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**“International Law and the State of Israel: Legitimacy,
Exceptionalism and Responsibility”
Cork Conference (31 March - 2 April 2017)**

*“Jews, Judaism and the Jewish State: Ethnic Rights and International
Wrongs”*

by

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[delivered at Cork, Ireland, Friday 31 March 2017]

1. It is too often forgotten that the Balfour Declaration was addressed to Jews, not Israelis – for in 1917 the State of Israel did not exist. The Declaration spoke, of course, of “a national home for the Jewish people.” This language was deliberate. In speaking of Jews as a “people” the Declaration acknowledged the reality of Jewish nationality and nationhood – which was why so many prominent, assimilated Jews opposed it. The Jews – the Declaration proclaimed – were a people, and as such they were entitled to “a national home.”
2. This home was to be in Palestine. The Declaration did not side-step the difficulties that this geographical location was bound to pose. It spoke of the

need to protect “the civil and religious rights of existing non-Jewish communities in Palestine.” This language – repeated in the Preamble to the Palestine Mandate (1922) - was also deliberate. The civil (for example, economic and cultural) and religious rights of these non-Jewish communities were to be protected, but not their political rights.

3. We may of course argue about the morality of such a proposal. We cannot in my view argue about its reality. A national home for persons of Jewish ethnicity was to be established in a place called Palestine, and if by that establishment the political rights of existing non-Jewish communities in that place were to be prejudiced, then so be it.
4. That was what the Balfour Declaration said. What it meant was that persons who are Jewish by virtue of ethnicity have the right of settlement virtually anywhere in historic Palestine. This right derived, and derives, from the precise terms of the Palestine Mandate, as given to the United Kingdom by the League of Nations. Article 6 of that Mandate obligated the mandatory power “to facilitate Jewish immigration under suitable conditions and [to] ... encourage... close settlement by Jews on the land, including State lands and waste lands not required for public purposes”.
5. “The land” in this context referred to the land within the geographical limits of the entire territory encompassed by the Mandate, and, incidentally, included - therefore – the West Bank in its totality, and even – in theory - the East Bank. As is well known, however, the British had second thoughts about Jewish

settlement on the East Bank, which was subsequently retitled the Emirate of Transjordan. Jews were prohibited from settling within this Emirate, and even today it is exceedingly difficult (pursuant to a Jordanian law dating from 1954) even if technically not impossible for any ethnic Jew to acquire Jordanian citizenship.¹

6. It is no part of my purpose in this paper to address substantively the status of Jordan either as a state from which Jews are very largely deliberately excluded or as a Palestinian state. I merely draw passing attention to these important considerations and, as I do so, I cannot refrain from noting that the recently suppressed report of the UN's Economic & Social Commission for Western Asia, somewhat provocatively entitled *Israeli Practices towards the Palestinian People and the Question of Apartheid* fails for the most part to consider the historical importance of what might be termed this Jordanian dimension.²

7. But as regards the West Bank – from the River to the Sea – the right of ethnic Jews to establish and maintain communities throughout the land was lawfully exercised by Jewish people during the period 1922-1948. Its exercise was unlawfully suppressed by the government of Jordan, which controlled the

¹ Interestingly, it was none other than Winston Churchill (then British Colonial Secretary) who in March 1921 gave Emir Abdullah the assurance that no Jews would be allowed to settle in Transjordan: W. R. Louis, *The British Empire in the Middle East 1945-1951* (Oxford University Press, New York, 1984), 348.

² The full text of this March 2017 report – suppressed after an international outcry and which was removed from the ESCWA website – may be read at: <https://web.archive.org/web/20170316054753/https://www.unescwa.org/sites/www.unescwa.org/files/publications/files/israeli-practices-palestinian-people-apartheid-occupation-english.pdf> [accessed 19 March 2017]. At page 27 of the report there is one footnoted reference to the original borders of Mandate Palestine having encompassed “Transjordan.”

West Bank from 1948 until 1967, when it fell under the control of the government of the State of Israel. Happily, this control has enabled the right to be exercised once more.

8. We might note, therefore, that a significant number of the Jewish West Bank settlements now apparently regarded as illegal (and condemned as illegal in Resolution 2334³ adopted by the Security Council of the United Nations Organisation on 23 December 2016) were in fact specifically and explicitly authorised and recognised by the British Mandatory administration: for instance the Jewish settlements of *Atarot* and *Neve Yaakov*, north of Jerusalem, and *Mount Scopus* in East Jerusalem – as well as the Jewish Quarter of the Old City of Jerusalem and numerous Jewish settlements in Hebron.

9. It is well known that during the 1920s, 1930s and 1940s the Jewish National Fund purchased, quite legally, extensive parcels of land in and around Jerusalem, between Nablus, Jenin and Tulkarm, and in Bethlehem as well as Hebron. Many of these parcels were then sold on to Jewish purchasers, and although illegally confiscated by occupying Jordanian forces they of course remain Jewish-owned: there is nothing remotely ‘illegal’ about them.⁴

³ For the full text of this resolution see: <https://www.un.org/press/en/2016/sc12657.doc.htm> [accessed 07 January 2017]

⁴ See Lyn Julius, ‘How the EU’s settlement policy legitimises mass dispossession,’ at: <http://www.jpost.com/Blogs/Clash-of-Cultures/How-the-EUs-settlement-policy-legitimises-mass-dispossession-364448> [accessed 07 January 2017]. The Jewish property rights in respect of such settlements appear to have been acknowledged – at least in private – even by Palestinian negotiators. See <http://www.ajtransparency.com/en/projects/thepalestinepapers/201218203525218283.html> [accessed 08 January 2017]

10. It is important to remember in this context that the Palestine Mandate has never been rescinded. On the contrary, the rights of ethnic Jews, as referred to in the Mandate, have been expressly guaranteed by the founding Charter of the United Nations Organisation.

11. Article 80 of the Charter of the United Nations states that “Nothing in this Chapter [dealing with the establishment of Trusteeships and Trustee Agreements] shall be construed in or of itself to alter in any manner *the rights whatsoever of... any peoples or the terms of existing international instruments* to which Members of the United Nations may respectively be parties.” [author’s emphasis].

12. No Trustee Agreement has ever been entered into relating to the Palestine Mandate. The Mandate itself was proposed to be terminated by virtue of UN Resolution 181 (29 November 1947), which sought to partition Palestine west of the Jordan River. But, as is well known, the Arab states rejected that resolution,⁵ which has remained unenforced and I would say unenforceable. So the Mandate itself has neither been revoked nor suspended. It is, therefore, in pursuance of Article 80 of the UN Charter, an “existing international instrument,” whose efficacy and purport that Article intentionally guarantees.⁶

⁵ Indeed, the armed assault instigated by Arab states upon Israel in 1948 had as its express purpose the frustration of the UN resolution. This appears to be the only example of its kind in the entire history of the UN.

⁶ My attention has been drawn to Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press, 2008), 1331, fn 221, where the advisory opinion of the International Court of Justice in relation to the status of South-West Africa in 1950 is discussed. In that advisory opinion the Court

13. The government of the State of Israel – which currently controls and administers parts of the territory known as the West Bank – is, therefore, under a legal obligation to ensure that the right of ethnic Jews to settle within that territory is honoured and facilitated.⁷

14. As a matter of international law, Israel is, furthermore, fully entitled and indeed obligated not merely to permit the voluntary settlement of ethnic Jews beyond the so-called Green Line, but to take any step and all such other steps as may be deemed necessary to protect ethnic Jewish populations so settled. These steps may include the building of walls, fences and ramparts, the imposition of curfews, the suppression of assemblies, the erection of checkpoints and gun emplacements, and the interdiction of materials likely to incite violence against persons of Jewish ethnicity.

15. In summary, in promoting the settlement of Jews in Judea and Samaria, the Israeli authorities are acting in the capacity of administrator in succession to the British rather than as occupier in succession to the Jordanians. It is for this reason that the applicable regime is the Mandate as continued in accordance

held that the supervisory responsibilities of South Africa under the mandate to administer the territory of South-West Africa (Namibia) “continued beyond the dissolution of the League of Nations and were in essence succeeded to by the United Nations. This was in the context of the fact that the mandate itself constituted an international status for the territory which therefore continued irrespective of the existence of the League and partly because the resolution of the Assembly of the League dissolving the League of Nations had declared that the supervisory functions of the League were ending, not the mandates themselves.”

⁷ The legality of Israel’s occupation of the West Bank (which is not the subject of this paper) was confirmed by the Versailles Court of Appeals in an historic judgment delivered on 22 March 2013: see <http://www.dreuz.info/2017/01/13/israel-is-the-legal-occupant-of-the-west-bank-says-the-court-of-appeal-of-versailles-france/> [accessed 17 January 2017]

with Article 80 of the UN Charter, and not Article 49(6) and other provisions of the 4th Geneva Convention.

16. What do I mean by the term “ethnic Jews” in this context? I mean not merely persons following the Jewish religion in one or other of its many forms, but persons who identify themselves as Jewish by virtue of a shared ancestry, history, language and/or culture. This is the essence of ethnicity, which is wider than religious practice but which must also be differentiated from “race,” which is a purely biological term. I refer in this context to the seminal judgment of the [British] House of Lords in *Mandla & Another v. Dowell Lee & Another* (1983), in which it was held that the term “ethnic” was to be construed “in a broad cultural and historic sense,” and that an “ethnic group” had to have “a long shared history” and “a cultural tradition of its own ... often but not necessarily associated with religious observance.”⁸

17. Whether successive governments of the State of Israel are themselves entirely happy with the state of affairs I have been delineating is a moot point. I have been struck by instances of extreme reluctance on the part of Israeli government spokespersons to be drawn into arguments relating to the legality of Jewish communal settlements on the West Bank. On 14 October 2014, for example, Israel’s then ambassador to the UK, Daniel Taub, was repeatedly quizzed on this topic on BBC Radio 4, and repeatedly failed to give a direct answer.

⁸ The judgment is given at: http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm [accessed 12 April 2015]

18. But facts are facts. And we might note in this connection that UN Resolution 242, passed after the Six-Day War of 1967, calls only for the withdrawal of Israeli armed forces from territories occupied by Israel as a result of that war, and then only as part of a comprehensive peace settlement. It does not call for the withdrawal of Israeli civilians, and certainly not of Jews - whether Israeli or not.⁹

19. We might also note that on the subject of Jewish as distinct from Israeli settlements and rights UN Resolution 2334 is completely silent.

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⁹ The relevant clause (clause 1) reads: “that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;”