THE BRITISH MANDATE:
DEFINING THE LEGALITY OF JEWISH SOVEREIGNTY OVER JUDEA AND SAMARIA UNDER INTERNATIONAL LAW

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I. INTRODUCTION

The purpose of this report is to present a clear solid historical and legal basis for Israeli sovereignty over the entire area of the Mandate. An objective evaluation of the relevant binding instruments and applicable rules of international law conclusively establishes the legality of Israeli sovereignty over Judea and Samaria,[1] and the right of Jewish settlement therein. These basic legal historical documents speak the truth to all who choose to read them.

It is common to analyze the legality of Jewish settlement in Judea and Samaria beginning in 1947[2] or in 1967 with the Six-Day War. Yet either starting point obscures the entire World War I era, which defined the framework of the region and Israel's legal claim of sovereignty over Judea and Samaria. Failure to

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[1] The proper name for these territories deserves a brief discussion. "Judea and Samaria" denote the Biblical names of the area commonly referred to today as the "West Bank." These names have historically been used to describe the region that Jordan illegally held from 1949-1967. Both the Palestine Mandate and the United Nations employed the terms "Judea and Samaria" to depict this geographic region – for example, United Nations General Assembly Resolution 181 utilizes these terms in Part II(A). After conquering this territory in 1949, Jordan renamed this area the "West Bank," since the territory lies on the west bank of the Jordan River. The term "West Bank" thus implies a connection to Jordanian sovereignty, despite the fact that Jordan never acquired lawful sovereignty over the area. See, e.g. "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," Advisory Opinion, 2004 I.C.J. 136, Paragraph 73.

[2] Many begin with the 1947 passage of United Nations General Assembly Resolution 181 – see, for example, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," Paragraph 71. 1947 is often used as the starting point of recounting the history to promote the argument that Jewish immigration to Israel was only permitted in light of sympathy to Holocaust victims. Such a view ignores the prior decades of documented public international support for reconstituting the Jewish home in Palestine, due to a historic right that long preceded the Holocaust. The Holocaust may have confirmed the need for a homeland for a homeless and persecuted minority, but, as discussed below, the modern notion of a Jewish homeland has been endorsed since at least 1917 with the Balfour Declaration. The subsequent Paris Peace Conference of 1919 gave "official and public consideration to the re-establishment of the Jewish people in their national homeland." Nathan Feinberg, *Some Problems of the Palestine Mandate* (Tel Aviv: Shoshani's Printing, 1936), 14.

As documented further in this paper, a multitude of binding international documents continued to portray explicit recognition of the Jewish people's connection to Palestine. In April 1920, for example, the British newspaper of record heralded the San Remo Conference as "an event that will be celebrated in all Jewish centres [sic] with great joy" and a date that "will perhaps become a Jewish national holiday" in its announcement that "the Wandering Jews," after 20 centuries, will begin to re-establish their "ancient homeland." "Zionist Rejoicings - British Mandate for Palestine Welcomed," *The Times*, 26 April 1920.

evaluate historical events and documents from this era will inevitably result in improper application of international legal precepts, producing inequitable and unjust conclusions. As the British Peel Commission noted in 1937, "the present problem of Palestine…is unintelligible without knowledge of the history that lies behind it. No other problem of our time is rooted so deeply in the past."[3]

Beginning in 1917 with the Balfour Declaration, the international community supported the return of the Jewish people to reconstitute their national home in Palestine. The international community committed itself to realizing this goal in a series of binding international documents, culminating in the British Mandate for Palestine with boundaries that included Judea and Samaria (hereafter: the "Palestine Mandate," "the British Mandate," or "the Mandate"). The League of Nations charged Britain via the Palestine Mandate as Mandatory, with the duty of facilitating the establishment of a Jewish national home in Palestine, while safeguarding the civil and religious rights of all of Palestine's inhabitants. The Mandate for Palestine, "in fact and in law [was] an international agreement having the character of a treaty or convention."[4] Although the League of Nations was abolished in April 1946, the Palestine Mandate remained in force, as will be discussed below.

No binding international agreement or event altered the inclusion of Judea and Samaria within the borders of the Palestine Mandate, from the time the international community recognized Israel as an independent state in 1948 and as a member of the United Nations in 1949. [5]At that time, this paper will demonstrate, the Mandate terminated upon the realization of its clearly stated purpose: facilitating the return of a sufficient number of Jews to Palestine to create a Jewish National home in their historic homeland with the ability to stand on its own. As detailed in its Declaration of Independence, the State of Israel stands as a Jewish national home, intent upon safeguarding the civil and religious rights of all its citizens, irrespective of race or religion. Truly, this is the nature of the state

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[3] The Peel Commission proceeded to recount the history of the Jewish people from Biblical times in great detail, basing their right of return to Palestine on this connection, which had remained the center of their spiritual lives since their dispersion. "Palestine Royal Commission Report: Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty" (London: His Majesty's Stationery Office, 1937), 14-17. (Hereafter: "The Peel Commission Report").

[4] "South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections," Judgment of 21 December 1962, I.C.J. Reports 1962, 319, 330.

[5] As will be discussed within, no subsequent agreement contains language or intent to constitute the forfeiture of Israeli sovereignty over Judea and Samaria, including Resolution 242, the Oslo Accords or the Road Map. Thus, Israeli sovereignty over these areas remains valid. It should also be noted that historically various plans to partition the area, including the Peel Commission Report in 1936 and the Woodhead Commission in 1938, were ultimately abandoned without altering the border. See Bell, p.676.

envisioned by the Principal Allied Powers, the League of Nations, and the international community as set forth in the Mandate for Palestine.

Upon Israel's recognition as an independent state—which triggered the termination of the Palestine Mandate—the Jewish people, as the Mandate's beneficiaries, acquired sovereignty over the territory in its entirety.[6] This sovereignty had been held in abeyance during the time of the Mandate, and no legal change had altered the status of the Jordan River as the Mandate's eastern border. Thus, as will be illustrated, the current legal borders of the modern State of Israel conform to those defined by the Mandate. As a result, sovereignty over the entire area of the Mandate—including Judea and Samaria—accrued to the Jewish people upon Israel's recognition as an independent state. This conclusion is further confirmed, *inter alia*, by application of the legal principle *uti possidetis juris* ("as you possess under the law"), a concept that the International Court of Justice has applied when recognizing historically designated administrative boundaries, subsequent to tracing internationally recognized historical documentation.[7]

Furthermore, although multiple international bodies—including the ICJ—have attempted to apply the Hague and Geneva Conventions to define the status of Judea and Samaria as "belligerently occupied," such an application is erroneous. Indeed, as will be demonstrated below, the fact that Israel acquired sovereignty rights in this territory upon termination of the British Mandate—and subsequently liberated this territory in the aftermath of the Six-Day War—establishes the irrelevance of the Hague and Geneva Conventions regarding Judea and Samaria. In addition, Israel has never waived sovereignty rights over Judea and Samaria, despite its participation in subsequent peace negotiations regarding the status of

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[6] The other mandates similarly terminated in accordance with the borders defined by the relevant mandates.

[7] "Frontier Dispute," Judgment, I.C.J. Reports 1986, 554, Paragraph 20. See also the comments of Professor Avi Bell cited by Caroline Glick in The Israel Solution, New York: Crown Forum, 2005, 174- 175. "Applying the rule would appear to dictate that Israel's borders are those of the Palestine Mandate that preceded it, except where otherwise agreed upon by Israel and its relevant neighbor. And, indeed, rather than undermine the application of *uti possidetis juris*, Israel's peace treaties with neighboring states to date – with Egypt and Jordan – appear to reinforce it. These treaties ratify borders between Israel and its neighbors explicitly based on the boundaries of the British Mandate of Palestine. Likewise, in demarcating the so-called "Blue Line" between Israel and Lebanon in 2000, the United Nations Secretary General relied upon the boundaries of the British Mandate of Palestine…Given the location of the borders of the Mandate of Palestine, applying the doctrine of *uti possidetis juris* to Israel would mean that Israel has territorial sovereignty over all the disputed areas of Jerusalem, the West Bank, and Gaza, except to the degree that Israel has voluntarily yielded sovereignty since its independence. This conclusion stands in opposition to the widely espoused position that international law gives Israel little or no sovereign claim to these areas." Avraham Bell and Eugene Kontorovich, "Palestine, Uti Possidetis Juris and the Borders of Israel", 58 Ariz.L.Rev. 633,637 (2016). See also Paul S. Reibenfeld, "The Legitimacy of Jewish Settlement in Judea, Samaria and Gaza" Israel's Legitimacy in Law and History. Center for Near East Policy Research, 1993. p.71

this territory.[8] Neither the Oslo Accords nor the 2003 "Road Map for Peace" nor any other negotiations have altered the borders of Judea and Samaria that were set down in the Mandate.

Political discussion should be premised upon the knowledge and assertion that Israel retains legal sovereignty over Judea and Samaria, and thus a Jewish presence and Jewish communities in the area are legal according to international law.

II. INTERNATIONAL ACCEPTANCE AND SUPPORT OF THE BALFOUR DECLARATION

Although there has been a continual Jewish presence in Israel since Biblical times,[9] the documented modern international recognition of the Jewish right to return to Israel began with the Balfour Declaration in 1917.[10] At that time—close to the end of World War I—the region known as "Palestine" was part of Syria[11] and under the control of the Ottoman Empire. The Balfour Declaration, communicated by the Foreign Secretary of the British Government, Lord Arthur James Balfour, stated that the British government wished to convey a "declaration of sympathy with Jewish Zionist aspirations":

> 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

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[8] See, for example, Article XXXI(6) of the 1995 Interim Agreement on the West Bank and Gaza Strip: "Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions." "Israeli and Palestinian Authority: Interim Agreement on the West Bank and Gaza Strip (September 28, 1995)," in *The Israel-Arab Reader*, ed. Walter Laqueur and Barry Rubin, 7th Edition (New York: Penguin Group, 2008), 520. Israel has included similar clauses in every document it has signed over the course of negotiations on Judea and Samaria until the present day.

[9] The Peel Commission Report delineates this extensive history on p. 14-17.

[10] The Balfour Declaration was the first official document issued by a government in hundreds of years that explicitly recognized a Jewish connection to Palestine. Prior significant recognition, such as the British offer of a Jewish homeland in Uganda in 1903, signified recognition of a Jewish *nationality*, but did not have the widespread international credibility and support afforded by the era beginning with 1917. Notably, Napoleon Bonaparte recognized a Jewish connection to Palestine in 1799, in his "Letter to the Jewish Nation from the French Commander-in-Chief Bonaparte." Cited in Simon Sebag Montefiore, *Jerusalem: The Biography* (New York: Random House, 2012), 331.

[11] The Peel Commission Report, 18.

> Palestine, or the rights and political status enjoyed by Jews in any other country.[12]

The Balfour Declaration has been discounted as a private letter, not constituting a binding act of international law.[13] However, far from being a clandestine promise, the Balfour Declaration was prominently included in multiple international documents, including the 1920 Treaty of Sévres between Turkey and the Allies, which was signed by the Ottoman Sultan (though never ratified).[14] It should also be emphasized that President Woodrow Wilson approved the Balfour Declaration before it was published, and the French and Italian governments also publicly endorsed the declaration.[15]

In addition, the Principal Allied Powers later unambiguously defined the realization of the Balfour Declaration as the purpose of the Palestine Mandate. Specifically, on April 25, 1920, at the San Remo Conference, representatives of the four Allied powers of World War I—Britain, France, Italy, and Japan—distributed the Mandate for Palestine to Great Britain, with the intention that

> the Mandatory will be responsible for putting into effect the declaration originally made on November 8, 1917, by the British Government, and adopted by the other Allied Powers, in favour of 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

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[12] "Balfour Declaration, 1917," *The Avalon Project: Yale Law School*. Accessed online: http://avalon.law.yale.edu/20th_century/balfour.asp.

[13] See, for example, John Quigley, *The Statehood of Palestine* (Cambridge: Cambridge University Press, 2010), 13-14.

[14] In the Treaty of Sévres, Turkey relinquished ownership of most of the territories of the former Ottoman Empire—including Palestine—to the League of Nations. However, the Treaty was not formally ratified due to a revolution led by Kamal Ataturk, for reasons unrelated to the Mandates. Ataturk, however, *did* negotiate the Lausanne Treaty in 1923, which was signed and ratified. See "Treaty of Peace Between the Allied and Powers and Turkey," *American Journal of International Law* 15:3 (July 1921): 179-181. Article 26 of the Lausanne Treaty acknowledged the new territorial boundaries and included recognition of the other Peace treaties, each of which included the Covenant of the League of Nations. Thus, although the Lausanne Treaty did not explicitly mention Palestine, it is clear that Palestine was included with the other relevant Mandates. In other words, although the Treaty did not specify "in whose favor the [Turkey's] renunciation [of sovereignty] was made, it was presumably contemplating the States then in occupation." L. Oppenheim, *International Law, A Treatise* (London: Longmans, Green and Co., 1928), 203.

[15] The Peel Commission Report, 22. Similarly, President Truman approved of the Balfour Declaration, "explaining that it was in keeping with former President Woodrow Wilson's principle of 'self-determination.'" "The Recognition of the State of Israel," Harry S. Truman Library and Museum. Accessed online: http://www.trumanlibrary.org/whistlestop/study_collections/israel/large/index.php.

> communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[16]

Notably, the Balfour Declaration and the subsequent documents utilize the term "national home for the Jewish people" rather than "Jewish state." As will be discussed further, unlike granting sovereignty to a population already residing in a given area, the unique nature of the proposed national home in Palestine involved sovereignty for the Jewish people, not yet constituting a majority therein. For this reason, the Mandate defined procedures to facilitate Jewish immigration and Jewish political institutions. Recognizing the uniqueness and uncertainty of this unparalleled endeavor, the Peel Commission noted in 1937 that "His Majesty's Government could not commit itself to the establishment of a Jewish State. It could only undertake to facilitate the growth of a Home. *It would depend mainly on the zeal and enterprise of the Jews whether the Home would grow big enough to become a State."*[17]

Further, the Zionist leadership regarded the Balfour Declaration's promise of a "Jewish National Home" to encompass *more* than "merely" a Jewish state for its residents; rather the Declaration refers to a single location in the world with a Jewish majority that would be obligated to provide a home to all Jews seeking refuge. As David Ben-Gurion explained to the United Nations Special Committee on Palestine, a "Jewish National Home" in Palestine meant that no government in Palestine could prevent a Jew in need from immigrating:

> Such a position might arise in a Jewish State. The Jews in Palestine might say, you are suffering in Germany; that is your business. Therefore, when you said "a National Home for the Jewish people," I said it was more than merely a Jewish State for those who are there. As long as there is a Jew who cannot stay where he is, and as long as there is a place in Palestine, a Jewish State will not have the right to prevent him from coming. Therefore, *a National Home for the Jewish people is more than a Jewish State*.[18]

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[16] "San Remo Resolution: April 25, 1920," http://web.archive.org/web/20071017031147/http:/www.therightroadtopeace.com/infocenter/Heb/SamRemoRes.html

[17] The Peel Commission Report, 37 (emphasis added). In addition, with regard to the interpretation of the phrase "Jewish National Home," the Commission noted that "Lord Robert Cecil in 1917, Sir Herbert Samuel in 1919, and Mr. Winston Churchill in 1920 spoke or wrote in terms that could only mean that they contemplated the eventual establishment of a Jewish State [in Palestine]," and that "leading British newspapers were equally explicit in their comments on the [Balfour] Declaration." The Peel Commission Report, 25.

[18] "United Nations Special Committee on Palestine, Report of the General Assembly, Volume III, Annex A: Oral Evidence Presented at Public Meeting," A/364/Add.2 PV.19, 7 July 1947. Accessed online: http://avalon.law.yale.edu/20th_century/balfour.asp. *Emphasis added*.

III. THE CREATION OF THE MANDATE SYSTEM

The 1919 Treaty of Versailles, together with the other World War I peace treaties, began with the text of the Covenant of the newly formed League of Nations, a multinational organization designed to resolve international disputes, expressing the hope of President Woodrow Wilson that future wars could be averted.[19] One year prior, in 1918, President Wilson had stressed the principles of nationhood and self-determination in his "Fourteen Points" speech.[20] Despite President Wilson's best efforts, however, the concept of self-determination was not explicitly included in the League of Nations Covenant, as "it was clearly not regarded as a legal principle." However, as Shaw notes, "its influence can be detected in the various provisions for minority protection and in the establishment of the mandates system based as it was upon the sacred trust concept."[21]

Thus, the Palestine Mandate intended to develop the self-determination of the Jewish nation, along with providing protection of the non-Jewish minority. Moreover, the Palestine Mandate specifically recognized "the historical connection of the Jewish people with Palestine [and] the grounds for reconstituting their national home in that country."[22] The multiple provisions of the Mandate specifically reflect this objective, and would be devoid of meaning were the purpose not to create a Jewish majority in the Jewish national homeland. The Peel Commission explicitly stated that "the policy of the Balfour Declaration made it clear from the beginning that Palestine would have to be treated differently from Syria and Iraq…unquestionably, the primary purpose of the [Palestine] Mandate, *as expressed in its preamble and its articles*, is to promote the establishment of a Jewish National Home."[23]

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[19] Interestingly, despite the prominent role of Woodrow Wilson in the establishment of the League of Nations, the United States never became a member.

[20] Woodrow Wilson, "President Wilson's Fourteen Points," *The Avalon Project*: *Yale Law School*. Accessed online: http://avalon.law.yale.edu/20th_century/wilson14.asp

[21] Malcolm Shaw, *International Law: Sixth Edition* (Cambridge: Cambridge University Press, 2008), 251. The concept of self-determination also served as a "guiding instrument in the peace treaties of 1919-1923…whatever else may be said about these treaties, there can hardly be any doubt that they have given to the [principle of self-determination] a much wider application than any previous treaty." Jacob Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (London: Hyperion Press, 1976), 51.

[22]"The Palestine Mandate," *The Avalon Project*: *Yale Law School*. Accessed online: http://avalon.law.yale.edu/20th_century/palmanda.asp.

[23] The Peel Commission Report, 38-39. Emphasis in the original.

Article 22 of the League of Nations Covenant defined the Mandate system as a "principle of guardianship over certain undeveloped peoples, [then viewed as] a new and progressive step in international law."[24] The system served as a compromise between those Allied powers with imperialist aims of annexing the occupied areas of the defeated Central Powers, and those who supported President Wilson's "demand that the interest of the peoples should be the primary consideration in the settlement."[25] Article 22 thus states that the European powers' responsibility forms a "sacred trust of civilization." The enlightened nations would provide "tutelage" to these less advanced peoples until they could adapt to the "strenuous conditions of the modern world."[26] Thus, Article 22 introduced "new principles of delegated government" into international law: international Mandates, a novel legal framework, allowed the Allied victors to maintain a presence while guiding the liberated population to self-rule, all under supervision of the League of Nations.[27]

Clearly, today this somewhat patronizing concept of "tutelage" might be dismissed as no longer politically correct, since the concept of self-determination as applied during the Mandatory period has evolved. Thus, it is important to stress the principle of intertemporal law, which requires that such acts be evaluated

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[24] Oppenheim, 301.

[25] Norman Bentwich, *The Mandates System* (London: Longmans, Green and Co., 1930), 2.

[26] Article 22, "The Covenant of the League of Nations, Including Amendments Adopted to December 1924," *The Avalon Project*: *Yale Law School*. Accessed online: http://avalon.law.yale.edu/20th_century/leagcov.asp.

[27] Bentwich, 2. Article 22 of the Covenant of the League of Nations delineated three different categories of Mandates, determined primarily by the level of development of the population. The more developed the population, the less involvement would be necessary by the assigned Mandatory power and the shorter the road to sovereignty and independence. The first category—so-called "Class A" Mandates—applied to "certain communities formerly belonging to the Turkish Empire." These territories "have reached a stage of development where their existence as independent nations can be provisionally recognized," on condition of "administrative advice and assistance by a Mandatory until such time as they are able to stand alone." The second category—so-called "Class B" Mandates—applied to "other peoples, especially those of Central Africa." These communities were at a less developed stage, requiring the Mandatory to "administer the territory under conditions which will guarantee freedom of conscience and religion, subject only to," *inter alia*, "the maintenance of public order and morals." Finally, the third category—so-called "Class C" Mandates—due to the small size of their population or their "remoteness from the centres of civilization," were to be "administered under the laws of the Mandatory as integral portions of its territory," subject to certain safeguards.

However, despite these three classifications, it should be noted that Article 22 also states that a Mandate might not necessarily fit neatly into one of the designated categories. According to paragraph 3, "the character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic condition and other similar circumstances." Thus, each Mandate was crafted to conform with the unique circumstances of the territory – lending support to the notion that the Palestine Mandate was not strictly an "A," "B," or "C" Mandate, but rather *sui generis*.

through the lens of the international law and mores of their time, and be judged by the law applicable at that time. Arguments which rely on legal developments not accepted at the time—for example, the principle that self-determination is an overriding criterion of statehood, permitting early recognition of self-determination movements, and precluding the statehood of any entity created in violation of self-determination—may therefore be misplaced.[28]

This idea is especially crucial in response to those who argue that the Palestine Mandate failed to properly implement President Wilson's notion of self-determination in regard to Palestine's Arabs. Indeed, some have argued that proper implementation of Article 22 of the League of Nations Covenant required providing the majority of the inhabitants living in Palestine at the time—i.e. the Arabs—with self-determination. [29] However, such an interpretation flies in the face of the language of the Covenant, the Peel Commission's elucidations, and the manner in which the Palestine Mandate, along with the other Mandates, were implemented and endorsed by 50 nations. In fact, the Palestine Mandate, as stated above, was *specifically* designed to fulfill the self-determination of a people – namely, the Jewish people, deemed a homeless nation worthy of international support to return to the land from which they were exiled. Indeed, the Balfour

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[28] James Crawford, *The Creation of States in International Law* (Oxford: University Press, 2006), 427.

[29] For example, the Arab delegates to the Peel Commission argued that the Palestine Mandate violated the Covenant precisely because it was not "in accordance" with Article 22 – and in particular, paragraph 4, which discusses the "A" Mandates. However, Article 22 clearly allows for the creation of a Mandate that is *sui generis*, as described in paragraph 3 of Article 22, and does not necessarily fall into either the "A," "B," or "C" designation.

Indeed, the Peel Commission expressly refuted the Arab delegates' attack on the validity of the Palestine Mandate:

> As to the claim, argued before us by Arab witnesses, that the Palestine Mandate violates Article 22 of the Covenant because it is not in accordance with paragraph 4 thereof, we would point out (a) that the provisional recognition of 'certain communities formerly belonging to the Turkish Empire' as independent nations is permissive; the words are 'can be provisionally recognised,' not 'will' or 'shall': (b) that the penultimate paragraph of Article 22 prescribes that the degree of authority to be exercised by the Mandatory shall be defined, at need, by the Council of the League: (c) that the acceptance by the Allied Powers and the United States of the policy of the Balfour Declaration made it clear from the beginning that Palestine would have to be treated differently from Syria and 'Iraq, and that this difference of treatment was confirmed by the Supreme Council in the Treaty of Sévres and by the Council of the League in sanctioning the Mandate.

This analysis leads to the inevitable conclusion that Palestine, unlike Syria/Lebanon and Iraq, was not strictly a "Class A" Mandate, and it was clearly not the intent of the Allied Powers or the international community to require provisional recognition of the non-Jewish majority in Palestine at the time. The Peel Commission Report, 38.

Declaration, which would form the basis of the Palestine Mandate, was viewed as an acme of the concept of self-determination.

The Peel Commission confirmed the fairness inherent in granting self-determination to the Jewish nation, as "all other civilized peoples had a homeland somewhere in which they were the overwhelming majority, a country they could call their own, a State which gave those of them who lived as a minority in other States a more equal footing…[for the Jews], that land could only be Palestine."[30] As David Ben-Gurion further stated,

> the entire civilized world said that while the Arabs were liberated in various territories there was room for the Jews in Palestine. The Jews are connected with this country. We recognize their connexion [sic]. They are coming back. They have a right to come back. They put on only one limitation. We, ourselves, would have put this limitation if it had been put by others: not to displace the population right here…That was the decision.[31]

Moreover, it is patently clear from the language of the Palestine Mandate that the Principal Allied Parties intended to implement self-determination once the Jews constituted a majority in Palestine, with guarantees to protect the Arab minority's civil and religious rights. If the Allied Parties did not intend for the Jews to eventually constitute a majority in Palestine, there would clearly not have been a need for the multiple repetitions of the obligation of the Jewish majority to protect the civil and religious rights of the "existing non-Jewish communities in Palestine."[32] Indeed, had the Principal Allied Powers intended to eventually provide self-determination to the Palestinian Arabs, the protective sections would have been written to safeguard a *Jewish* minority.

Finally, it is worth noting that the Mandate omits the word "political" in describing the protection to be afforded to the "civil and religious rights of existing non-Jewish communities in Palestine." This omission was not accidental. As Eugene Rostow explains, the language "reflected that the primary purpose of the Palestine Mandate was the establishment of a national home for the Jewish people in Palestine, not the right of self-determination of the indigenous population."[33] It

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[30] The Peel Commission Report, 26.

[31] "United Nations Special Committee on Palestine, Report of the General Assembly, Volume III, Annex A: Oral Evidence Presented at Public Meeting."

[32] "The Palestine Mandate."

[33] Eugene Rostow, "The Perils of Positivism," *Duke Journal of Comparative and International Law* 2 (Spring 1992): 236.

should also be noted that the other Mandates contained articles to protect minority rights without intent to grant each minority political self-determination.[34]

IV. THE JURISPRUDENCE OF THE MANDATE SYSTEM – MANDATE AS A "TRUST"

While the juridical nature of a Mandate has been a continuing topic of legal discussion, the most prominent legal consensus defines the concept of a mandate as closely analogous to that of a trust. First, Article 22 defines the Mandate system as a "sacred *trust* of civilization," and that "securities for the performance of this *trust* should be embodied in this Covenant."[35] Second, the designated territories were never considered the possession of the Mandatory or part of the Mandatory's country. Rather, the Mandatory power acted on behalf of the international community, similar to a trustee. This charge was clearly understood. As Sir Percy Wyn-Harris noted in the British Parliament, "After all, the mandated territories are not parts of the British Empire. We hold them in trust, for their benefit, to the League of Nations, and we have to administer them, not in our own interests, but in the interests of the native inhabitants."[36]

Third, jurists have understood the international Mandate to be closely analogous to that of a guardianship for the benefit of a minor, designed to terminate upon the infant reaching the age of majority. In this way, the designated peoples of a Mandate are like the *beneficiaries* of a trust. As Norman Bentwich argues, the Mandate system was a "guardianship of peoples, similar to the guardianship by individuals of minor persons."[37] In fact, with regard to the Palestine Mandate specifically, Bentwich insists that

> it is notable that the Palestine Mandate draws a distinction between the powers and functions of the Mandatory and the powers and functions of the Administration of Palestine. The latter, though controlled by the Mandatory and having as its head a High Commissioner who is the representative of the Mandatory, is nevertheless regarded in the Mandate as a separate authority, *the*

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[34] See, for example, Article 6 and Article 8 of the Mandate for Syria and Lebanon.

[35] Article 22, "The Covenant of the League of Nations, Including Amendments Adopted to December 1924." Emphasis added.

[36] Cited in Stoyanovsky, 310. See also Bentwich, 42: "Palestine is entrusted to the guardianship of the Mandatory until such time as its people are able to stand alone as an independent self-governing nation."

[37] Bentwich, 17.

> *Government of the infant which is under the guardianship of the Mandatory. This is a first step towards recognition of a separate country which will eventually be autonomous.*[38]

Crucially, and as will be discussed more fully below, Bentwich also noted that, similar to a trust, the Mandates were intended to be temporary and to conclude upon fulfillment of the conditions set forth. The Mandates were intended to terminate when the population was capable of functioning independently of the Mandatory:

> It is contemplated also that…the responsibility and authority of the mandatory should come to an end when the infant nation has reached a stage at which it may be able to stand alone. The purpose of the Mandate would then be fulfilled, and the minor would be emancipated and recognized by the society as an independent State.[39]

Furthermore, jurists have considered sovereignty of the Mandated territory to be like the *res* of a trust – that is, it is suspended until the beneficiaries demonstrate the ability to "stand on their own." Thus, the Mandate system introduced a modified concept of sovereignty, an entirely "new relationship in international law."[40] The Mandatory power "obtains the guardianship of a people, and not the ownership and dominion of a territory; and the sovereignty is suspended or held in trust" for the eventual benefit of the Mandate's designated population.[41] The concept of "suspended sovereignty" is a well-rooted concept.

Judge Arnold McNair expresses this position in the 1950 ICJ Advisory Opinion "International Status of South-West Africa." In that decision, Judge McNair discusses the role of South Africa—the designated Mandatory power of South West Africa—in representing the inhabitants of the Mandated territory. South Africa, as Mandatory, "does not have sovereignty over th[is] territory," Judge McNair insists. Indeed,

> the [traditional] doctrine of sovereignty has no application to this new system [of international Mandates]. Sovereignty over a

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[38] Bentwich, 26. Emphasis added.

[39] Bentwich, 16-17.

[40] Bentwich, 20.

[41] Bentwich, 18. Emphasis added.

> Mandated Territory is in abeyance; *if and when the inhabitants of the Territory obtain recognition as an independent State…sovereignty will revive and rest in the new State.* What matters [here] is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of the territory being administered by it.[42]

Thus, Judge McNair articulates established principles that have developed concerning the nature of sovereignty within the Mandate system. Sovereignty, or the *res* of the trust, as stated above, is held in abeyance—suspended, or "at rest," so to speak—in a Mandated territory, residing neither with the people, the Mandatory power, nor the League of Nations. Once the intended goal of a Mandate has been achieved—that is, the designated peoples are deemed able to govern on their own—the Mandate terminates, at which point sovereignty vests in the newly independent state. Thus, upon termination of the Mandate, sovereignty accrues to the government of the designated beneficiaries of the Mandate. This view corresponds to the theory of "'dormant' sovereignty," which at all times lay with the people in Mandated territories, but "was only re-established when the territory became independent."[43] Accordingly, a territory obtains sovereignty upon its independence and recognition of the international community that the territory is able to stand on its own. In fact, it is this recognition from the international community that triggers termination of the "sacred trust of civilization," thus giving rise to the new nation's sovereignty.

As discussed above, the Palestine Mandate was unique among Mandates, in that the Mandate's designated population did not yet constitute a majority of the designated territory. The international community has made clear that the unambiguous and overriding purpose of the Mandate was to create a Jewish National Home in Palestine. Thus, in essence, as Stoyanovsky argues, the Mandate defines "the Jewish people as a whole" as the "*virtual population*" of Palestine, who must first immigrate to the Mandated territory before it can be accorded independence:

> The mandates system has been applied to Palestine not merely on account of the inability of its present population to stand alone...but also, and perhaps chiefly, on account of the fact that the people whose connection with Palestine has been recognized

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[42] "International Status of South-West Africa," Advisory Opinion: I.C.J. Reports 1950, 128, 150.

[43] Nele Matz, "Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship," *Max Planck Yearbook of United Nations Law* 9 (2005): 71.

> is still outside its boundaries. *The mandatory Power thus appears not only as a Mandatory...but as a kind of a provisional administrator in the interest of an absent people.* In this capacity, the Mandatory has assumed an obligation not towards the actual but the virtual population of Palestine.[44]

It is worth noting, in fact, that Palestine was the solitary Middle Eastern territory in which the international community purposely intended *not* to recognize Arab political autonomy, as opposed to the Arab self-determination applied throughout the rest of the region. Indeed, the international community was so intent on providing self-determination to the region's Arab population that it amended the Palestine Mandate to include Article 25, severing the East Bank of the Jordan River from the area in which the Balfour Declaration was to be implemented.[45] The inclusion of Article 25 resulted in the creation of the Arab state of Transjordan on what was originally designated in the Mandate to be part of the Jewish homeland. As the Peel Commission later concluded in 1937, "the field in which the Jewish National Home was to be established was understood, at the time of the Balfour Declaration, to be the whole of historic Palestine, and the Zionists were seriously disappointed when Trans-Jordan was cut away from that field under Article 25."[46]

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[44] Stoyanovsky, 41-42, emphasis added. Later, Stoyanovsky cites Bentwich in stating that "the peculiar nature of the Palestine mandate [is that] the mandatory is to administer that country not simply on behalf of the population which is there, but with a view to help the people who desire to come there…There is no parallel in history to a State undertaking a task of this kind, not on behalf of its own subjects, but as a trustee for the conscience of the civilized world…It undertakes the continual and gradual realization of an ideal." Ibid.

[45] The League of Nations originally created Mandatory Palestine on both banks of the Jordan River. However, on September 16, 1922 in accordance with the Transjordan Memorandum, the League of Nations amended the original Mandate for Palestine to include Article 25. Specifically, Article 25 authorized Great Britain to "postpone or withhold" Jewish close settlement in the area of the Mandate east of the Jordan River." Although the legality of the act remains questionable, Britain indeed exercised the alleged right and partitioned the area east of the Jordan River, creating the "territory known as Trans-Jordan" in 1922. As explained above, the Mandatory exempted the application of the Balfour articles (Articles 2, 4, 6, 13, 14, 22, and 23), as well as abbreviating the application of others (Articles 7 and 11) designed to achieve "the establishment of the Jewish national home." See Crawford, *The Creation of States in International Law*, 428-9. However, it should be noted that no limitation was placed on the other articles, specifically Article 5, which encourages Jewish settlement in Judea and Samaria. This right has never been abdicated and remains consistent with international customary law regarding the concept of "usufruct" embodied in Article 55 of the Hague Regulations (1899 and 1907) even to the extent that Israel could – inaccurately- be viewed as an "occupier". (While beyond the scope of this report, it can be argued that this same concept would invalidate any land transfers by Jordan during its illegal occupation, and could, at best, have had validity only until Jordan's withdrawal. The laws of usufruct do not permit the permanent transfer of government land and any such attempts can be seen as void. The validity of such transfers are dubious at best and each case would have to scrutinized in light of land law requirements.)

[46] The Peel Commission Report, 38. Moreover, as this area was less densely populated, it would have afforded the potential of dramatically less conflict over the influx of Jewish immigration. Ibid. In addition, the

The separation of Transjordan from the rest of the Palestine is often omitted when recounting the history of the territory. This omission obscures from view the extent to which self-determination has already been granted to the Arab population in Palestine, as well as the fact that Palestine has already been divided once.[47] Nonetheless, while it is certainly true that the British government's decision to eliminate the area east of the Jordan River was a devastating blow for the Zionists, it is also undeniable that the final, amended version of the Mandate for Palestine designated *all* of the remaining territory west of the Jordan River as the Jewish National Home – including Judea and Samaria.

Finally, it is crucial to note that the obligation to facilitate a Jewish National Home in Palestine constituted a binding international agreement that extended far beyond the British government's obligation to facilitate a Jewish return to Palestine. The 50 countries that comprised the League of Nations in 1922 unanimously ratified the language of the Mandate for Palestine. Under Article 20 of the Covenant of the League of Nations, all nations "solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms [of this Covenant]," and if any member has "undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations."[48]

As a result, some argue that all of the nations who voted for and adopted the Mandate for Palestine in 1922 obligated themselves to facilitate the creation of a Jewish National Home in all of the territory west of the Jordan River. Nathan Feinberg, for instance, argues that this obligation was incumbent even upon those nations who joined the League *after* 1922, since "from the moment of joining the League, a State becomes bound by all the previous resolutions and decisions adopted by the League."[49] Thus, for example, the State of Iraq, which joined the League as an independent nation in 1932—and made no reservation regarding the

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Commission's clarification here dispels any ambiguity as to what the Mandate meant when it pledged to create a Jewish National Home "*in* Palestine."

[47] Feith illustrates the significance of how obscuring this history skews the view of an observer in this conflict by bringing the analogy of an event that occurred in his home. Once, after he bought a pie for his children, one of his sons ate the pie almost in its entirety. When his second son was later eating the small remaining piece, the first son suddenly demanded half. Had his father not been privy to the fact that the first son had already eaten the lion's share of the pie, he would have felt it just to force his second son to divide the remaining piece. Knowing, however, that the pie had already been divided once, with his first son eating almost the entire pie, he saw the situation differently. So, too, understanding that Palestine has already been divided once, to facilitate an additional Arab state, changes one's perspective of "fair division" in Israel. Douglas Feith, "The League of Nations Mandate for Palestine," in Edward M. Siegel, ed., *Israel's Legitimacy in Law and History* (New York: Center for Near East Policy Research, 1993): 14-15.

[48] Article 22, "The Covenant of the League of Nations, Including Amendments Adopted to December 1924."

[49] Feinberg, 114.

Mandate for Palestine in respect to Article 22—implicitly ratified the Mandate, including its provisions regarding the Jewish National Home.

In addition, on two separate occasions the United States Government formally supported the British Mandate's goals of establishing a homeland for the Jews in Palestine, despite the fact that America never became a member of the League of Nations. First, on June 30, 1922, both houses of Congress adopted Joint Resolution Public No. 73, 67th Congress, in which it was "resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States of America favors the establishment in Palestine of a national home for the Jewish people..."[50] Again, two years later, the U.S. Government signed the Anglo-American Treaty of 1924, which affirmed the United States' support of the Mandate for Palestine, specifically recognizing "the historical connection of the Jewish people with Palestine" and "the grounds for reconstituting their national home in that country."[51]

As a result, it can be said that the Mandate for Palestine created a binding international treaty—incumbent upon all members of the League of Nations, and also, by consent, the United States—to facilitate the establishment of a homeland for the Jewish people in all of the territory west of the Jordan River. Under the terms of the Mandate—and in line with the legal concept of a trust as reflected in the language of Article 22 —the Jewish people would be slated to receive sovereignty over all of Mandatory Palestine when they were deemed able to "stand by themselves."

V. THE LEGAL INVALIDITY OF UN GENERAL ASSEMBLY RESOLUTION 181 ("PARTITION PLAN")

The League of Nations ceased to exist as a legal entity on April 20, 1946, and transferred virtually all of its duties as an international institution to the United Nations, established on October 24, 1945.[52] Crucially, however, the Mandates

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[50] The Peel Commission Report, 31.

[51] Cited in Howard Grief, *The Legal Foundation and Borders of Israel Under International Law* (New York: Mazo Publishers, 2008): 199.

[52] Importantly, sovereignty over the Mandates, which did not reside in the League of Nations, was never transferred to the United Nations. "Little now is heard of the theory that sovereignty over the mandated territories resided in the League of Nations in view of the fact that the League of Nations has disappeared without any direct transfer of its mandates responsibilities or sovereignty to others, and certainly without any suggestion that the League was transferring title to the mandated territories to the United Nations." Francis Sayre, "Legal Problems Arising from the United Nations Trusteeship System," *The American Journal of International Law* 42:2 (April 1948): 271.

survived and did not terminate upon the League's demise. As the ICJ noted in 1971,

> the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But *that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery.* To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that *an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose.*[53]

Thus, after the League's termination, the Palestine Mandate continued to exist in the form in which it was originally conceived and with its original purpose unaltered.

Similarly, as Judge McNair of the ICJ noted in relation to South-West Africa in 1950, the *rights* bestowed by a Mandate also survive the dissolution of the League. Citing U.S. Chief Justice John Marshall in *Chirac v. Chirac* (1817), Judge McNair held that "a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty of law cannot extinguish that right."[54] Indeed, Judge McNair continued, the Mandate created a "status," which has an "objective existence" independent of the League itself:

> This fact is important in assessing the effect of the dissolution of the League. This status – valid *in rem* – supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League…'Real' rights created by an international agreement have a greater degree of permanence than personal rights, because these rights acquire an objective existence which is more resistant than are personal rights to the dislocating effects of international events…"[55]

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[53] "Legal Consequences For States Of The Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)," Advisory Opinion, I.C.J. Reports 1971, 16, Paragraph 55. Emphasis added.

[54] "International Status of South-West Africa," 157.

[55] "International Status of South-West Africa," 157-158.

Thus, the Palestine Mandate created an international status, "valid *in rem*," designating the borders of the Mandate territory as the national home of the Jewish people, while guaranteeing the rights of the non-Jewish population, intended to be a protected minority within the Jewish state. This status survived the demise of the League of Nations.

In 1947, however, due to internecine violence between Jews and Arabs in Mandatory Palestine, the British government announced its intention to abandon its role in administering the Mandate. Multiple efforts to resolve the conflict failed, and Britain placed the issue of the Palestine Mandate before the General Assembly of the United Nations. On November 29, 1947, the United Nations General Assembly passed Resolution 181, which proposed the termination of the British Mandate and the partitioning of Palestine into two states – one Jewish and one Arab.[56] The Jews accepted this plan on condition that the Arabs would accept it as well.[57] The Arabs did not accept the plan and instead launched a war of annihilation against the Jewish people of Palestine. In addition, although the Resolution requested the Security Council to "take the
necessary measures as provided for in the plan for its implementation,"

the Security Council never did so:

> Both the Security Council and the United Kingdom refused to enforce the partition plan, and various alternative schemes were mooted.[58]

As a result, Resolution 181 was never implemented.[59]

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[56] United Nations General Assembly Resolution 181(II), "Future Government of Palestine," A/RES/181(II), 29 November 1947. Accessed online:
https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253

[57] In a statement on behalf of the Jewish Agency on October 2, 1947 to the United Nations Ad Hoc Committee on the Palestine Question, Dr. Abba Hillel Silver endorsed the Partition Plan, as proposed by the United Nations' Special Committee on Palestine's report of August 31, 1947. However, he added the following caveat: "If [our] offer of peace and friendship were not welcomed in the same spirit [by the Arab states, including the proposed Arab state of Palestine], the Jews would defend their rights to the end. In Palestine there had been built a nation [i.e. the Jewish people] which demanded its independence, and would not allow itself to be dislodged or deprived of its national status. It could not go, and it would not go, beyond the enormous sacrifice which had been asked of it." Cited in Grief, 154-155.

[58] Crawford, 431-432.

[59] See Grief, 150-173. In addition, it is worth noting that Resolution 181 created a United Nations Palestine Commission, which was designed to assist in implementing the Partition Plan. According to the Commission's minutes from its first meeting on January 29, 1948, although the Jewish Agency for Palestine willingly

Although some posit that Israel's acceptance into the United Nations was conditional upon its acceptance of Resolution 181, this argument is baseless.

> Although the relevant Jewish organization did accept the partition Resolution when it was first adopted, the Resolution was not accepted by the Arab states involved. Instead war broke out leading to a cease-fire on quite different boundaries. Israel was not admitted to the United Nations on the basis of a division of territory which in any way reflected the partition resolution. *Moreover, the Charter makes no provision for 'conditional admission*'.[60]

Indeed, there is no concept of a state's admission to the UN that is "conditional."

Despite the fact that Resolution 181 is void, some entities continue to promote this proposal as a valid and recognized partition plan, proposing the division of the land west of the Jordan River into two states.[61] This interpretation willfully and negligently distorts the context of this Resolution – and misrepresents its legal status and content on multiple levels. First, Articles 10 and 14 of the United Nations Charter clearly indicate that the General Assembly can only make non-binding recommendations.[62] Indeed, the preamble of Resolution 181 specifically framed the Resolution as a recommendation to the United Nations Security Council, which possessed the power to authorize enforcement of the plan

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accepted the Commission's invitation to participate, the UN Secretary-General received the following telegraphic response from the Arab Higher Committee [errors and capital letters in original]: "ARAB HIGHER COMMITTEE IS DETERMINED PERSIST IN REJECTION PARTITION AND IN REFUSAL RECOGNIZE UNO [United Nations Organization] RESOLUTION AND ANYTHING DERIVING THEREFROM. FOR THESE REASONS IT IS UNABLE ACCEPT INVITATION." United Nations Palestine Commission, "First Monthly Progress Report to the Security Council," A/AC.21/7, 29 January 1948.

[60] James Crawford, "The Creation of the State of Palestine: Too Much Too Soon?" *European Journal of International Law* 1 (1990): 312-313. Emphasis added.

[61] For example, in its 1988 "Declaration of Independence," the Palestine National Council claimed that Palestinian Arabs were "depriv[ed] of the right to self-determination, follow[ing] UN General Assembly Resolution 181 (1947), which partitioned Palestine into two states, one Arab, one Jewish, yet it is this resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty." "Palestine National Council: Declaration of Independence (November 15, 1988)," in *The Israel-Arab Reader*, 355.

[62] Article 10 states that "the General Assembly may discuss any questions or any matters within the scope of the present Charter…and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters." Article 14 states that "subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations." "Charter of the United Nations," *UN.org*. Accessed online:http://www.un.org/en/sections/un-charter/chapter-iv/index.html.

and provide it with a binding nature.[63] Because the Security Council did not do so, Resolution 181 could only have become binding if both sides to the dispute had accepted the resolution. Such an action would have made Resolution 181 a *pacta sunt servanda* (agreement of the parties).[64] Clearly, however, this did not happen. In light of the Arab attack designed to destroy the nascent Palestinian Jewish communities, the agreement was "frustrated *ab initio* by the Arab rejection."[65]

Second, it must be emphasized that the partition of the area was merely one aspect of the lengthy, elaborate, and multi-point Resolution 181. In fact, the resolution was entitled "Plan of Partition With Economic Union" – the assumption being that any proposed division was premised upon extensive economic cooperation and peaceful co-existence. It is simply infeasible to insist that the spirit of this proposal could possibly be consistent with a declaration of war by the Arabs. Indeed, those who voted for Resolution 181 viewed it as a **single, comprehensive, and non-severable proposal**. As US Ambassador to the UN Warren Austin told the Security Council in March 1948, "the plan proposed by the General Assembly is an integral plan which *cannot succeed unless each of its parts can be carried out."*[66] Similarly, it should be noted that the United States' subsequent recognition of Israel's independence in May 1948 was explicitly *not* based upon the borders recommended in Resolution 181.[67]

Thus, in light of the Resolution's non-binding nature, together with the Arabs' war against the Jewish communities in Palestine, it is blatant error to deem Resolution 181 operable or even valid at any point in time.

Certainly it cannot be cited today as an authoritative basis for partitioning Palestine. Moreover, the Jewish acceptance of Resolution 181 in 1947 must be

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[63] "[The General Assembly] requests that (a) The Security Council take the necessary measures as provided for in the plan for its implementation." A/RES/181(II), 29 November 1947.

[64] Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Baltimore: Johns Hopkins University Press, 1981): 101. See also Grief, 157.

[65] Stone, 59.

[66] "Statement by Ambassador Warren R. Austin, United States Representative in the Security Council," S/P. V. 271, March 19, 1948. (*Emphasis added*.)

[67] Harry Truman, "Memorandum on the De Jure Recognition of Israel, 1948," Harry S. Truman Library and Museum. Accessed online: https://www.trumanlibrary.org/whistlestop/study_collections/israel/large/documents/newPDF/34.pdf#zoom=100.
It is also interesting to note that the partition suggested in Resolution 181 was not recognized in the 1949 armistice agreement with Lebanon, which deferred to the Palestine Mandate-Lebanon border, further attesting to the fact that 181 was not recognized even at that time. See Lebanese-Israeli General Armistice Agreement, Isr.–Leb., March 23, 1949, U.N. Doc. S/1296/Rev. 1. http://avalon.law.yale.edu/20th_century/arm02.asp
Cited by Bell, p.680. In fact, none of the armistice agreements referred to the lines proposed in Resolution 181.

understood as an agreement of its time, one that assumed Arab cooperation with the *entire* Partition Plan. It is, therefore, absurd to argue that the Jewish acceptance in 1947 could possibly constitute automatic consent to partition today. Any other conclusion flies in the face of basic principles of general and international law. As the ICJ noted in a 1971 Advisory Opinion, "one of the fundamental principles governing the international relationship…is that a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship."[68]

As a result, Resolution 181 was a non-binding document that failed to alter the legal status of any of the Mandated territory. The Resolution was immediately void upon Arab rejection, with no international legal significance.[69] The plan was seen as invalid even by the General Assembly:

> By 14 May 1948 the Assembly itself had, in effect, abandoned the partition plan as a whole.[70]

As the scholar Eli Hertz concludes, "Resolution 181 had been tossed into the waste bin of history, along with the Partition Plans that preceded it."[71]

Still, the question of the current legal validity of Resolution 181 continues to be raised as part of the false pervasive narrative. One need look no further than the speech of Palestinian Authority Mahmoud Abbas before the General Assembly on September 22, 2016:

> …Israel, since 1948, has persisted with its contempt for international legitimacy by violating United Nations General Assembly Resolution 181, the partition resolution, which called for the establishment of two States on the historic land of Palestine according to a specific partition plan… Regrettably, however, the Security Council is not upholding its responsibilities to hold Israel accountable for its seizure of the territory allotted to the Palestinian State according to the partition resolution…[72]

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[68] "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)," Advisory Opinion, ICJ Reports 1971, 16, Paragraph 91.

[69] Stone, 128.

[70] Crawford, 432.

[71] Eli Hertz, "UN Resolution 181 – The Partition Plan," *Myths and Facts*. Accessed online: http://www.mythsandfacts.org/article_view.asp?articleID=135.

[72] https://www.timesofisrael.com/full-text-of-pa-president-mahmoud-abbass-speech-at-the-un/

Thus the false narrative that Resolution 181 is a resolution that remains valid today continues to be boldly asserted and perpetuated despite the clear legal and historic evidence to the contrary.

VI. Termination of the Mandate and Israel's Sovereignty Over Judea and Samaria

On April 29, 1948, Britain released the Palestine Act, announcing its intention to "relinqui[sh]" its role as Mandatory on May 15, 1948.[73] A fundamental issue thus revolves around the question of the status of a Mandate subsequent to a Mandatory's unilateral decision to cease administrating the Mandate. In 1971, the ICJ articulated that a Mandate-trust survives despite the resignation of the Mandatory-trustee. In its words, "the responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution."[74]

Indeed, claiming that a Mandate is extinguished merely because the administrator chooses to abandon her assignment is as fallacious as insisting that a trust terminates due to the removal of the trustee. As Eugene Rostow notes, "a trust never terminates when a trustee dies, resigns, embezzles the trust property, or is dismissed. The authority responsible for the trust appoints a new trustee, or otherwise arranges for the fulfillment of its purpose."[75] Thus, Rostow posits that in the case of the British Mandate, Britain's decision to relinquish its role as Mandatory power did not affect the existence or essence of those rights. Moreover, the Mandatory power never possessed the authority to terminate the Mandate, any more than a trustee assigned with administrating the *res* would have authority to terminate the trust or affect the legal rights of the beneficiaries.[76]

At midnight of May 15, 1948, the State of Israel declared its independence – and five Arab armies immediately invaded. In the midst of this war, Jordan

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[73] "Palestine Act, 1948," 11 & 12 Geo. 6, Chapter 27 (London: H.M. Stationery Office, 1948), 358. It is worth noting that the Act contained no language suggesting that Britain was actually *terminating* the Mandate. Furthermore, Britain abstained from voting for Resolution 181, which purported to "terminate" the Mandate "as soon as possible." United Nations General Assembly Resolution 181(II), "Future Government of Palestine," A/RES/181(II), 29 November 1947.

[74] "Legal Consequences For States Of The Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)," Paragraph 55. Emphasis added.

[75] Eugene Rostow, "Historical Approach to the Issue of Legality of Jewish Settlement Activity," *The New Republic*, April 23, 1990.

[76] Rostow, "Historical Approach to the Issue of Legality of Jewish Settlement Activity."

seized control of Judea and Samaria. The fighting ended following a series of Armistice agreements, which contained explicit provisions that there would be no international ramifications or political conclusions drawn from these lines.[77] Jordan proceeded to annex Judea and Samaria, the legality of which was recognized only by Britain and Pakistan. Jordan subsequently renamed the territory the "West Bank," due to its geographical location on the west bank of the Jordan River.[78]

In accordance with the "well-recognized"[79] concept of *ex injuria jus non oritur*—that is, illegal acts cannot produce legal rights—Jordan's illegal annexation of Judea and Samaria cannot be said to have affected the territory's legal status. As a result, neither Jordan's illegal annexation of Judea and Samaria, Britain's withdrawal as Mandatory nor the Armistice Agreements affected the legal status of the territory mandated to Israel west of the Jordan River.[80]

The subsequent international recognition of Israel's independence, however, *did* alter the legal status of the Mandated territory, since this validation terminated the Mandate and awarded the Jewish people the sovereignty that had been previously held "in abeyance."[81] The purpose of the Palestine Mandate was

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[77] According to Article II, Section 2 of the Armistice agreement between Israel and Jordan, for example, "No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations." "Hashemite Jordan Kingdom – Israel: General Armistice Agreement," S/1302/Rev.1, 3 April 1949. Accessed online: https://unispal.un.org/DPA/DPR/unispal.nsf/0/F03D55E48F77AB698525643B00608D34. Moreover, the lack of significance of the armistice lines was admitted by Jordan: "Some seventeen years later, on May 31, 1967 (i.e. less than a week before the outbreak of the Arab-Israel hostilities of June, 1967), Jordan herself seems to have called in question-unwittingly, perhaps-the validity of her annexation measures of April, 1950, when her representative, Mr. El-Farra,told the Security Council: "There is an Armistice Agreement. The Agreement did not fix boundaries;
it fixed the demarcation line. The Agreement did not pass judgement on rights-political, military or otherwise. Thus, I know of no boundary; I know of a situation frozen by an Armistice Agreement." Yehuda Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", *3 Isr. L. Rev. 279 1968*, 291 citing U.N. Doc. S/PV. 1345 of May 31, 1967, p. 47.

[78] See footnote 1, *supra*.

[79] See "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," 254.

[80] Some legal scholars claim that the Mandate for Palestine remains in force to this day in certain parts of the territory. According to Rostow, for example, the Mandate continues to be operative in Judea and Samaria, as they are territories "which have not yet been allocated either to Israel or to Jordan or become an independent state." Thus, according to Rostow, Jews can rely on the provisions of the Mandate—under, *inter alia*, Article 6 granting Jewish rights to close settlement on the land—to build Israeli settlements in Judea and Samaria. See Rostow, "Historical Approach to the Issue of Legality of Jewish Settlement Activity." However, to claim that the Mandate continues to exist on only part of its original territory makes little sense, since, as explained below, the general consensus of the Permanent Mandates Commission was the Mandate was created as one indivisible unit, which could either be emancipated entirely or not at all.

[81] See Section III, *supra*.

realized when the Jewish population was a majority—or at least large enough and deemed capable of building a country, governing, and standing on its own, while also protecting the rights of the minorities residing in Palestine. Once this occurred, the Jewish people accrued the *res* of the Mandate-trust—i.e. sovereignty—in all of the territory west of the Jordan River. To recall the words of Judge McNair of the ICJ, "if and when the inhabitants of [a Mandated] Territory obtain recognition as an independent state…sovereignty will revive and rest in the new state."[82]

Thus, the British Mandate terminated—and the Jewish people received sovereignty in Palestine in accordance with the terms of the Mandate—the moment that the State of Israel received recognition as an independent state. This recognition certainly occurred on May 11, 1949, when the United Nations decided that "Israel is a peace-loving State" and voted to admit Israel as a full member.[83] As there was no amendment or alteration of the Mandate before its termination, the agreement and trust terminated in accordance with its terms when Israel declared independence and was so recognized.

Jurisprudence and case law of the era clearly articulated the concept that international recognition as an independent state results in the termination of Mandate status and sovereignty for the Mandate's designated people.[84] The Mandate for Syria, for example, effectively terminated in 1941, when France and Britain both recognized its independence. This occurred without the consent of the Council of the League of Nations. In fact, as the *Jewish Telegraphic Agency* reported at the time, diplomats noted that Britain's recognition of Syria's independence "may have far reaching results for Palestine, since it sets a precedent of ending the mandate without even consulting the League."[85] Similarly, on March

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[82] "International Status of South-West Africa," 150.

[83] "Admission of Israel to Membership in the United Nations," A/RES/273 (III), 11 May 1949. It should be noted, however, that since the League of Nations never listed rights over the mandates as part of the property being transferred to the United Nations upon its dissolution, it is commonly understood that the League did not see itself as holding sovereignty over the mandates. Indeed, "it is obvious that if the League had no sovereignty over mandated territories, then the United Nations has none." Donald Leeper, "Trusteeship Compared with Mandate," *Michigan Law Review* 49:8 (June 1951): 1206.

[84] As early as 1935, Quincy Wright had suggested that "it is possible that a mandate might cease through recognition of the independence of the mandated community, admission of the community to the League, or amendment of Article 22 of the Covenant, without the Council's consent." Quincy Wright, "The Effect of Withdrawal For the League Upon a Mandate," *British Yearbook of International Law* 16 (1935): 104-113. Wright further develops this thesis in *Mandates Under the League of Nations* (Chicago: Praeger, 1930).

[85] "Syria Sets Precedent for Quiet Termination of Palestine Mandate, Diplomats Believe," *Jewish Telegraphic Agency*, November 3, 1941. Accessed online: http://www.jta.org/1941/11/03/archive/syria-sets-precedent-for-quiet-termination-of-palestine-mandate-diplomats-believe#ixzz2ivrtA8dF.

22, 1946, Britain recognized Jordan as an independent state, and on April 18, 1946, the League of Nations recognized that this act constituted an effective termination of the Mandate over Jordan. The scholar Richard Young writes that during the League of Nations' final Assembly, the League "took note of this termination of the Mandate and of Transjordan's status as a new member of the world community."[86] Moreover, the United States expressed the view that "formal termination of the mandate…would be generally recognized upon the admission of [Transjordan] into the United Nations as a fully independent country."[87] As *The International Law Quarterly* concludes, "at their creation, it was envisaged that the mandates would find their natural and only conclusion in the attainment of independence by the mandated territory." As a result, the Mandate for Palestine "made no express provision for termination in any other circumstances."[88]

Moreover, the UN Charter clearly assumes that a Mandate terminates upon international recognition of a territory's independence. Although the League of Nations never transferred authority over the Mandates to the United Nations, Chapter XII of the UN Charter outlines a parallel concept of "Trusteeships," designed to succeed the League of Nations Mandates.[89] According to Article 78 of the Charter, "the trusteeship system shall not apply to territories which have become Members of the United Nations." This clearly indicates that "sovereignty and tutelage are mutually exclusive," and UN recognition of a Mandated territory's independence automatically terminates the Mandate.[90] In the ICJ's 1978 Aegean Sea Continental Shelf Judgment, Judge Salah Tarazi expands on this position, and also notes that France and Britain's recognition of Syria's independence terminated its Mandate in 1941.[91]

When the Palestine Mandate terminated, the only internationally recognized borders for that territory were those originally set forth in the Mandate in 1922. Thus, Israel's sovereign borders legally became the territory of Palestine

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[86] Richard Young, "Recent American Policy Concerning the Capitulations in the States of the Middle East," *The American Journal of International Law* 42:2 (April 1948): 420. Emphasis added.

[87] Crawford, *The Creation of States in International Law*, 579.

[88] "Termination of the British Mandate for Palestine, *The International Law Quarterly* 2(1), Spring 1948. 58.

[89] Crucially, as Article 80 of the Charter makes clear, the Mandates were not *automatically* placed under Trusteeships. Indeed, in the absence of such a Trusteeship agreement, "nothing in [Chapter XII of the Charter] shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments." "Charter of the United Nations."

[90] Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (Leeds: Knight & Forster, Ltd., 1951): 151.

[91] "Aegean Sea Continental Shelf," Judgment, I.C.J. Reports 1978, 3, 58-59.

west of the Jordan River. Indeed, the Permanent Mandates Commission reached the consensus that the Mandate was created as one unit. Therefore, the Commission found that the Mandate would have to either be emancipated as a unit, or remain entirely subject to the Mandate: "the idea prevailed…that the mandated territory had been established as an entity, and such it would have to remain, either all emancipated or all mandated."[92]

This is also the logical application of the principle of *uti possidetis juris*, a critical concept in international law that "defines borders of newly sovereign states on the basis of their previous administrative frontiers."[93] The ICJ has recognized *uti possidetis* as an important concept of contemporary customary international law. As the ICJ noted in its 1986 "Frontier Dispute" Judgment,

> by becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power [i.e. in this case, the former Mandatory]. This is part of the ordinary operation of the machinery of State succession. International law - and consequently the principle of *uti possidetis* - applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the "photograph" of the territorial situation then existing. *The principle of uti possidetis freezes the territorial title; it stops the clock, but does not put back the hands.*[94]

Thus, the ICJ insists that application of this principle has the effect of *freezing* the borders of the designated area based on the borders that existed at the time of the State's independence – what it describes as the "photograph of the territory" at the critical date. As a result, since the territory of Judea and Samaria was never legally severed from the Mandate at any time before international recognition of Israel's independence, the so-called "photograph" includes Judea and Samaria within the borders of Palestine. [95] It must, therefore, be that Israel's modern eastern border is the Jordan River.

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[92] Luther Harris Evans, "The General Principles Governing the Termination of a Mandate," *The American Journal of International Law* 26:4 (October 1932): 744.

[93] Enver Hasani, "Uti Possidetis Juris: From Rome to Kosovo," Fletcher Forum of World Affairs 27:2 (2003),85. See also the comments of Professor Avraham Bell cited in Glick, 174-175. See also Avraham Bell and Eugene Kontorovich, "Palestine, Uti Possidetis Juris and the Borders of Israel", Northwestern Public Law Research Paper No. 16-04 (2016).

[94] "Frontier Dispute," Paragraph 30. Emphasis added.

[95] "Indeed," Shaw argues, "once defined in a treaty, an international frontier achieves permanence so that even if the treaty itself were to cease to be in force, the continuance of the boundary would be unaffected, and may only be changed with the consent of the states directly concerned." Shaw, 528-529.

This interpretation is further reinforced by the refusal of the Arab side to agree on different borders, which would have been the only effective method of changing the internationally recognized borders defined by the League of Nations when attempting to divide the Mandate into two parts. Indeed, as explained above, had the Arab population agreed upon the proposed UN partition in 1947, those borders would have been valid under international law. Absent an agreement at the definitive time, however, the internationally recognized borders remain those defined by the Mandate. [96]

Furthermore, as stated above, Jordan's illegal annexation of Judea and Samaria after Israel's acceptance into the United Nations did not affect the legal borders of the Mandate or Israel's rights that accrued over this territory. The fact that Israel was forcibly *prevented* from exercising its sovereignty in this territory due to Jordan's illegal military presence did not extinguish or affect the Jewish people's rights. Thus, the Palestine Mandate, an "international agreement having the character of a treaty or convention"[97] endorsed by the international community, provided the facilitation of Jewish sovereignty within the territory designated in the Mandate.

VII. THE INAPPLICABILITY OF THE HAGUE AND GENEVA CONVENTIONS

On June 5, 1967, Israel launched a war of self-defense[98] against the Egyptian army, triggering what would become known as the Six-Day War. In the midst of this war, the Israeli army liberated Judea and Samaria from Jordan's illegal rule. Recognizing the delicate and political nature of Israeli administration of these territories—and in anticipation of a possible and imminent peace agreement—Israel refrained from exercising its legal sovereignty over Judea and Samaria. Instead, the government decided to *de facto* apply the "humanitarian provisions" of the international conventions designed for belligerent occupation of foreign territory: the 1907 Hague Regulations and the 1949 Fourth Geneva Convention.[99] Moreover, as per Article 43 of the Hague Regulations, the

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[96] To be sure, the Old City of Jerusalem, which had special status under Articles 13 and 14 of the British Mandate, may be a separate legal matter than the rest of the former Mandated territory. Since the focus of this thesis is the legal status of Judea and Samaria, however, Jerusalem is beyond the scope of our investigation.

[97] "South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections," 330.

[98] Egypt had committed multiple acts of war and threats against Israel. See, in general, Michael Oren, *Six Days of War* (New York: Presidio Press, 2003), 127-169.

[99] Meir Shamgar, "The Observance of International Law in the Administered Territories," in *The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights*, ed. Yoram Dinstein and Fania Domb (The Netherlands: Martinus Nijhoff Publishers, 2011), 433.

government chose to leave in place most of the (primarily Ottoman and Jordanian) civil law that was in effect at the time.[100]

Over the past few decades, however, widespread consensus has developed that these conventions also apply *de jure* to Judea and Samaria.[101] It must therefore be noted that Israel's *de facto* application of these provisions does not imply consent that these rules have *de jure* applicability. Indeed, as former President of the Israeli Supreme Court Meir Shamgar notes, "*de facto* observance of rules does not necessarily mean their applicability by force of law...[there exist] cases of voluntary observance of certain rules unconnected with acceptance of their legal applicability."[102]

Furthermore, the argument that these regulations apply *de jure* is invalid. Israel received sovereignty rights in these areas due to the termination of the British Mandate. Thus, the idea that Israel's presence in these territories constitutes a "belligerent occupation" is baseless. [103] An objective reading of the text of these conventions, along with the historical context in which they were conceived, firmly dispels this notion.

The Supreme Court has adopted a "pragmatic approach" , which "allows it to apply some provisions of the Geneva Convention, without ruling that it applies

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[100] See Allan Gerson, *Israel, the West Bank, and International Law* (New York: Routledge, 1978), 113.

[101] "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," Paragraph 90.

[102] Shamgar, 429.

[103] To be sure, Justice Aharon Barak of the Israeli Supreme Court has stated that Israel's presence in Judea and Samaria constitutes a "belligerent occupation," and that the Hague Regulations and the Geneva Conventions apply. See HCJ 2056/04
Beit Sourik Village Council v *The Government of Israel* et al., 48(5) PD, p.807, 2004. However, the Israeli Supreme Court's interpretation of international law is not binding on the Israeli government. Moreover, it should be noted that the Court's interpretation of international law continues to evolve and does not reflect expertise or stability. For example, in one decision, Justice Landau, President of the Court, stated that he and the Court had been mistaken in the applicability of the Hague Regulations and the Fourth Geneva Convention. "When the Court first related to the Hague regulations and the Fourth Geneva Convention, it lumped both these instruments together as treaty law. However, the Court later admitted that it had been mistaken and that all the provisions of the Hague Regulations are part of customary law." D.Kretzmer, p.212. In that case, Justice Landau explains that he changed his view on the basis of a law review article, despite the fact that the courts had ruled on a different interpretation since 1951.This illustrates the court's susceptibility to changing trends in legal interpretation. Most importantly, the Court is obligated to implement laws passed by the Knesset, which has the authority to declare sovereignty, as it did regarding Jerusalem and the Golan Heights. The courts would be bound by any such law declaring sovereignty, and any past designation by the Israeli Court of Judea and Samaria as territory under belligerent occupation would no longer be relevant or accurate. Indeed, Israeli law makes clear that when a domestic statute conflicts with international law, the domestic statute takes precedence. D. Kretzmer

de jure to the actions of Israel on the West Bank or that its provisions are all part of customary law that may be enforced by a domestic court…"[104]

First, as the jurist David M. Phillips notes, the 1907 Hague Conventions were "primarily designed to protect the interests of a temporarily ousted sovereign in the context of a short-term occupation."[105] Certainly, this is *not* the case regarding Judea and Samaria, which were part of the Mandate area in which Jews were granted rights to settle. These borders have not been redrawn and have rightfully belonged to Israel as early as 1949, as shown above. Article 42 of the Hague Convention supports this argument, by defining occupied territory as territory that is "actually placed under the authority of the hostile army."[106] Article 43 explicitly states that the convention obligations arise when territory has passed from "the authority of the *legitimate* power."[107] (Emphasis added.) First, Jordan was not a legitimate power . Second, as the lawful sovereign in this territory, Israel cannot be said to be a "hostile" entity, and its army cannot be said to be a "hostile army."[108]

Second, the 1949 Fourth Geneva Convention does not apply to all situations in which a military seizes territory it did not previously control. According to Article 2 of the Convention, regarding "occupation," the Convention only applies to "cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[109] Since, in 1967, Judea and Samaria rightfully belonged to Israel, and Jordan controlled the territory illegally, it cannot be said that Israel's current presence in

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[104] Kretzmer, *The Role of Domestic Courts in Treaty Enforcement 203.*

[105] David M. Phillips, "The Illegal Settlements Myth," *Commentary Magazine*, December 1, 2009.

[106] Article 42, "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907," *ICRC.org.* Accessed online: http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=01D426B0086089BEC12563CD00516887

[107] Article 43 states: "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[108] The language of Article 43 of the Hague Convention similarly demonstrates that this Convention does not apply to Judea and Samaria. Article 43 states that "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety." Because the "legitimate power" in this case is, in fact, the very country that has seized the territory—namely, Israel—a simple reading of this Article leads to the undeniable conclusion that the Convention cannot apply to the present case.

[109] Article 2, "Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949," *ICRC.org*. Accessed online: http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5

Judea and Samaria constitutes an occupation "of the territory of a High Contracting Party." This applies all the more so after 1994, when Jordan relinquished any claim over Judea and Samaria in its peace treaty with Israel.[110]

Finally, it should be noted that even if the Fourth Geneva Convention *did* apply *de jure*, it cannot be said that Article 49(6), which is commonly cited as the basis for the illegality of Israeli settlements,[111] prohibits this kind of activity. Under Article 49(6), "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The strong implication of this language—affirmed by the International Committee of the Red Cross—is that this Article only prohibits *forcible* transfer of a population into an occupied territory[112]. Because Israel has never coercively forced its citizens to settle in Judea and Samaria, and the residents of these towns have chosen to move there voluntarily, Article 49 is completely irrelevant in the extant case.[113] Moreover, as the administrating power, Israel has the right under international law to use the land and enjoy the usufruct of land that is not privately owned. [114]

Thus, international conventions regarding "belligerent occupation" have no relevance to the territory of Judea and Samaria. The fact that Israel has decided to *de facto* apply the humanitarian provisions of certain international conventions does not mean that Israel has acknowledged that they apply *de jure*. Nor does the fact that Israel has thus far decided only to exercise its sovereignty in certain areas of Judea and Samaria mean that Israel has forfeited its legitimate right to apply sovereignty within the entirety of its legal borders. Israel's attempts to reach a negotiated settlement regarding Palestinian claims to parts of Yehuda and Shomron do not constitute Israeli relinquishment of sovereignty, which continues to be derived from the Mandate, uninterrupted by any other valid legal claim.

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[110] See Article 3(a), "Israel and Jordan: Peace Treaty (October 26, 1994)," in *The Israel-Arab Reader*, 479.

[111] See, *inter alia*, paragraph 16, United Nations Human Rights Council, "Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem," A/HRC/22/63, 7 February 2013.

[112] *ICRC Commentary to the Fourth Geneva Convention,* edited by Jean S. Pictet (1958). Accessed online: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407

[113] See Alan Baker, "The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords," *Jerusalem Center for Public Affairs*, January 5, 2011. Accessed online: http://jcpa.org/article/the-settlements-issue-distorting-the-geneva-convention-and-the-oslo-accords/

[114] See Alan Baker, "Israel's rights in the Territories under International Law", *Jerusalem Center for Public Affairs*, September 7, 2016. Accessed online: http://jcpa.org/israels-rights-territories-international-law/.

VIII. CONCLUSION – THE MANDATE IS STILL RELEVANT AFTER ALL THESE YEARS

The British Mandate for Palestine terminated over sixty years ago. However, this basic document—first set forth and agreed upon by the Principal Allied Powers in 1922—established the modern-day legal status of Judea and Samaria, and remains crucial. In fact, the purpose of the Mandate has been fully executed and realized. Israel has become a Jewish homeland, civil and religious rights of the non-Jewish minority are protected, and access to the holy places in Jerusalem is guaranteed to all religions.

The Mandate for Palestine, a binding international treaty "in fact and in law,"[115] designated Palestine as the intended national home of the Jewish people, and recognized the territory of "Palestine" as including the area of Judea and Samaria. No valid treaty, document, or resolution altered this reality. UN Resolution 181, which proposed a Partition of the territory, was nullified and voided by Arab aggression and refusal to accept the existence of a Jewish state in Palestine. Thus, upon termination of the Mandate in 1949, the Jewish people received sovereignty—the *res* of the Mandate-trust—over this territory. No subsequent agreement or resolution repudiated Israeli sovereignty over the area defined by the Mandate, which continues to dictate the existence of Israeli sovereignty over Judea and Samaria.[116]

Some modern legal pundits rely on the faulty assumption that Israel was admitted "conditionally" into the United Nations upon its acceptance of Resolution 181. Their premise is that Israel remains bound by its agreement to Resolution 181 despite the fact that the Arabs did not consent. Such an argument is simply baffling, since, as discussed above, Resolution 181 was merely a non-binding recommendation, and it became invalid and void upon the clear rejection of its terms by the other party involved. Nonetheless, in recent years, reliance upon the validity of Resolution 181 has become crucial to the Arab assertion.

Other commentators insist that the Palestine Mandate was void since it contradicted the self-determination principle of Article 22 of the Covenant of the League of Nations. Yet that assertion ignores the clear language of Article 22,

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[115] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections," 330.

[116] Israel has never demonstrated that the borders set forth in the Mandate changed either prior to or subsequent to statehood.
"… For the most part, there is insufficient evidence to show any transfer of territorial sovereignty or acquiescence in the creation of new de jure borders. The potential exception to this general rule is the Israeli withdrawal from the Gaza Strip in 2005, which might be seen as an abandonment." Bell, p.50.

which, as detailed above, allows for self-determination to be granted in the fashion outlined in the Palestine Mandate – i.e. to a homeless "virtual population" not yet residing in the territory in substantial numbers, but attached to that territory through strong historical and spiritual ties. Moreover, as shown above, this interpretation was accepted by the international community – and was incorporated into the Treaty of Versailles and the other World War I international peace treaties. These commentators disingenuously interpret Article 22 without considering the Palestine Mandate, which clearly detailed the goal of creating a Jewish homeland with a Jewish majority.

One cannot seriously make these arguments if one reads the relevant documents. It is absurd that a Mandate culminating in statehood would not be recognized in accordance with its terms and the geographical borders defined therein. In the case of the Palestine Mandate, including Judea and Samaria within Israel's modern-day sovereign borders also aligns with the principle of *uti possidetis juris* – which, as discussed above, bases the borders of newly sovereign states on their previous administrative boundaries. The modern borders of Israel can only be defined by the "photograph" of the borders of the Palestine Mandate – which include, *inter alia*, Judea and Samaria. It is for this very reason that the Hague and Geneva Conventions do not apply to Israel's presence in these territories, as a state clearly cannot "belligerently occupy" land over which it has legal sovereignty.

Thus, the pervasive belief that Israeli settlements are illegal under international law is at variance with the simplest and most logical reading of the documents which constitute the jurisprudence upon which international law has traditionally been construed.

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