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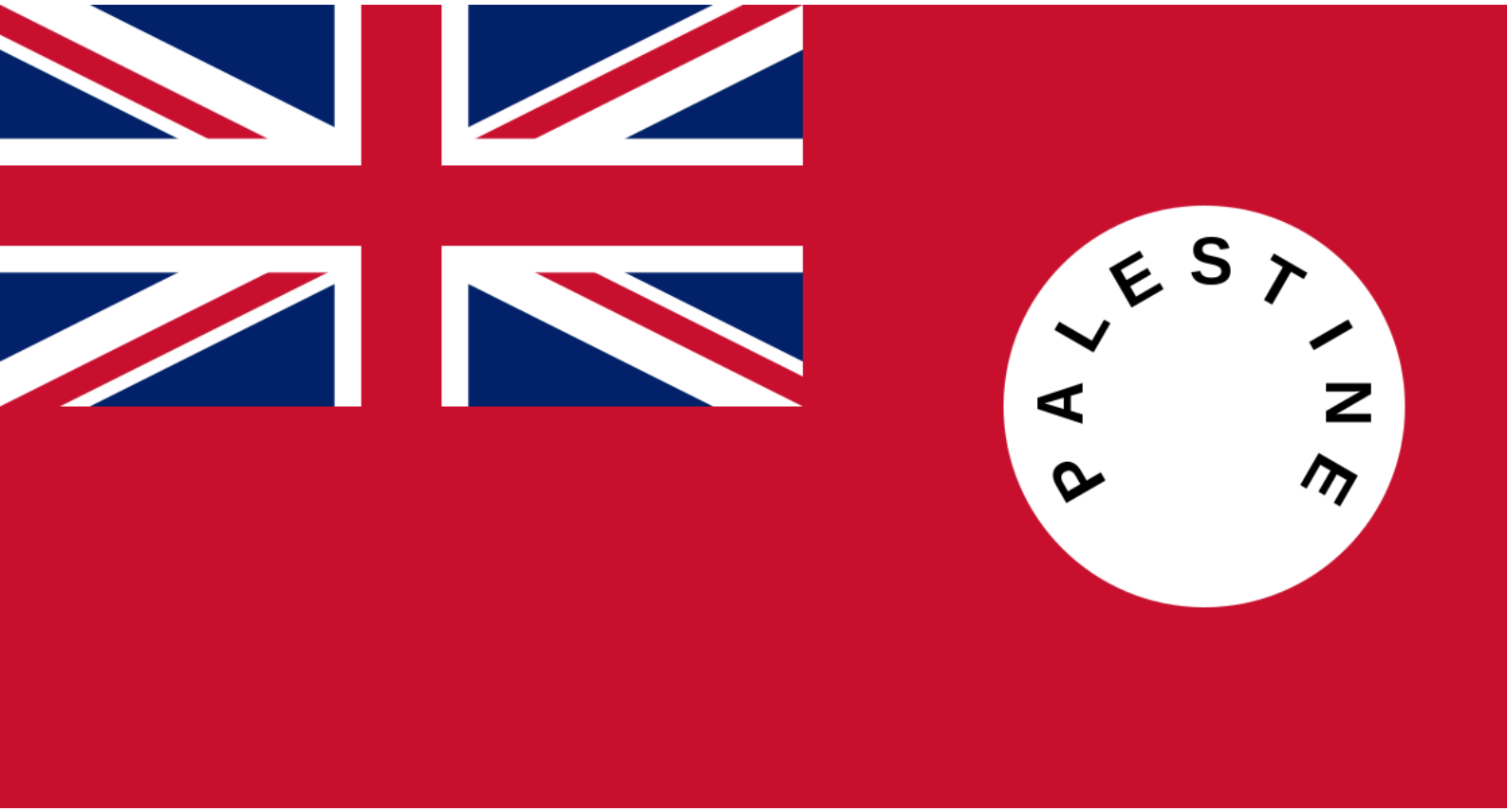
Position Paper

British Reparations Owed to the Palestinian People



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Cover Image: Ensign of the Palestine Mandate (1927–1948)

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Introduction

In his speech before the UN General Assembly on 21 September 2023, Palestinian Authority President Mahmoud Abbas pledged that:

> [W]e will persist with our pursuit of accountability and justice at the relevant international bodies against Israel because of the continued Israeli occupation of our land and the crimes that have been committed, and are still being committed against us; as well as against both Britain and America for their roles in the fateful Balfour declaration. Yes, Britain and America and against everyone who had a role and the catastrophe and tragedy of our people. We will not forget the tragedy, we will not forget the pain. We call for acknowledgment, we call for an apology — acknowledgment and apology. We call for reparations, we call for compensation in accordance with international law.

This call for reparations from the UK for its role in the Balfour Declaration—a statement made by the then UK Foreign Secretary Arthur Balfour in 1917 pledging to establish a "national home for the Jewish people" in Palestine, despite that land already being inhabited mostly by non-Jewish Palestinians—is not new. Notably, it was made at the time of the centenary of the Balfour pledge, when then UK Prime Minister Theresa May reportedly proclaimed, at a commemorative event with Israeli Prime Minister Benjamin Netanyahu, that she was "proud of our pioneering role in the creation of the state of Israel". Mahmoud Abbas invokes international law, but is there a legal basis for reparations against the UK for something that happened when global norms were very different from today? Based on new research, we argue that there is, and the key to this possibility is a legal agreement adopted one hundred years ago today.

Balfour Declaration and its implementation in practice

In the 1917 Declaration, Arthur Balfour stated to Lionel Walter Rothschild, a prominent member of the Jewish community in the UK, that:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object.

When the UK took over control of Palestine from the Ottoman Empire after the so-called First World War, it implemented this commitment in practice. It facilitated Jewish-only migration. This enabled a demographic shift in favour of members of the Jewish community. It provided for the transfer of land and property to members of the Jewish community, including through

compulsory expropriations and other confiscations from non-Jewish Palestinian owners/occupiers. It provided support for developing and establishing provisional self-governing Jewish political institutions while denying support to and suppressing the activity of any corresponding, equivalent non-Jewish Palestinian institutions. Popular Palestinian dissent was violently and lethally suppressed, notably in the case of the Great Palestinian Revolt of 1936-9, a nationalist uprising against colonial rule and the policy of enabling the establishment of a "national home for the Jewish people". With the onset of conflict in Palestine following the UN General Assembly adopting the partition resolution in 1947, the UK withdrew its presence in the first part of 1948. This paved the way for, and did nothing to stop, and protect the majority non-Jewish Palestinian people from, two related things. First, the creation of Israel as a Jewish state in a significant part of the territory of Palestine that year. Second, the associated forced displacement of a large number of the non-Jewish Palestinian population from the territory that would form the basis for the new state—the Nakba.

Balfour Declaration legal status

As Mahmoud Abbas' UN speech illustrates, calls for accountability typically invoke the Balfour pledge. The legal significance of the pledge, however, is not so much in the declaration itself, and its adoption in 1917. At that stage, it was merely a political statement made by the UK Foreign Secretary to a prominent private individual. As such, it is of dubious legal standing as a commitment binding on the UK, and, in any case, the UK had no authority over the territory when it was made. What makes it significant politically, practically and legally is something else, with a different date. The centennial anniversary of which being today.

The Mandates system and the Mandate Agreement

To appreciate this, it is necessary to understand Palestine as a 'Mandate' of the League of Nations. What was, then, the Palestine Mandate and how is this relevant to contemporary accountability?

At the end of the so-called First World War, the victorious allies took over the colonies of the defeated powers, one of the prizes of victory. The UK became the power in Palestine, displacing the defeated Ottoman Empire. These arrangements were placed under the authority of the League of Nations in the Mandates system. Unlike with other colonies, they were subject to the stipulations of the Covenant of the League of Nations. The Covenant formed part of the Versailles Treaty, thereby binding in international law on the states administering the Mandated territories as part of that international agreement to which they were a party.

The administration of each particular Mandate was set out in a dedicated 'Mandate Agreement', itself a binding international law instrument adopted by the governing Council of the League of Nations, on which the UK sat.

In the case of the Palestine Mandate, the Agreement incorporated the terms of the Balfour Declaration. It expanded out the general objective of the Declaration into a detailed set of objectives for colonial rule. This then formed the ostensible legal basis, as a matter of international law, for how the UK implemented these objectives in the way it administered Palestine. Thus as a matter of international law it is the Mandate Agreement, not the Balfour Declaration as such, that is the key legal instrument.

The Council approved the terms of the Agreement in 1922, in a closed session at St James' Palace in London. However, the entry into force of the agreement was made dependent on whether and when a separate mandate arrangement for Syria was concluded. When that subsequently happened, the Council then decided, on 29 September 1923, one hundred years ago today, that the Palestine Mandate entered into force as a binding international legal instrument.

When it comes to Palestinian demands for a reckoning, and the question of addressing what legal instrument is relevant to these demands, then, it is the Mandate Agreement—its entry into force and subsequent implementation by the UK—that ultimately counts, not the Balfour Declaration. For this, the key centennial anniversary is today.

Common view – colonial peoples did not have a legal right of self-determination at the time of the Mandate

Some critics of the League Council's adoption of the Mandate Agreement, and/or the UK's implementation of it, invoke the idea of a right of self-determination in international law vested in the inhabitants of the territory. Typically, they associate this, somewhat vaguely, with Wilsonian self-determination and the League of Nations. However, the view of international lawyers is that in this period there was no *legal* right of external self-determination—the right to be free from colonial rule—for colonial peoples. This came later, in the second half of the 20th Century. Thus, the Palestinian people may have that legal right now, but they did not have it then. In consequence, it is said, the UK and the League of Nations Council had a free hand on the question of the future of Palestine. If they decided that all or part of it was to be a "national home for the Jewish people", even though most people living in Palestine at that time were not Jewish, there was nothing, legally, impermissible about this. Such an account removes any international law basis for addressing Palestinian demands for a reckoning.

This feeds into the predominant current approaches to the scope of the Palestinian right to self-determination in some Western countries. According to such approaches, things only start once Israel and the territory it claimed in 1948 has been taken into account and excluded from consideration. This limited focus then addresses matters only in terms of Israel maintaining the occupation of the Palestinian territory outside its borders captured in 1967 – the so-called West Bank, including East Jerusalem, and Gaza (with Jerusalem as a whole also treated as a distinct matter). According to this account, the question of Palestinian self-determination is, legally, only a subject addressed by norms that became properly recognized in international law after

the creation of Israel. Israel may be bound by the international law of self-determination and the law on the use of force to end the occupation on an immediate basis (though even this standpoint, which is the position in international law, is not commonly advanced by Western states). But equivalent questions relating to the Mandatory period running up to 1948 are, it is said, by virtue of when in history that period falls, subject to an opposing normative position. At that time, the practice of the UK—which in preventing Palestinian independence and enabling Zionist settler-colonialism echoes Israel in the occupied Palestinian territory since 1967—was supposedly permitted. For the same reason, the Nakba in 1948 did not, therefore, involve the violation of the self-determination right of the Palestinian people in the territory of the newly proclaimed Israeli state.

This feeds into broader international law debates about colonial redress and reparations. In these debates, a similar account is sometimes given to foregoing account of the Palestine Mandate. International law facilitated imperialism and colonialism, it did not prohibit it. Contemporary efforts at redress try to respond to this inter-temporal normative challenge by emphasising ongoing effects and legacies. This temporal shift moves the clock forward into later periods of history where international law standards became different.

A different view

Others, such as Sir Hilary Beckles, chair of the Reparations Commission of the Caribbean Community, CARICOM, challenge the 'it was lawful at the time' narrative, in his case when it comes to the enslavement of people transported to and held and exploited in the Caribbean. Inspired by his work, and also in response to a question put to us by the Palestinian writer and founder of the Palestinian Al-Haq human rights NGO, Raja Shehadeh, concerning the issue of UK responsibility, we decided that it was necessary to revisit the international law arrangements of the Mandate and re-evaluate the received wisdom about these arrangements.

This led to the conclusion that the law is different from how it is commonly understood. The was no internationally valid legal basis for the League to incorporate the Balfour commitment into the Mandate Agreement. And so no legal cover for the UK to implement the commitment in practice. Thus, it is argued, the UK violated international law in doing this. And the creation of Israel in 1948 necessarily involved a violation of the collective legal right of the Palestinian people.

Article 22 and A class mandates

To appreciate how this argument is made, it is necessary to clarify the significance of a third legal instrument that entered into force half-way in the period between the Balfour Declaration of 1917, and the Mandate Agreement entry into force in 1923.

As mentioned, the League of Nations Mandates system was set up legally through the League of Nations Covenant, binding in international law as part of the Treaty of Versailles which

entered into force 1920. In particular, through Article 22 of the Covenant. That article contained a crucial provision. For Mandates covering the former dominions of the Ottoman Empire, what became referred to as 'A' class mandates (the mandates were divided up into three classes), it stipulates that:

> their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.

This is, effectively, a *sui generis* model of self-determination. It is not the same as the immediate right to independence which became the right in international law applicable to people in all colonial territories in the second half of the twentieth century (and so applicable to the Palestinian people in Jerusalem, the West Bank and the Gaza Strip now). But it is close to it, through the requirement that independent statehood is the clear objective, and, moreover, that this should be 'provisionally recognized'. The people in 'A' class Mandates were placed in a privileged category compared to the people of all other colonies, including other classes of Mandate, as far as their entitlement to self-rule in general international law was concerned.

This is commonly ignored because of the lack of such an entitlement for peoples in colonial territories generally, which only came decades later. 'A' class Mandates are sometimes mistakenly lumped together into a general category, whereby self-determination as it came to be understood in the second half of the 20th century did not have any relevance in the earlier period. This oversight treats the position of the people of these Mandates, such as the population of Mandatory Palestine, as if the status of their territory was to be determined at the complete discretion of the League Council and/or the Mandatory authority. Such discretion did indeed prevail in the case of many other colonial territories (until the later emergence of the general right of self-determination in international law). However, things were different for 'A' class Mandates.

The *sui generis* regime of Article 22 was to be in operation from the start of the Mandate. The community that was to be 'provisionally recognized' as an 'independent nation' was that of Mandatory Palestine at that time, the population of which being 90 percent non-Jewish Palestinian.

Contradiction with the Palestine Mandate

There is, therefore, a fundamental contradiction between the provisional independence obligation in Article 22 of the Covenant, and the Balfour Declaration plan enshrined in the Mandate Agreement and implemented by the UK in practice.

We are far from being the first to point out this contradiction. A minority of commentators suggest that it can be somehow reconciled in favour of the Agreement—and so, actually, there

is no contradiction. But most of the actors involved in and reacting to the process of adopting the Agreement, including Balfour himself, and commentators at the time and since, proceeded from an assumption that there was a fundamental contradiction between it and the Covenant. Some criticise the Agreement as an unjustified departure from the Covenant, characterising this as a 'violation' of the Covenant. But they do not then explain whether this had any consequences for the legal effectiveness of the Agreement and, in turn, the lawfulness of UK actions in implementing it. It is as if the Covenant was violated but the Mandate Agreement was nonetheless legally valid insofar as it departed from the Covenant and thus constituted such a violation.

To ultimately the same effect, others assume, without even acknowledging they are doing this, let alone justifying their reasons for doing so, that the Agreement legally-validly overrode the Covenant insofar as there were contradictions between the two.

Either way, then, the suggestion is that the Mandate Agreement was legally effective notwithstanding the fundamental contradiction with the Covenant.

The missing question

What all these approaches ignore is a fundamental legal question that always arises when organs of international organizations—here the Council of the League of Nations—act. Did that organ have the legal competence under the constituent instrument of the organization that it forms part of—the League of Nations Covenant—to modify the operation of a fundamental stipulation of that constituent instrument in the way it did here? And, if it did not, what are the consequences for the legal validity of the provisions of the Mandate for Palestine that contradicted Article 22, and thus the legality of the UK actions whose lawfulness depended on such legal validity?

Although many commentators have addressed the legal status of the Mandate Agreement in the centenary since it entered into force, no-one has considered it in these terms.

The answer to the missing question

According to the general principles of international law relating to the powers of international organizations, the League Council's competence to act was limited: it had to stay within the bounds of the Covenant as the constituent instrument of the organization. In consequence, the Council did not have the power to take action that contradicted the express provisions of the Covenant. Thus, the Council could not validly approve any stipulations in the Mandate Agreement which were incompatible with those provisions. Any such purported approval would involve the Council acting *ultra vires*—beyond its powers. As a result, the relevant approval would be without legal effect—in legal terminology, "void *ab initio*".

In the same way, the UK was bound to respect and comply with the provisions of the Covenant, as part of a binding international treaty, insofar as they related to Mandatory Palestine. This prohibited the UK from any action which did not respect and comply with those provisions. Any breach of this prohibition is not only a violation of international law. Also, necessarily, it could not act as a valid basis for new arrangements which purported to trump the prior relevant stipulations in the Covenant.

The consequence, as a matter of both the limited legal powers of the League Council, and the legal obligations of the UK as a party to the Treaty of Versailles, is as follows. The operative international legal regime for Mandatory Palestine was constituted by the relevant provisions of the League Covenant taken together with *only those elements of the Mandate Agreement compatible with the Covenant provisions*.

It follows that we have to read the Mandate Agreement as if those parts of it implementing the Balfour commitment and contradicting Article 22 of the Covenant are not there. And insofar as the UK followed these invalid parts of the Agreement—which it did in practice—it acted unlawfully. By failing to provisionally recognize Palestinian statehood in 1920s, and, instead, holding onto the territory for a quarter of a century in order to enable the Balfour pledge to be realized, the UK violated international law.

Contemporary accountability

Just as the contemporary inability of the Palestinian people to exercise their right of self-determination has its origins in what the UK did, and did not do, during the Mandate period, the violation of the right of self-determination of the Palestinian people began with the UK in that period, not 1948 or 1967. As a result of its cut-and-run in 1948, the UK has not, since then, been in the same position to terminate the violation it enabled, compared to the period when it was the direct agent of that violation. However, the unbroken factual trajectory of the violation since 1948 means that UK liability for it has operated since, and continues today.

The sacred trust and the possibility of a 'public interest' case brought by a state other than Palestine

A protective obligation of 'trusteeship over people' was adopted to apply to all Mandates under the Covenant. This was, in the terms of Article 22, a 'sacred trust of civilization'. As such, it implicates a general, special global 'community interest' that all states, and the UN, have in both expressing concern about the violation, and supporting redress for it. In international law, certain core obligations have this special status, engaging a global 'good neighbour' principle where everyone is regarded as having a legitimate stake in seeing a core protective norm observed, not just those directly affected when it is violated. Thus, not only the Palestinian people, and the State of Palestine, can potentially invoke UK liability. Also, other states, and the UN as the institutional manifestation of the international community, can do this on a global public interest basis.

The Palestine Mandate Agreement is the key to one of the main avenues of redress here. Each Mandate Agreement, including the Agreement for Palestine, has an international dispute settlement clause. That clause enabled a League member state to bring a case to the League Permanent Court of International Justice if it had a complaint about how the Mandatory state was complying with its obligations under the Mandate. Whereas the League and its Permanent Court are no more, the successor United Nations International Court of Justice in the Hague inherited its predecessor Court's jurisdiction. And the ICJ has already affirmed, in a different context, that the obligations under the Covenant concerning the Mandates did not come to an end with the extinction of the League.

In consequence, any state that was a member of the League of Nations would have standing to bring a case against the UK to the International Court of Justice in the Hague, to ask the Court to provide the reparations sought by the Palestinian people.

Conclusion

The past is present. Not only, as is commonly appreciated, in the ongoing denial of self-determination of the Palestinian people. And the link between this and Israel, in both its 1948 creation in, and post-1967 occupation of the remaining parts of, Palestine. But also, as is much less commonly appreciated, in the origins of the Nakba in the acts and omissions of the UK, the illegality of this, and the possibility of an international remedy today.