prime Minister of Iran, Mossadegh, in 1953,[1280] it had also helped depose the democratically elected President of Guatemala in 1954.[1281] Both actions were seen as justified in the fight against communism. It is also widely assumed that one reason the US government was very angry with British actions in Egypt was that the two states had long been planning to organize a coup in Syria, which was supposed to take place around the time the military attack against Egypt was launched.[1282] US policy at the time seems to have been focused on keeping any violations of international law as secret as possible, thereby preserving deniability, not on upholding international law.[1283]

b) Soviet Union

The Soviet Union's protestations, as far as international law was concerned, were open to ridicule as soon as they were uttered. While the Soviet Union was denouncing Britain, France, and Israel, its troops were invading Hungary in order to suppress an anti-communist revolt.[1284] This action could not be justified under international law, even on the spurious grounds that the new Hungarian government,

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[1279] Vice-President Nixon; quoted by Eden in *Full Circle*, 541-542.
[1280] For a detailed account of the coup in Iran in 1953, see: Stephen Kinzer, *All the Shah's Men, An American Coup and the Roots of Middle East Terror*, Hoboken: John Wiley & Sons, Inc., 2008 (2003); Bacevich, "A Hell", 5.
[1281] Corbett, "Power", 2; Salt, *The Unmaking*, 179; Lloyd, *Suez*, 241; Bacevich, "A Hell", 5.
[1282] "Operation Straggle"; Kyle, *Suez*, 102-103; he points out that the date fixed for the coup had actually been October 29, 1956, the day Israel launched its attack on Egypt; Freiberger, *Dawn*, 188; Salt, *The Unmaking*, 179; Turner, *Suez 1956*, 173; Borowy, *Diplomatie*, 565, 659.
[1283] Turner, *Suez 1956*, 113; Bacevich, "A Hell", 5; Woollacott, *After Suez*, 10, 104.
[1284] Corbett, "Power", 3; Salt, *The Unmaking*, 178.

conveniently installed in Moscow, had asked for Soviet help against its own people.[1285]

The tripartite aggression therefore provided the Soviet Union with a useful distraction from its troubles in Eastern Europe, especially in Poland and Hungary.[1286] Some have even argued that the Anglo-French intervention in Egypt influenced Soviet decision-making on how to proceed in Hungary.[1287]

The use of force by the traditional colonial powers, however, also offered a strategic opportunity: just as much as the Americans feared such a development, the Soviets were hoping they could persuade the Arabs to align themselves with the Soviet Union in their fight against western imperialism.[1288] Not dependent on oil from the region, Soviet strategy may have also been based on the hope that such a partnership could result in Arab states denying Western Europe the oil it needed.[1289]

Such a strategic re-alignment seemed much more likely now Soviet attitudes towards Israel had changed. Although the Soviet Union had at first been an enthusiastic supporter of Israel, the bilateral relationship had deteriorated badly during the

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[1285] Bowett, *Self-Defence*, 16.
[1286] Borowy, *Diplomatie*, 645-646, 649; Peter G. Boyle, "The Hungarian Revolution and the Suez Crisis", *History*, Vol. 90, 2005, 561, 564; Woollacott, *After Suez*, 22; Trevelyan, *The Middle East*, 129.
[1287] Boyle, "The Hungarian", 556, 558; Boyle outlines arguments that the Anglo-French action may have encouraged the Soviet Union to intervene forcefully in Hungary, perhaps also in order to avoid the impression of weakness in comparison to the western powers (Soviet politicians were apparently convinced the Americans would in the end support Britain and France). Boyle does not think that likely, but acknowledges that the timing of the Soviet intervention in Hungary may have been influenced by the Suez War, because the Soviets may have been keen on exploiting the distraction Suez provided; Gustav Kecskes, "The Suez Crisis and the 1956 Hungarian Revolution", *East European Quarterly*, Vol. XXXV, 2001, 47- 58, 48-49, 56; he describes the theories being advanced in Eastern Europe at the time. According to some, Britain and France had ignored the situation in Hungary in order to attack Egypt, and they had allegedly profited from the distraction caused by the Soviet intervention in Hungary. He also confirms that some assumed the Soviets had only intervened because of the Suez War. Kecskes himself disagrees with these theories, and claims that the decision to intervene in Hungary had already been made by the time the attack on Egypt was launched.
[1288] Ulfkotte, *Kontinuität*, 48-49; Levy, "Issues", 459.
[1289] Shwadran, "Oil", 21; Levy, "Issues", 463, 465; Rustow, "Defense", 274.

1950s.[1290] As signified by the Soviet-Egyptian arms deal, the Soviets had begun supporting the Arabs and had vetoed numerous Security Council Resolutions condemning Arab behaviour towards Israel.[1291] The Suez Crisis therefore offered a unique opportunity to solidify this new Soviet-Arab partnership, and to weaken any western-orientated defence arrangement in the Middle East, like the Baghdad Pact, which was, unsurprisingly, perceived as a threat to the Soviet Union. It was therefore sensible to strengthen the Baghdad Pact's opponents, such as Nasser.[1292] Generally speaking, the Soviets, of course, wanted to utilize the chance to openly back a developing country, in what was seen as a fight for independence from old-style imperialists, at a time when decolonisation was a major topic. Gaining influence in these newly independent states was becoming increasingly important.[1293]

C. Conclusion

The Suez War was the culmination of a disgraceful record as far as international law and its application in Egypt was concerned. Britain, in particular, had shown very little interest in upholding international law in its bilateral dealings with Egypt if its application turned out be disadvantageous. The tradition, of expecting the Egyptians to comply and, if they did not to force them to do so, led to the disaster of Suez.[1294]

[1290] Connell, *The Most*, 77 (the former Head of British propaganda in the Middle East during WW II attributes this change of heart by the Soviets to the simple fact that they had supported the Zionists to get the British out of Palestine. That had been achieved, so they now supported the Arabs to get the British out of the Arab states); Allen, *Imperialism*, 448 (he claims this change of heart was due to disappointment with Israel's development, since it had become a new state); Gainsborough, *The Arab-Israeli*, 66 (he attributes the deterioration in bilateral relations to Israel's western orientation, to the *Jewish Doctors' Trials* in Moscow, and the *Slansky Trials* in Prague).

[1291] Allen, *Imperialism*, 449; Gainsborough, *The Arab-Israeli*, 66.

[1292] Ulfkotte, *Kontinuität*, 49.

[1293] Ulfkotte, *Kontinuität*, 49; Levy, "Issues", 459, 463, 465.

[1294] Murray, "Glimpses", 57; Murray describes the Suez War as a "clumsy and outdated return to gunboat diplomacy", and as a "nineteenth-century manoeuvre". The Legal Advisor at the Foreign Office –implicitly-

By the late 19th century, once the British had realized the potential of the French-constructed Suez Canal, they were determined to be, and remain in control of it, which in turn meant to be in control of Egypt.

Having "temporarily occupied" Egypt since 1882, Britain declared Egypt a British Protectorate at the beginning of the First World War, which was in clear violation of the 1907 Hague Regulations. In a method familiar from Britain's dealings in Palestine, this situation was partially rectified by inserting suitable clauses in the peace treaties of 1919. Sadly, it was 1924 before the peace treaty with Turkey was ratified, another "anomaly", given the fact that Britain had, in 1922, already unilaterally declared Egypt to be "independent", albeit in a very limited interpretation of the term.

That "independence" could, however, not obscure the fact that the Egyptians had been denied all the rights promised by the victorious powers during WW I. Egypt, with a history as a state going back thousands of years, and its much more recent experience of "quasi-independence" under the Khedive, was the obvious candidate for independent statehood, or at least, "A"-Mandate status -even more so when compared to artificial constructs, such as Iraq or Trans-Jordan. The British, however, were determined not to let the concept of self-determination get in the way of their control of the Suez Canal.

The Suez Canal itself, which the British during the Suez Crisis claimed had been internationalized, meanwhile was anything but as long as the British were in control of Egypt and could block such a development. The negotiations leading to the

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came to a similar conclusion; on September 6, 1956, he wrote: "Very few people in this country realize the immense change that has taken place in the climate of world opinion on the question of the use of force, especially that particular use of it that takes the form of what might be called 'gun-boat diplomacy'..." (LO 2/825); quoted by Marston, "Armed Intervention", 787.

Convention of Constantinople dragged on for years precisely because the British wanted to exclude as much international involvement as possible. Once the Convention was concluded in 1888, it effectively remained in abeyance until 1904, due to the British reservation in effect ruling out international oversight. During both World Wars the Canal was in reality treated as a British waterway, despite being under Ottoman/Egyptian sovereignty.

Under intense Egyptian pressure, the British were, however, forced to grant Egypt more independence. In 1936 the Anglo-Egyptian Treaty, leading to Egypt's admission to the League of Nations, was concluded. Developments during the next decade, however, demonstrated that the British would pay little heed to the Treaty.

Not only was the number of British troops stationed in the Suez Canal Zone always well in excess of what had been agreed, but the British intervened forcefully on three occasions[1295] to impose the United Kingdom's wishes on the nominally independent Egyptian government, the most famous and far-reaching episode being the "February incident" of 1942, when the Egyptian King was threatened with removal should he refuse to sack an anti-British Prime Minister.

Having thus treated international law with disdain in its relationship with Egypt, the British claimed surprise to learn of Egyptian dissatisfaction after the Second World War. Until the Suez Crisis erupted and ended in disaster, the British were unwilling to accept that international law demanded that Egypt be treated as an equal. Egyptian demands for greater independence were invariably treated as illegal, based on the Treaty of 1936 -an agreement the British themselves had completely discredited by consistently violating it. Anybody suggesting compromise was accused of being an

[1295] Farnie, *East*, 632.

appeaser, and of following Chamberlain's Munich example, in complete denial of the fact that it was Britain that was curtailing another state's sovereignty.

Thus the British entered the Suez Crisis of 1956 with the feeling that the withdrawal of British troops on the basis of the *Suez Canal Base Agreement* of 1954 had been one concession too many, and it was time the Egyptians were taught a lesson. This state of mind almost automatically led to the use of force being seen as necessary and legitimate, without any detailed consideration being given to the question of international legality.

Nevertheless, the three allies were quick to accuse Egypt of breaching international law, an assessment that at the time was controversial even within the British government. Claiming violations on the part of Egypt was, however, deemed necessary to set the scene for the use of force. Without creating the impression that Egypt was lawless and therefore to blame for the conflict, it was obvious that international support would be found wanting.

As has been shown, the accusations relating to the Suez Canal levelled at Egypt were largely unjustified and certainly hypocritical. By nationalizing the *Universal Company of the Suez Maritime Canal,* Egypt had not violated public international law, but had only exercised its rights as a sovereign state in regard of a domestic company on Egyptian territory, a right the British government had previously exercised many times in respect of British companies. Egypt had also not violated the *Convention of Constantinople* by nationalizing the company, as the company's status was not in any way guaranteed by it.

The Convention's provisions are ambiguous as far as the legality of barring Israeli shipping is concerned. Based on British and American state practice, as far as the Suez and the Panama Canals were concerned, the Egyptian actions were, however, in accordance with the Anglo-American interpretation of the obligation to guarantee free passage. This is a conclusion confirmed by the fact that the Security Council -when condemning Egyptian behaviour towards Israel in the Suez Canal- refrained from claiming a violation of the *Convention of Constantinople*. Despite the Security Council, in 1951, demanding from Egypt that it cease the restrictions on Israeli shipping, it is also interesting to note that the British never tried to enforce that resolution, despite being easily able to do so as a result of having thousands of troops there.

Egypt also had not violated the Armistice Agreement with Israel as a maritime blockade had not been outlawed. This is confirmed by the vague statements issued by UN officials who claimed Egypt had violated "the spirit" of the agreement. Any such claim was not of great importance anyway, as Israel had -according to the UN Security Council- also violated the Armistice Agreement without suffering repercussions.

It must therefore be concluded that the tripartite aggression was launched against the backdrop of only one clear Egyptian violation of public international law committed by Egypt in relation to the Suez Canal: a violation of Article 25 UN Charter, which demands adherence to Security Council Resolutions. Utilising this violation by Egypt was, however, near impossible, as Israel had also been found in violation of Article 25 UN Charter in its conduct towards Egypt, without any consequences.

The charade of Egyptian lawlessness put on show by the three allies had one further, but basic weakness: even if the accusations had been correct they never would have justified the use of force against Egypt.[1296] Therefore, more plausible arguments had to be found. The collusion between Britain, France, and Israel at Sèvres, however, which resulted in the Israeli incursion into the Sinai, makes any attempt by these three states to justify their actions in international law impossible. Even so, examined more closely, the official justifications put forward have been shown to be no more than desperate attempts to cover up the truth. None of the official justifications put forward could be reconciled with international law, a fact the British Government was well aware of.

To the allies' dismay that was recognized by almost every other state in the world. The pretence of Egyptian breaches of, and allied adherence to international law were seen for what they were: fig leafs that did not successfully cover up the grave breach of international law committed by the allies.

Due to the overwhelmingly negative reaction displayed by the international community to the tripartite aggression, Suez seems to many to be one of the moments international law triumphed in international relations. By successfully resisting British and French dictates, Egypt had finally become a truly sovereign state. Britain and France, on the other hand, had been humiliated. The Suez War and the way it ended was a potent symbol of Britain's decline as an imperial power, especially as far as the

[1296] In a Memorandum for the British Cabinet's "Egypt Committee" of August 20, 1956, the Foreign Secretary concluded: "...however illegal the Egyptian action in purporting to nationalise the Suez Canal Company may be, it is not,... of such a character as would, under international law, afford a legal justification for the use of force..." (CAB 134/1217, 136-137 (E.C. (56) 26); quoted by Marston "Armed Intervention", 782; the Legal Advisor at the Foreign Office concurred with that view on September 6, 1956: "If we attacked Egypt solely on the ground that the nationalisation of the Canal is illegal and incompatible with the Suez Canal Convention, or in order to impose an international authority for the operation of the Canal, we should...be committing a clear illegality...in fact...a simple act of aggression" (LCO 2/5760); quoted by Marston, "Armed Intervention", 787.

Middle East is concerned.[1297] That decline had, however, already set in after WW I, when, as has been shown, Britain was not able to resolve the problems in Palestine, and was continuingly fighting unrest in places as diverse as Egypt and Iraq.[1298] Suez was also not the end of that development, as the British decision to evacuate positions held "east of Suez" in 1971 evidences.[1299]

Nevertheless, it was the most striking example of Britain's inability to impose its will on a much weaker, developing country, and its failure to gain any significant support from other states in its undertakings. The Suez Crisis was the end of any meaningful British role in Egypt.[1300] Suez also raised widespread awareness of Britain's diminished role in the world, both in Britain itself and among the Arabs. [1301] As Woollacott points out, "the whole country had been abruptly demoted."[1302]

The British also found their "special relationship" with the Americans -whose unconditional support could no longer be counted on- in tatters.[1303] Rebuilding it was necessary in order to project a semblance of Great Power status to the world,[1304] even though this would entail "educating" the Americans. As the British Ambassador to the

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[1297] Corbett, "Power", 11-12; Murray, "Glimpses", 57; Farnie, *East*, 741; Woollacott, *After Suez*, 46, 59, 77.
[1298] Woollacott, *After Suez*, 28; McDermott, *The Eden*, 165.
[1299] Turner, *Suez 1956*, 456-457; Mansfield, *A History*, 258; Woollacott, *After Suez*, 109-110; McDermott, *The Eden*, 165.
[1300] Allen, *Imperialism*, 456.
[1301] It is interesting to note that the Legal Advisor at the Foreign Office had predicted such calamity for Britain; on August 31, 1956, he wrote: "...by acting ...in clear violation of the Charter, we shall be making a serious mistake for which we shall pay heavily in the future..." (FO 800/748); quoted by Marston, "Armed Intervention", 785; Fullick/Powell, *Suez*, 199; Woollacott, *After Suez*, 22-23, 46, 59, 77.
[1302] Woollacott, *After Suez*, 23.
[1303] Murray, at the time of the Suez Crisis Senior Counsellor at Canada's UN mission, describes how the Canadian Ambassador to the UN had to pass notes between the British and the American Representatives at the UN -who actually sat next to each other- because they no longer communicated with each other; in "Glimpses", 55; McDermott, *The Eden*, 157.
[1304] Gordon, "Trading", 95; Martel, "Decolonisation", 408-409; Turner, *Suez 1956*, 455; Farnie, *East*, 736.

USA pointed out in a telegram to the Foreign Office in February 1957, it would be necessary to change Eisenhower's "boy scout views about colonialism."[1305]

For France the Suez debacle merely re-confirmed its weak position in the Middle East. French rule having long been more unpopular even than British rule, it had virtually lost all influence in the region by the end of WW II.[1306] Its rearguard action to hold on to Algeria in the face of stiff opposition was doomed to failure, an outcome probably not much influenced by the Suez War.[1307] Suez is, nevertheless, often viewed as having set in motion France's alienation from NATO and the USA.[1308] French politicians were very bitter about the American attitude and very disappointed by what they viewed as Britain's dithering.[1309] This resulted in French ambitions being much more forcefully directed at achieving European integration, an alternative avenue for a middle-ranking power trying to retain power and influence in changing times.[1310]

Although for Israel the over-all result of the Suez conflict was more ambivalent, the final outcome was, nevertheless, disappointing. The war had seemingly made the armistice line between Egypt and Israel more secure, the Straits of Tiran had finally been opened to Israeli shipping, and much of Egypt's more sophisticated weaponry had been destroyed. However, Nasser had not only survived the war, but had prospered, thanks to the Suez conflict. Two further Arab-Israeli wars in the next seventeen years also demonstrated that any gains in security and stability were short-

[1305] "Caccia to FO, telegram No. 309, Secret", February 11, 1957 (PRO PREM 11/1835); quoted in Martel, "Decolonisation", 407.
[1306] Woollacott, *After Suez*, 24-25; Keay, *Sowing*, 442.
[1307] Woollacott, *After Suez*, 12-13, 25; Keay, *Sowing*, 442.
[1308] Fullick/Powell, *Suez*, 160, 198; Farnie, *East*, 741.
[1309] Gordon, "Trading", 96; Fullick/Powell, *Suez*, 160, 198; Turner, *Suez 1956*, 458; Farnie, *East*, 741; McDermott, *The Eden*, 160.
[1310] Farrnie, *East*, 741; Martel, "Decolonisation", 408-409; Turner, *Suez 1956*, 462-463; German Chancellor Adenauer is to said to have told French Prime Minister Mollet that "Europe will be your revenge" on the day the ceasefire in Egypt came into force; also quoted by Scott, "Commentary", 212.

lived. Arab hostility could not be banished by launching retaliatory and/or preventive strikes. More than fifty years later, Israel, still resistant to any change in its policy of reverting to overwhelming force as often as possible, remains surrounded by largely hostile Arab populations, and has remained the outcast in its neighbourhood.

The Suez Crisis, in Trevelyan's words "a miserable business",[1311] was a watershed moment as far as British and French power in the Middle East was concerned. In pursuit of the national interest, the Great Powers utilized international law as a tool in a propaganda war that aimed to discredit Nasser and Egypt. In their governments' decision-making process, however, international law had no role to play. The results of this course of action were disastrous. Woollacott concludes:

> *For the British and the French a chapter in history was closing in a way which was at least dispiriting and perhaps also dishonourable...A few words spoken in London no longer settled the fate of millions across the globe. Rather, they had sealed the fate of England.*[1312]

It is therefore understandable that the former Deputy Legal Adviser to the British Foreign Office, Elizabeth Wilmshurst, declared in 2010: "Certainly that was the lesson I draw from Suez: that it is in the UK's interest to keep within international law and within the UN Charter."[1313]

[1311] Trevelyan, *The Middle East*, 122 (Trevelyan was the UK Ambassador in Cairo at the time of the Suez crisis).

[1312] Woollacott, *After Suez*, 3, 46; Bacevich, "A Hell", 5; Bacevich has come to a similar devastating conclusion: "...they effectively brought down the curtain on the age when a European power could pursue an independent foreign policy. Although France, especially after de Gaulle's return to power, tried to pretend otherwise, Britain didn't bother. The process of transforming lion into poodle had begun."

[1313] Elizabeth Wilmshurst, giving evidence at the Iraq Inquiry on January 26, 2010; Transcript, at 10; available at: http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf; last accessed 19/08/2011.