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International Law and the Balfour Decision

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The Balfour Declaration in International Law

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Introduction: Why Law Matters

The Balfour Declaration had enormous political significance, but did it have any legal force? Was it legally binding, exposing Britain to legal remedies for its breach, or was it merely an expression of policy that could be disregarded without legal consequences? These questions are of intense interest to legal historians, but they also have contemporary political relevance. The issue is not so much whether Britain might be liable to the Palestinians for failing to safeguard the “civil and religious rights” of non-Jewish residents of Palestine, though that is a theoretical possibility. Instead, the question is whether the Declaration is legally relevant to the ongoing peace process. The Declaration’s binding character matters because any negotiated settlement to the Israeli-Palestinian conflict will take the form of a legal document, and any such document will build on—indeed, be shaped by—the pre-existing legal framework. If the Balfour Declaration is part of that legal framework, then a final settlement to the conflict has to account for the legal obligations set forth in the Declaration, at least in broad terms. The parties have routinely recited the most prominent planks of the legal framework in their peace agreements. The Camp David Accords and the first Oslo Accord, for example, both begin by invoking UN Security Council Resolutions 242 and 338.¹

The legal framework is important in another way: it shapes the negotiation process itself. Background legal norms set boundaries for the parties by describing which negotiating positions are acceptable and which are beyond the pale. What is more, the legal framework can define the political “center of gravity” of negotiations.

If, for example, there is unquestionably a “Palestinian right of return,” then the Palestinian negotiating position on displaced persons is somewhat stronger; if, on the other hand, there is no such right, then the Palestinian position is correspondingly weaker. If the Declaration has some binding character, in theory it could even be the basis for a lawsuit for reparations or other relief, although this is very unlikely. Finally, the legal framework provides a common language for negotiation, a shared vocabulary. This is no small thing when the parties come to the table without a shared historical narrative.

Accordingly, this paper takes up several questions about the legal history of the Balfour Declaration: Was the Declaration binding as a matter of international law when it was first issued in 1917? For that matter, was it binding in British domestic law? If not, did the Declaration acquire a legally-binding character once it was enshrined in the Mandate for Palestine? Did the purported termination of the Mandate also terminate the Declaration as a matter of law? Does the Balfour Declaration have any continuing legal effect today? Have modern legal norms of self-determination and anticolonialism destroyed any remnant of the Declaration that might have survived termination of the Mandate? Is it possible that some parts of it have no continuing validity, but others live on?

The Legal Character of the Balfour Declaration, 1917–1923

The main body of the Balfour Declaration reads as follows:

His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.²

This instrument, embodied in a letter to Lord Rothschild, was not a treaty. Treaty law, then and now, generally requires an agreement between states.³ The Balfour Declaration did not purport to be an “agreement”; it is a letter to a private citizen containing a unilateral statement of policy. It was more a proclamation than an agreement. It became known as the Balfour Declaration, not the Balfour-Rothschild Agreement or the Britain-Zionist Treaty.

Even if the Declaration could be understood as an agreement, neither Lord Rothschild nor the British Zionist Organization constituted a “state.” In international law a state, then and now, consists of an entity with a defined territory, a permanent population, a government, and the capacity to engage in foreign relations.⁴ Certainly,

the international community has sometimes taken a broad view of statehood. During World War I members of the British government seem to have assumed that the Hussein-McMahon correspondence constituted a “strict, contractual, treaty-like obligation.”⁵ (Indeed, there is a case to be made that the Hussein-McMahon letters have more of a legally binding character than the Balfour Declaration.) And treaty law has come to recognize treaties between a state and a “subject of international law” such as the Holy See or a national liberation movement that has some characteristics of statehood. I have argued elsewhere that the Oslo Accords are legally binding treaties between a state (Israel) and a “subject of international law,” the Palestine Liberation Organization.⁶ It is true, moreover, that the Zionists lobbied the British government, providing draft language, some of which (like the famous phrase “national home”) made it into the final document.⁷ But the Zionist Organization did not hold itself out as a state, and Lord Balfour did not purport to be making an agreement with one. In fact the words of the Declaration do not necessarily promise a full-fledged state. The curious term “national home,” which has no particular meaning in international law, could presumably have implied something less than a state—a territorial enclave inside another state, say, without the capacity to engage in foreign relations on its own. At any rate, it seems safe to conclude that the Balfour Declaration was not an “agreement between states” as is required of a treaty.

There is a somewhat stronger argument that the Declaration was binding as a unilateral promise by a state made in good faith. Sixteen years after the Balfour Declaration, the Permanent Court of International Justice (the “World Court”) held that Norway was legally bound by a unilateral oral promise its foreign minister made regarding Eastern Greenland. The promise was not encased in a treaty, but the Court found it binding anyway, stressing that Denmark had relied on the promise.⁸ In 1974 the PCIJ’s successor, the International Court of Justice, extended the holding in *Eastern Greenland* by concluding that a unilateral promise by France not to engage in certain nuclear tests was binding even without a showing of reliance by other states. The test for the 1974 Court was whether France’s promise had been made in “good faith” with intention to be bound.⁹ But the 1933 *Eastern Greenland* decision was something of a novelty; it is far from clear that it reflects the customary international law prevailing in 1917. Even today, examples of state practice or case law following *Eastern Greenland* and *Nuclear Tests* are rare. Still, the Balfour Declaration has some of the formal characteristics of those later, binding unilateral promises: it was issued by a senior government official, in written form, with a certain amount of formality, possibly reflecting intention to be bound.

One obvious objection to this “unilateral obligation” theory is timing: *Eastern Greenland* postdates the Balfour Declaration. Normally we assess the legal validity of an act in light of then-prevailing law, not later law.¹⁰ One might circumvent this obstacle by arguing that Britain effectively reiterated the Declaration in the 1930s, after *Eastern Greenland* was issued by the ICJ. But Britain did not restate the Declaration forcefully in that period; if anything, it sought to walk the Declaration back, as it moved to endorse the partition of Palestine. Alternatively, one might argue that *Eastern Greenland’s* “binding unilateral promise” theory was already becoming the law when the Balfour Declaration was issued in 1917. One might even argue that a “general principle” of contract law was evolving toward enforcement of some unilateral promises, particularly those inducing reliance, and that the common law was in the forefront of this development.¹¹ But even if one concedes that Balfour’s declaration was made in good faith and that it induced reliance (in the form of Jewish immigration to Palestine, say), one might doubt whether the Declaration was made with “intention to be legally bound.”¹²

In particular, one might doubt whether the Declaration embodies any promise at all. The *Eastern Greenland/Nuclear Tests* theory of unilateral obligation—and, as we shall see in a moment, domestic contract law—assumes there was a promise. In law a promise is understood as a “commitment,” not merely a statement of intention. Lord Balfour’s words arguably fall short of a commitment. He says the government “views with favour” the establishment of a national home in Palestine—not that he “promises” one. A promise does not require the use of the word “promise,” and indeed Balfour goes on to use one of the most common substitutes: the word “will.” The government “will use their best endeavours to facilitate this object.” Even so, the word “will” is qualified with “best endeavours” and “facilitate.” And, as Brian Klug has pointed out, the Declaration is encapsulated by a cover memorandum that further dilutes its character as a commitment. Lord Balfour says he is conveying a “declaration of sympathy.” That is not the language of promise.

To top it off, Lord Balfour’s much-qualified declaration is followed by a proviso that threatens to swallow up the supposed promise: “it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.” If the undertaking to facilitate a “national home” could *only* be fulfilled by prejudicing the “civil and religious rights” of non-Jewish communities in Palestine, then it was no promise at all. In law we might call such an undertaking an “illusory promise”—a promise that has the superficial attributes of a promise (the word “will”) but in substance lacks the requisite commitment of a

promise. At the time of Lord Balfour's promise, illusory promises generally were not binding in British or American law.

Coincidentally, just one month after the Balfour Declaration was made public, a leading American court declared for the first time that a seemingly illusory promise *could* be rendered nonillusory (and hence binding) by assuming it included an obligation to use "best efforts" to achieve its aim. A "best efforts" (or "best endeavours") clause, in other words, can "cure" an otherwise illusory promise. The decision, *Wood v. Lucy, Lady Duff-Gordon*, is one of the most famous in all of American contract law, and it was rendered by one of its most famous judges—Judge Benjamin Nathan Cardozo, of the New York Court of Appeals, himself a rather lukewarm Zionist. In *Lucy* a fashion designer had agreed to pay a promoter half the proceeds of whatever sales he made of her designs—but the contract contained no explicit promise that the promoter try to make any sales at all, and in fact he had not made any. Judge Cardozo found that the promoter had an "implied" (that is, unstated) duty to use "best efforts" to put the designs on sale. (As an aside, it is tempting to ask whether Cardozo had read the Balfour Declaration when he wrote his famous opinion in *Lucy, Lady-Duff Gordon*, and if so, whether it influenced his thinking. A review of the docket in *Lucy* sheds no light on this question.)

The Balfour Declaration contains just such a "best efforts" clause—the British version, a "best endeavours" clause. The Declaration says that the government will use its "best endeavours" to facilitate the object of a national home. British courts and contract drafters had long used such a clause to strengthen or clarify an underlying duty. One interesting question is whether any member of the British cabinet was familiar with this body of English law. Few members of the cabinet were lawyers, apart from David Lloyd George. Indeed, the 1917 British government seems to have drafted the Balfour Declaration without much lawyerly input. Thus it seems unlikely that the insertion of the "best endeavours" clause was designed to give the Declaration legal effect.

There is at best a weak case, then, that the Declaration was binding in international law as a unilateral statement. Even if it had such a character, it still might have been unenforceable for other reasons. It might be said to have been inconsistent with Britain's undertakings in the Hussein-McMahon correspondence, which had a more treaty-like nature than the Balfour Declaration. The binding nature and breadth of the Hussein-McMahon correspondence is beyond the scope of this paper, but it is fair to say that there is significant tension between the correspondence and the Declaration. One might also argue that even if the Balfour Declaration had some binding character as a matter of treaty law, it was unenforceable because it

violated an emerging international legal norm of self-determination, as embodied in the Covenant of the League of Nations. The problem with that contention is that the League of Nations itself endorsed the Declaration, more or less, when it incorporated much of its text into the Mandate for Palestine. The next section takes up that question in more detail.

Whether or not the Declaration had binding force in international law, it almost certainly had no binding effect in British domestic law. There was no general rule of British constitutional or administrative law that automatically ascribed binding status to unilateral statements of policy made by cabinet ministers. Then, as now, British public law was characterized by parliamentary supremacy. Parliament made law; the government executed law. Of course the prime minister and the Foreign Office conducted foreign policy, but it was policy, not law—changeable at will, not enforceable in courts.

Nor was the Declaration a contract under British domestic law. Even if one makes the precarious assumption that private contract law can apply to statements of policy by government ministers, the Balfour Declaration lacks the elements of a contract.¹³ British common law, then and now, generally defined a contract as a promise given in exchange for “consideration” (a return promise or performance), expressed through offer and acceptance or some other process indicating intent to be bound. Lord Balfour’s promise (if it was a promise) is not given in exchange for any explicit “consideration” on the part of Lord Rothschild or the Zionists. Even if the British harbored fantasies that the Zionists would somehow reciprocate by helping them in the war effort, those hopes were not expressed in any agreement, as is required of consideration doctrine.¹⁴

In sum, there is a somewhat plausible argument that the Balfour Declaration was legally binding as a matter of international law between 1917 and 1923. It was not a treaty, but it might be regarded as a unilateral promise by a state, made in good faith and intended to be legally binding—depending on whether one finds a concrete promise in the document. If there is a continuum of legal obligation, one running from full obligation to soft obligation to zero obligation, then the Balfour Declaration might be somewhere in the soft middle. Even if it had some binding character, it was in tension with British undertakings in the Hussein-McMahon correspondence, which has a more treaty-like nature than the Balfour Declaration. Finally, whether or not the Balfour Declaration was binding in international law, it had little if any binding force in British domestic law.

Did the Declaration become binding once it was embedded in the Mandate? The next section takes up that question.

The Legal Character of the Declaration during the Mandate, 1923–1948

In its preamble, the Mandate for Palestine recites that the Allied Powers had agreed that Britain “should be responsible for putting into effect” the Balfour Declaration. This language alone might not connote legal obligation: “should” is traditionally regarded as the hortatory version of “shall.” But in Article 2, the Mandate imposes legal obligations on Britain. It declares that Britain “shall be responsible for placing the country under such political, administrative and economic conditions as will secure” the objectives of the Declaration, including establishment of the Jewish national home, creation of self-governing institutions, and safeguarding the rights of “all the inhabitants of Palestine, irrespective of race and religion.”¹⁵

That said, the Mandate did not incorporate the Declaration verbatim. For example the Mandate replaced “view with favour” with “shall be responsible,” language more clearly indicating legal obligation. The Mandate also elaborated considerably on Britain’s obligations to Jews and non-Jews alike. Article 4, for example, calls for a Jewish Agency for Palestine, and Article 6 calls on Britain to “facilitate Jewish immigration” and to encourage “close settlement by Jews on the land.” Article 9 protects the “rights” of “natives” and the “religious interests” of all peoples, and Article 13 seeks to safeguard Muslim places of worship and other holy places.

In a sense, then, it is a category error to ask whether the Mandate transformed the Balfour Declaration into a legally-binding document, because the Mandate did not incorporate the Declaration word-for-word. Rather, the Mandate was a treaty-like instrument unto itself, as it was founded on a series of agreements, including the League Covenant, the San Remo Conference, the Treaty of Sèvres, and the actions of the League Council confirming the Mandate. There is little doubt that the Mandate had a binding character. The main legal question here is whether the Mandate violated higher norms of international law, in particular the emerging right of self-determination of peoples.

Under modern international law, a treaty-like instrument such as the Mandate is invalid if it violates peremptory norms of international law.¹⁶ In today’s law these norms are thought of as a sort of super-constitutional law of the international order, founded on natural law. These peremptory norms are known as *jus cogens*. While there is no agreement on the exact content of *jus cogens*, there is broad agreement that states cannot enter into treaties to commit genocide, torture, slavery, crimes against humanity, and other gross violations of human rights, and probably piracy and other serious international crimes. Some sources specifically identify the right of self-determination as a *jus cogens* norm.¹⁷

Do these modern notions of *jus cogens* imply that, at the time of their promulgation, the Mandate and the Balfour Declaration were null and void as violating Arab rights of self-determination? The doctrine of intertemporal law dictates that we evaluate a legal instrument in light of the law prevailing at the time of its adoption, not in light of modern law.¹⁸ In 1923 the doctrine of *jus cogens* was not nearly as well embedded in international law as it is today. To be sure, the notion of natural law is as old as law itself: it features in sources as diverse as Sophocles's *Antigone*, Thomas Jefferson's Declaration of Independence, and Justice Clarence Thomas's jurisprudence. Hugo Grotius explicitly grounded international law in natural law.¹⁹ But the specific notion that a treaty might be invalid for violation of a *jus cogens* norm did not enter positive law until the 1969 Vienna Convention on the Law of Treaties, and it was not actually applied by international courts until decades later.²⁰

Moreover, the right of self-determination was not as well developed in 1923 as it is today. The Treaty of Versailles and the League of Nations Covenant contain provisions calling for some form of self-determination for some peoples—usually European peoples. Article 22 of the Covenant in particular envisions that the Mandatory powers would help some peoples develop their own governing institutions. But after World War I the international community rejected President Wilson's calls for a more robust treaty-based right of self-determination.²¹ During this period, self-determination was a "political principle, but not a right under international law," and it was "subject to many limitations."²² Certainly the British understood it as a principle rather than a right. In 1919, Balfour wrote to Lloyd George that "in the case of Palestine, we deliberately and rightly decline to accept the principle of self-determination," since the present inhabitants would surely deliver an "anti-Jewish verdict," but he felt Palestine was "absolutely exceptional" because the Jewish national home was of "world importance," provided it could be obtained without either "dispossessing or oppressing the current inhabitants."²³ A "right" of self-determination did evolve as decolonization accelerated through the twentieth century, and self-determination was eventually enshrined in the 1945 UN Charter and subsequent instruments to protect human rights. But even today, the precise content of the right of self-determination remains uncertain. It does not, for example, include an absolute right to secede.

Even if some right of self-determination had emerged by 1923, it seems unlikely it had achieved the status of a *jus cogens* norm, which has to be "accepted and recognized by the international community of states as a whole."²⁴ Given the resistance to Wilson's proposed right of self-determination, it is hard to conclude that the post-World War I community of states "as a whole" had agreed upon such a right. International law would not take on an anti-imperialist cast until after World War II.²⁵

But that is not to say the right of self-determination is irrelevant to *interpretation* of the Mandate or Balfour Declaration. In interpretation of treaties and other international instruments, the plain text is the first port of call.²⁶ Lord Balfour may have believed his Declaration excluded a Palestinian right of self-determination, but the plain text of the Declaration endorses “civil and religious rights” for Palestinians—a phrase broad enough to embrace some form of self-determination. Nowhere does the Declaration disclaim Palestinian rights to self-determination.

True, the law of treaty interpretation also permits recourse to the context of the instrument. In particular, treaty law requires that one read an instrument in light of any “relevant rules of international law.”²⁷ This rule again suggests that the Declaration’s proviso should be construed as protecting some form of Palestinian self-determination. Admittedly, in 1917 there was, at most, an emerging norm of self-determination. By 1923, however, the international community had begun to recognize such a norm; the Mandates themselves reflect a certain level of commitment to the principle of self-determination. In any case, if the Balfour Declaration is still in force today, it is a modern instrument that must be read in light of modern international law, which most certainly does include a *jus cogens* norm of self-determination. The most important human-rights treaty defining “civil rights,” the International Covenant on Civil and Political Rights, states the following in Article I: “All peoples have the right of self-determination.”²⁸ If Britain wishes to avoid responsibility for ensuring “civil rights” for Palestinians, including this right of self-determination, it can renounce the Declaration and declare that it has no further legal effect. But Britain has not done so.

As a last resort, treaty law does permit recourse to the *travaux préparatoires* (“preparatory works,” or negotiating history) of an instrument, but only if the natural reading of the text is “ambiguous or obscure” or leads to an “absurd result.”²⁹ Opponents of Palestinian self-determination might argue that the term “civil rights” is ambiguous and thus that it should be interpreted by examining the drafting history of the Declaration (though not postpromulgation comments by Balfour and others). This argument would point to evidence that the men who drafted the Declaration and Mandate intended to exclude Palestinian rights of self-determination, even if they did not say so in the text.

Commentators have long asserted that international law disfavors “negotiating history,” though that view has recently been challenged.³⁰ (This controversy is analogous to the controversy over the use of “original intent” in American constitutional law.) A good case can be made for caution in the use of drafting history; identifying bureaucratic intent is challenging even when a bureaucracy is

unified. In the case of the Declaration, whose drafting process was chaotic, and the Mandate, it seems advisable to consult drafting history with caution. At any rate, the law says one should consult negotiating history only if the phrase “civil and religious rights” is “ambiguous,” “obscure,” or “absurd.”

The phrase “civil rights” certainly isn’t “obscure,” and interpreting it as including at least a weak form of self-determination—such as limited autonomy—hardly seems absurd. Is the phrase “civil rights” ambiguous? It might be vague, but it is not necessarily ambiguous. Vagueness refers to a term whose general meaning is agreed upon but whose outer boundaries are uncertain, such as the word “equality” or the color red. Ambiguity refers to a term that might have two starkly different meanings, like the word “light,” which can refer to illumination or weight. Vagueness is an inevitable part of all agreements, contracts and treaties alike; ambiguity should be avoided by any competent drafter. The Vienna Convention on the law of treaties does not support resort to drafting history for mere vagueness.

But even if one concludes that some resort to drafting history is appropriate, it is still not possible to read the term “civil rights” as entirely excluding some right of Arab self-determination. The drafting history of the Declaration and Mandate may or may not reflect consensus that there would be no Arab state or “national home,” but it certainly does not rule out lesser forms of Arab self-determination in Palestine, such as autonomy, local self-rule, or participation in a federal system. And the intention of the Allied powers as to the future of the Arabs in Palestine was far from clear in 1923. The British had already made conflicting promises to the Arabs and Jews, suggesting that the British government might have envisioned that “civil and religious rights” could amount to a “national home” for Arabs. At the very least, “civil and religious rights” would seem to mean much more than the rights Palestinian Arabs enjoyed throughout the term of the Mandate and thereafter.³¹

There is nothing radical about reading the term “civil rights” as including a right of self-determination. The right of self-determination does not necessarily mean a right to full statehood, secession, or even a “national home.” What is more, the right attaches only to “peoples,” not to small groups or individuals. In practice self-determination implies some right to participate in decisions about how a people will be governed. State practice, the foundation of customary international law, reflects a mixed attitude toward aspirations for national homes and statehood. While states acquiesced in many decolonization and independence movements in the twentieth century, they have also often opposed national liberation movements that seek independence, secession, statehood, or other robust forms of self-determination.³²

In sum the Mandate for Palestine was a legally binding document, at least for as long as the Mandate existed. For that period of time, at least, it mooted the question of whether the Balfour Declaration standing alone was legally binding, since the Mandate restated and then enlarged upon the undertakings in the Balfour Declaration. The Mandate probably did not violate a *jus cogens* norm of self-determination, because the notion of *jus cogens* had not been accepted as positive law in 1923, and the right of self-determination was still emerging. But modern norms of self-determination should inform modern interpretation of the Declaration. Those norms imply that the Balfour Declaration, if still in force, might have legal implications for Britain's current policy toward the Arab residents of Palestine. In particular Britain may have a continuing obligation to promote Arab self-determination in Palestine, though self-determination does not always take the form of full statehood.

The next section considers the legal status of the Balfour Declaration after the British terminated the Mandate in 1948.

The Balfour Declaration from 1948 to the Present

When the British announced that they were terminating the Mandate for Palestine, effective in 1948, did the Balfour Declaration disappear from the legal landscape? This section argues that it did not.

A threshold question is whether the British, acting pursuant to General Assembly Resolution 181(II), actually terminated the Mandate at all. Some jurists have suggested that the Mandate was not validly terminated, or was only partly terminated.³³ The Mandate had the character of a multilateral treaty, as it reflected the decisions taken at San Remo and Sèvres, as well as the votes of the states in the League of Nations Council. Unless the treaty provides for one state to terminate it, one state cannot unilaterally end a multilateral treaty; all the parties have to consent.³⁴ In this case the treaty terms are ambiguous about the process of termination: Article 28 of the Mandate does recognize the possibility of termination of the Mandate, but it does not make clear who could terminate it and how. Article 27 says modification requires consent of the League Council, the successor to which is the Security Council, not the General Assembly.

Assembly Resolution 181(II) did reflect the views of a majority of the international community. That resolution was not unanimous, however; all the Arab states voted against it, and the United Kingdom, China, and eight other states abstained. Moreover, a General Assembly resolution ordinarily is not legally binding.³⁵ The Resolution also seems to disregard the trusteeship process of the UN Charter. Article 77(1)(a) of the

Charter envisioned trusteeship agreements to place existing Mandates under the new Charter trusteeship system.³⁶ For that matter, some modern jurists argue that the entire Mandate system was an invalid exercise in imperialism.³⁷ On the other hand, state practice since 1948 suggests that many states have acquiesced in the termination of the Mandate: no state is clamoring for Britain to reassert its Mandatory authority. Moreover, Article 85 of the Charter empowered the General Assembly to oversee the new Trusteeship Council, suggesting that the Assembly possessed some competence to terminate the Mandate.

Assuming the Mandate did terminate in 1948, its demise did not necessarily terminate the Balfour Declaration. The British government may have renounced the Mandate, but it did not renounce the Declaration itself. Since 1917 the law has gradually become more inclined to enforce unilateral declarations. At the time Lord Balfour issued his declaration, there was doubt about whether a unilateral statement made in good faith could be binding. But, as we saw earlier, the World Court held such declarations enforceable in *Eastern Greenland* (1933) and *Nuclear Tests* (1974). Insofar as the British government has renewed its commitment to the Declaration, it might be said to have issued *new* unilateral statements; even oral declarations (such as the one in *Eastern Greenland*) can be legally binding. Recently, the British government has said it is “proud” of the Declaration; it invited Israeli Prime Minister Benjamin Netanyahu to London to celebrate the one hundredth anniversary of the Declaration, and it has refused Palestinian demands that Britain apologize for the Declaration. One could interpret such statements as reaffirmations of the Balfour Declaration.

Reaffirmation is relevant not because of the main undertaking of the Declaration, which has been fulfilled by the creation of the State of Israel, but because of the proviso. The proviso is an unconditional promise: “it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.” This language is absolute. It has none of the weasel words of the main clause (“view with favour,” “best endeavours,” and so forth). The proviso is the sort of promise that might constitute a legally-binding commitment under the *Eastern Greenland/Nuclear Tests* doctrine. Indeed, its unconditional nature makes it a better candidate for enforcement than the main undertaking in the Declaration.

Even if the Balfour Declaration has never had any binding force of its own, and even if the Mandate terminated validly, it is still possible that the civil rights proviso might have some residual legal effect today. When announcing its termination of the Mandate, Britain interpreted the Mandate as imposing three obligations:

(1) to promote the “well-being and development of the people of Palestine,” (2) to facilitate the Jewish “national home,” and (3) “to prepare the people of Palestine for self-government.”³⁸ His Majesty’s Government gave itself high marks on the first two obligations, trumpeting the development of civic institutions, law and order, economic development, and growth of not only the Jewish but also the Arab population, and of course the establishment of the national home itself—all the while acknowledging that Britain was unable to prevent violence and civil strife. But the British government had to admit that it was “unable to make comparable progress towards the accomplishment of their third task, the preparation of the people for self-government, owing to the mutual hostility of Arabs and Jews.”³⁹ That could be taken as an admission that Britain did not fulfill all its obligations under the Mandate—in particular, its obligation under Article 2: “safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.” Even if that statement is not an admission of failure to meet its obligations, the facts on the ground in 1948 suggest that Britain did less than a fulsome job of protecting Palestinian “civil rights.”

By no means does this imply that Britain is legally responsible for all the ills of the Arab-Israeli conflict. The law of state responsibility exempts Britain for force majeure and other acts not attributable to that state, such as the decision of Arab states to make war on the new state of Israel.⁴⁰ International law holds Britain accountable only to an extent proportionate to Britain’s failure to abide by its own obligations, not the wrongdoing of others.⁴¹ Nor does the law of responsibility imply that Britain owes Palestinians enormous reparations. Rather, that body of law recognizes that when compensation is not adequate to redress a wrong, satisfaction is an appropriate remedy. Thus Article 37 of the International Law Commission’s Articles on State Responsibility provides this: “Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”⁴²

An apology or expression of regret would be a start, but “another appropriate modality” could also imply a foreign policy that aims to safeguard the “civil and religious rights” of “non-Jewish inhabitants in Palestine.” At a minimum this might entail promoting Palestinian voting and other civil rights, as well as access to holy places. Or it might mean a commitment to a stronger form of Palestinian governance than exists now, or confederation with another Arab state, or a demilitarized Palestinian state in the West Bank and Gaza Strip, or British recognition of a fully independent Palestinian state. Of course, Britain’s pursuit of any of these aims must be through peaceful means.⁴³ A guiding principle for all of this is the norm of good faith that permeates modern international law.⁴⁴

Insofar as Britain may have reaffirmed the proviso to the Balfour Declaration, a broad interpretation of “civil and religious rights” would be consistent with modern human rights law. Today there is a stronger right of self-determination than was the case a century ago. Again, modern international law also obliges states to respect the sovereignty, security, and territorial integrity of the State of Israel, and in particular to oppose terrorism and other forms of violence.⁴⁵

Perhaps British and Palestinian diplomats might consider adjusting their talking points. The Palestinian Authority regularly denounces the Balfour Declaration as an unlawful violation of the right of self-determination. It has called for the British government to apologize for the Declaration and has threatened to sue Britain for damages ensuing from the Declaration.⁴⁶ Palestinian anger about the Declaration is understandable. But it is not clear what court would have jurisdiction over a lawsuit, or what relief could be obtained.⁴⁷ More important, the Palestinian Arabs might still have something to gain from the Balfour Declaration. They could insist that the proviso of the Declaration is valid and enforceable, and use it to press Britain to help ensure “civil and religious rights” for the Palestinian Arab people. Rhetorically, they could pivot from their traditional criticism of the Balfour Declaration to speak more favorably of the “Balfour Proviso,” the unconditional promise to protect Palestinian rights.

For its part, the British government has defended the Declaration but also admitted that the Declaration “should have called for the protection of political rights of the non-Jewish communities in Palestine, particularly their right to self-determination.”⁴⁸ Britain is right that the Declaration should have protected the Palestinian right to self-determination explicitly, but Britain might do better to emphasize that the Declaration *did* call for the protection of “civil and religious rights” of non-Jewish communities in Palestine, and to interpret those rights as including a right to self-determination. Britain should take the opportunity of the one hundredth anniversary of the Balfour Proviso to redouble its efforts to facilitate a durable and just peace.

Conclusion

The Balfour Declaration may have continuing legal relevance—not as a promise of a Jewish national home, which has already been fulfilled, but as a promise for Palestinian rights. The Declaration’s proviso is part of the pre-existing legal framework upon which any future peace agreement will be constructed. Britain may have an ongoing legal obligation to ensure its promise is kept, or at least to make some form of diplomatic satisfaction to the Palestinian people in the form of an apology or “other modality.”

But even if Britain is free from any such residual legal obligation, it still has a moral obligation to help correct a state of affairs that it played a role in bringing about. Britain is not powerless to carry out this obligation. The British government has involved itself in attempts to construct a peace agreement, for example through its participation in the Middle East “Quartet” (the United Nations, the United States, Russia, and the European Union). Indeed, former British Prime Minister Tony Blair served as the Quartet’s chief diplomatic envoy from 2007 to 2015.

In current diplomatic practice, when drafting agreements or UN resolutions about the Arab-Israeli conflict, the authors begin by reciting a canonical list of sacred legal texts. At a minimum these lists usually include UN Security Council Resolutions 242 and 338, but sometimes they also mention the UN Charter, the Camp David Accords, the Oslo Accords, human rights treaties, or other planks in the legal framework. These “recitals” help lawyers draft and interpret the new instrument by providing a clearer sense of its context and purpose. Recitals also add an air of formality to a legal agreement, perhaps enhancing its “pull to compliance.”⁴⁹

In the current climate, it is probably too much to hope that the drafters might add the Balfour Declaration to the canonical list of recitals. That is unfortunate because the Declaration has something to offer to both sides: security for the Israelis and an unfulfilled promise of “civil and religious rights” to the Palestinians. Eventually the two sides might see that it is in their interests to acknowledge the continuing relevance of the Declaration. In the meantime drafters should at least include recitals of human rights instruments that restate and enlarge upon the “civil and religious rights” first stated in the Balfour Proviso. Arab-Israeli peace agreements have not always done so.⁵⁰

Nonlawyers may be skeptical that pre-existing legal norms can influence the course of a negotiation. But good lawyers always survey the background law before they start drafting, and in treaty negotiations, the lawyers do the drafting. They draft in legal language, using a legal vocabulary and drawing on legal history. The Balfour Proviso establishes a human rights “floor” for future agreements: any such agreement must, at minimum, safeguard the “civil and religious rights” of the Palestinian Arabs. Of course later instruments—human rights treaties, UN resolutions—say roughly the same thing. But the Balfour Proviso was the first to say it in this specific context. It deserves a place at the table.

Notes

- 1 See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993 (Isr.-PLO), Art. 1, accessed May 9, 2018, http://avalon.law.yale.edu/20th_century/isrplo.asp; The Camp David Accords: Framework for Peace in the Middle East, Preamble, paras. 2, 6, and 9, accessed May 9, 2018, http://avalon.law.yale.edu/20th_century/campdav.asp. The Camp David Accords also attached the full texts of Resolutions 242 and 338 as appendices.
- 2 Jonathan Schneer, *The Balfour Declaration* (New York: Random House, 2010), 341.
- 3 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 2(1)(a) (requiring an “an international agreement concluded between States in written form and governed by international law”), accessed May 9, 2018, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.
- 4 See Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881, Art. 1, accessed May 9, 2018, http://avalon.law.yale.edu/20th_century/intam03.asp.
- 5 See Elie Kedourie, *In the Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and Its Interpreters 1913–1949* (Cambridge: Cambridge University Press, 1976), 246, 249.
- 6 See Geoffrey R. Watson, *The Oslo Accords* (New York: Oxford University Press, 2000), 91–102.
- 7 For an excellent discussion of the final drafting process, see Schneer, *Balfour Declaration*, 333–342.
- 8 *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).
- 9 *Nuclear Tests* (Aus. v. Fr.), 1974 I.C.J. Reports 253, 269–70 (Judgment of Dec. 20).
- 10 See *Island of Palmas Case*, 2 Hague Case Reports 83, at 100, 2 U.N. Rep. Intl. Arb. Awards 829 (Perm. Court of Arbitration, 1928).
- 11 See, e.g., *Hughes v. Metropolitan Railway*, [1877] 2 A.C. 439 (House of Lords); *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (Sup. Ct. Neb., 1898).
- 12 See Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Conflict, 1891-1949* (London: Pluto Press, 2009), 58.
- 13 For a variety of reasons, promissory estoppel suits against the government are unusual in common law jurisdictions. See Phuong N. Pham, “The Waning of Promissory Estoppel,” *Cornell Law Review* 79, no. 5 (1994): 1282: “Absent unusual circumstances, promissory estoppel cannot be used against government agencies or municipalities that act within their statutory authority, even if such action is in breach of a prior promise.”
- 14 See, e.g., *Currie v. Misa* (1875) LR 10 Ex 153; (1875-76) LR 1 App Cas 554 (requiring consideration for enforcement of promises in English law).
- 15 Mandate for Palestine, League of Nations Doc. C.529 M.314 1922 VI (1922), accessed May 9, 2018, http://avalon.law.yale.edu/20th_century/palmanda.asp.
- 16 See Vienna Convention on the Law of Treaties, Art. 53, 64 (providing that treaties that violate *jus cogens* are null and void).

- 17 See, e.g., Report of the International Law Commission, 66th Session, A/69/10, Annex, 274–279 (2014) (summarizing the ILC’s understanding of the content of *jus cogens*); *ibid.*, 276 n10 (identifying the right of self-determination as one example of *jus cogens*), accessed May 9, 2018, <http://legal.un.org/docs/?path=../ilc/reports/2014/english/annex.pdf&lang=EFSRAC>.
- 18 See *Island of Palmas Case*, 2 Hague Case Reports 83, at 100, 2 U.N. Rep. Intl. Arb. Awards 829 (Perm. Court of Arbitration, 1928).
- 19 Hugo Grotius, *De jure belli ac pacis* [*On the Law of War and Peace*] (1625), bk. 1, chap. 1, para. 10.
- 20 See, e.g., Prosecutor v. Furundžija, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T, Judgement, paras. 153-57 (Dec. 10, 1998), accessed May 9, 2018, <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>. Compare with Dinah Shelton, “Sherlock Holmes and the Mystery of *Jus Cogens*,” *Netherlands Yearbook of International Law* 2015 (The Hague: T.M.C. Asser Press, 2016), 48: “Like the tourists who flock to Baker Street convinced of the reality of Sherlock Holmes, adherents of *jus cogens* may continue [to] look for it to have an impact in the real world.”
- 21 See Hurst Hannum, “Rethinking Self-Determination,” *Virginia Journal of International Law* 34, no. 1 (1993): 7.
- 22 Hurst Hannum, “The Right of Self-Determination in the Twenty-First Century,” *Washington and Lee Law Review* 55, no. 3 (1998): 774.
- 23 F.O. 371/4179/2117, Balfour to the Prime Minister, 19 February 1919, quoted in Isaiah Friedman, *The Question of Palestine: British-Jewish-Arab Relations, 1914-1918*, 2nd ed. (New Brunswick, NJ: Transaction, 1992), 325.
- 24 Vienna Convention on the Law of Treaties, Art. 53.
- 25 For an excellent discussion of the relationship between colonialism and the development of modern international legal institutions, see Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004). Perhaps the most radical transformation of international law in history took place from the 1920s through the 1950s, as the law moved from the embrace of colonialism to the rejection of it.
- 26 See Vienna Convention on the Law of Treaties, Art. 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
- 27 See Vienna Convention on the Law of Treaties, Art. 31(3)(c).
- 28 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 1, accessed May 9, 2018, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.
- 29 See Vienna Convention on the Law of Treaties, Art. 32.
- 30 Compare Julian Davis Mortenson, “The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?,” *American Journal of International Law* 107, no. 4 (2013): 780, 782n3 (arguing

that treaty law permits recourse to negotiating history) with Georges Abi-Saab, “The Appellate Body and Treaty Interpretation,” in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, ed. Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (Leiden: Martinus Nijhoff Publishers, 2010), 99, 104–105 (arguing that international law disfavors the use of negotiating history).

- 31 See Kattan, *From Coexistence to Conquest*, 129 (arguing that the Balfour Declaration protected Arab as well as Jewish rights of self-determination in Palestine).
- 32 See Hannum, “Right of Self-Determination,” 774.
- 33 See, e.g., Eugene V. Rostow, “‘Palestinian Self-Determination’: Possible Futures for the Unallocated Territories of the Palestine Mandate,” *Yale Studies in World Public Order* 5, no. 2 (1980): 158–159. See also Memorandum by the [US] Legal Adviser (Gross) to the Under Secretary of State (Lovett), May 11, 1948, 867N.01/5–1048, in *Foreign Relations of the United States, 1948, Near East, South Asia and Africa*, vol. 5, pt. 2, doc. 247, accessed April 14, 2018, <https://history.state.gov/historicaldocuments/frus1948v05p2/d247>: “British abandonment of the mandate may be a breach of Great Britain’s international obligations; but as a practical matter the mandate would nevertheless be terminated.”
- 34 See Vienna Convention on the Law of Treaties, Art. 54(b).
- 35 See UN Charter, June 26, 1945, Art. 10, accessed May 10, 2018, <http://www.un.org/en/charter-united-nations/> (providing that General Assembly resolutions generally constitute “recommendations” rather than legally binding obligations). Compare with Kattan, *From Coexistence to Conquest*, 153–155, (arguing that Resolution 181(II) was not legally binding).
- 36 See UN Charter, Art. 77(1)(a) (providing that “the trusteeship system shall apply” to such existing Mandates “as may be placed thereunder by means of trusteeship agreements”). Also compare with Susan M. Akram and Terry Rempel, “Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees,” *Boston University International Law Journal* 22, no. 1 (2004): 29 n136: “A majority of the General Assembly rejected established procedures set forth in article 77(1)(a) of UN Charter chapter 12 concerning the termination of mandate regimes set up under the League of Nations.” See also Kattan, *From Coexistence to Conquest*, 144.
- 37 See, e.g., Kattan, *From Coexistence to Conquest*, 138. For more on the transformation of international law from imperialism to anti-imperialism, see Anghie, *Imperialism*.
- 38 “Palestine; termination of the mandate 15th May, 1948,” Statement prepared for public information by the Colonial Office and Foreign Office, May 15, 1948, accessed April 14, 2018, <http://cojs.org/wp-content/uploads/TerminationOfTheMandate.pdf>.
- 39 Ibid.

- 40 International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001, accessed April 14, 2018, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, Art. 8 (on attribution to states generally); Art. 23 (imposing no responsibility on states for force majeure).
- 41 See, e.g., *ibid.*, Art. 37(3): “Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.”
- 42 *Ibid.*, Art. 37(2). Satisfaction does not require that the injured party be a state. The classical law of state responsibility was so limited, but the modern rules envision that responsibility might extend to “other subjects of international law,” presumably including Palestine, which is now classified as a non-member observer state at the United Nations. See International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, accessed April 20, 2018, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, Art. 1, comment 5 (stating that the rules of state responsibility extend to an injured state and possibly “also to other States or indeed to other subjects of international law”). The UN General Assembly accorded Palestine non-member observer state status in 2012. See UNGA Res. 67/19 (Dec. 4, 2012).
- 43 Compare with UN Charter, Art. 2(4) (obliging states to refrain from the use of force).
- 44 See, e.g., UN Charter, Art. 2(2): “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter”; Vienna Convention on the Law of Treaties, Art. 31 (obliging states to interpret treaties in “good faith”). See Elizabeth Zoller, *La Bonne Foi en Droit International Public* (Paris: Editions A. Pedone, 1977).
- 45 See, e.g., UN Security Council Resolution 1373, UN Doc. S/RES/1373 (Sept. 21, 2001), accessed May 20, 2018, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373%20%282001%29.
- 46 See Yadam Rasgon and Tovah Lazaroff, “Palestinians Seeking to Sue Britain over 1917 Balfour Declaration,” *Jerusalem Post*, July 26, 2016, accessed August 28, 2017, <http://www.jpost.com/Arab-Israeli-Conflict/Palestinians-seeking-to-sue-Britain-over-Balfour-Declaration-462379>.
- 47 The International Court of Justice (that is, the World Court) would not have jurisdiction over a contentious suit by Palestine. Even if Palestine can be considered a state for this purpose, it has not accepted the ICJ’s jurisdiction under the “optional clause.” The United Kingdom has accepted the Court’s jurisdiction, but only as to matters arising after 1987, and only as to other states accepting the Court’s jurisdiction. See U.K. Decl. Recognizing the Jurisdiction of the Court as Compulsory, Feb. 22, 2017, accessed August 28, 2017, <http://www.icj-cij.org/en/declarations/gb>.

- 48 Lizzie Dearden, “UK Refuses to Apologise to Palestinians for Balfour Declaration and Says It Is ‘Proud of Role in Creating Israel,’” *The Independent*, April 26, 2017, accessed August 28, 2017, <http://www.independent.co.uk/news/world/middle-east/palestinian-authority-uk-balfour-declaration-israel-sue-israel-zionism-refuse-apologise-lawsuit-a7702866.html>.
- 49 Thomas M. Franck, “Legitimacy in the International System,” *American Journal of International Law* 82, no. 4 (1988): 705, 708.
- 50 For example, Oslo I (the “Declaration of Principles”) mentions Resolutions 242 and 338 but not much other pre-existing law. See Declaration of Principles, Art. I.