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LAW AND THE ARAB–ISRAELI CONFLICT

THE TRIALS OF PALESTINE

STEVEN E. ZIPPERSTEIN

LAW AND THE ARAB–ISRAELI CONFLICT

During the British Mandate for Palestine (1922–1948), Arabs and Jews repeatedly used the law to gain leverage and influence international opinion, especially in three dramatic and largely forgotten trials involving two issues: the interplay between conflicting British promises to the Arabs and Jews during World War I, and the parties' rights and claims to the Wailing Wall.

Focusing on how all three parties – Arab, Jewish, and British – used the law and the legal process to advance their objectives during the Mandate years, this volume reveals how the parties availed themselves – with varying degrees of success – of the law and the legal process. The book examines various legal arguments they proffered, and how that early tendency to resort to the law as a tool, a resource, and a weapon in the conflict has continued to this day. The research relies almost entirely on primary source documents, including transcripts of the public and secret testimony before the Shaw, Lofgren, and Peel Commissions, diaries, letters, government files, and other original sources.

This study explores the origins of many of the fundamental legal arguments in the Arab–Israeli conflict that prevail to this day. Filling a gap in research, this is a key text for scholars and students interested in the Arab–Israeli conflict, Lawfare, and the Middle East.

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The Trials of Palestine

Steven E. Zipperstein

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CONTENTS

List of figures
List of tables
List of maps
List of cases and statutes
Preface and explanatory note
Acknowledgments

Introduction

1 McMahon-Hussein, Balfour, and the legality of the Jewish national home

2 The Wailing Wall: conflicting legal claims

3 The Shaw Commission

4 The Lofgren Commission

5 The Peel Commission

6 The early legal battles and their relevance today

Conclusion

Bibliography
Index

FIGURES

1.1 Abdullah, first King of Jordan, seated at right
1.2 Sherif Hussein of Mecca
1.3 Sir Henry McMahon
1.4 Weizmann and Feisal, 1919
1.5 Feisal
1.6 Herbert Samuel
1.7 Lord Balfour
1.8 The Balfour Declaration
2.1 Aerial view of the Old City of Jerusalem, 1931
2.2 Aerial view of the Moghrabi Quarter and Wailing Wall
2.3 View of the Moghrabi Quarter and Wailing Wall
2.4 View from the south showing the Wall and narrow pavement area in front of the Wall. The Moghrabi Quarter lies immediately to the west of the pavement
2.5 Wailing Wall, 1865
2.6 Wailing Wall, late 19th/early 20th century
2.7 Wailing Wall, 1870s
2.8 Typical crowd at the Wailing Wall for *Yom Kippur*
2.9 Wailing Wall, area of New Door
2.10 New Door to Wailing Wall
2.11 Wailing Wall, 1910
2.12 Wailing Wall, 1929
2.13 Chancellor Proclamation, 1 September 1929
2.14 Mohamed Ali Pasha's letter
3.1 Sir Boyd Merriman
3.2 Sir Walter Shaw (front center), with Sir Henry Betterton (front left), Henry Snell (front right), R. Hopkin Morris (rear left), and T.I.K. Lloyd (rear right)
4.1 Eliel Lofgren (center), Charles Barde (front left), and C.J. Van Kempen (front right)
4.2 Dr. Mordechai Eliash
4.3 Auni Bey Abdul Hadi at the London Conference, 1939
5.1 Lord Peel (third from left) and other members of the Palestine Royal Commission in the garden of the King David Hotel in Jerusalem immediately following their first session, 12 November 1936
5.2 Sir Winston Churchill
5.3 Haj Amin al-Husseini, Grand Mufti of Jerusalem, departing after his testimony
5.4 Lord Peel, Sir Horace Rumbold, and Prof. Reginald Coupland with the Emir Abdullah,

January 1937
5.5 Chaim Weizmann arriving for his testimony
6.1 Destruction of the Moghrabi Quarter and Preparation of the Wailing Wall Plaza, June 1967

TABLES

3.1 Shaw Commission: key players
4.1 Lofgren Commission: key players
5.1 Peel Commission: key players

MAPS

1.1 Ottoman administrative districts (Cmd. 5957)
1.2 The Sykes-Picot Agreement
5.1 The Peel Commission partition plan (Cmd. 5854)

CASES AND STATUTES

Cases

The Mavrommatis Palestine Concessions, Permanent International Court of Justice, Series A, No. 2 (30 August 1924)
Lehrer v. Postmaster General, High Court No. 88, Supreme Court of Palestine Sitting as High Court of Justice (1928)
District Governor, Jerusalem-Jaffa District v. Suleiman Murra, 1926 A.C. 321
Attorney General v. Karaewany, Criminal Case No. 192/46, District Court of Jerusalem, Judgment of Acquittal (18 November 1946)
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, International Court of Justice (2004)
Public Committee Against Torture v. Government of Israel, HCJ 5100/94 (1999)

Statutes

Commissioners' Powers (Conferment of) Ordinance, No. 71 (1936)
International Criminal Court (ICC) Statute 17 July 1998, in force 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, arts. 17(1)d), 53(2)(b)

PREFACE AND EXPLANATORY NOTE

An often-overlooked aspect of the early years of the Arab–Jewish experience in Palestine involves the significant role the law played in the conflict. The parties constantly invoked the Petition process, developing a custom and practice of seeking relief from a succession of outside authorities, from the Ottomans to the British to the League of Nations. The British also relied on legal frameworks, treating the *Status Quo* as a principle of substantive law, issuing various White Papers replete with legal language and principles, seeking a formal legal opinion from the Law Officers of the Crown regarding Jewish and Muslim rights at the Wailing Wall, and relying repeatedly on Commissions of Enquiry to investigate and adjudicate violent outbreaks and their underlying causes.

By the late 1920s and 1930s the conflict had become as much a battle fought in the courtroom as in the streets, playing out in three separate trials and focusing primarily on two issues: the legality of the Balfour Declaration and the Mandate for Palestine, and the parties' rights and claims to the Wailing Wall. In two instances – the Shaw Commission in 1929 and the Lofgren Commission in 1930 – Arabs and Jews faced off against each other in full-blown, dramatic trials before British and international judges, in which outside counsel made opening statements and closing arguments, introduced exhibits, and cross-examined each other's witnesses under oath. In a third instance, the 1936–37 Peel Commission, the parties used witness testimony and extensive written submissions to continue their legal advocacy.

The parties also engaged in sporadic settlement discussions regarding the Wailing Wall, including multiple Jewish offers to buy the Wall and/or the then-narrow strip of pavement in front of the Wall. The settlement efforts also included – surprisingly and never before revealed – an Arab offer to *sell* the Wall to the Jews in late August 1929.

Many observers have adopted the term "lawfare" to describe what they claim is the relatively recent practice of the parties to use the law as a weapon against each other. This study demonstrates, however, that the parties began using the law and legal procedure more than a century ago to advance their positions and influence international opinion. Moreover, the legal arguments and procedural tactics the Arabs and Jews honed during the 1920s and 1930s continue resonating to the present day.

This study, therefore, attempts to fill the gap in research regarding these early legal battles during the Mandate years. The study relies almost entirely on primary source documents, including the transcripts of the public and secret testimony before the Shaw, Lofgren, and Peel Commissions, the exhibits, briefs, and memoranda submitted to the Commissions, and the contemporaneous statements, diaries, letters, British and Palestine Government files, and other original source material shedding light on how all three parties – Arab, Jewish and British – used the law as a vehicle to advance their objectives and influence international opinion during the

Mandate years. Collections of primary source documents were also consulted, and are cited accordingly. A broad range of secondary sources was also consulted, to gain the benefit of other contemporaneous and more modern perspectives.

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project, without the constant support and encouragement from my wonderful wife Diane Zipperstein. I dedicate this book to her, with all my love.

INTRODUCTION

The early years of the Arab–Israeli conflict have been studied extensively. Scholarly attention has focused on the political motives and Machiavellian machinations of various British governments before and during the Mandate period (1922–1948), along with the rise of Arab nationalism and the progress of Zionism. Several works have examined the early and occasional violent clashes between Arabs and Jews, stimulated by conflicts over immigration, land acquisition, and provocative expressions of nationalist and religious sentiment.[1]

But no study has yet focused on how all three parties – Arab, Jewish, and British – used the law and the legal process during those early years in an attempt to vindicate their positions and gain leverage against each other and with the international community. This study endeavors to fill that gap, exploring the early legal encounters between the parties and the origins of many of the fundamental legal arguments in the Arab–Israeli conflict that prevail to this day.

The intent of the study is not to decide which party had (or has) the better legal arguments, but instead to show *how* the parties availed themselves – with varying degrees of success – of the law and the legal process during those early years of the conflict. We will examine the various legal arguments they proffered, and how that early tendency to resort to the law as a tool, a resource, and a weapon in the conflict has continued to this day.

The study will focus on the two most important legal battles of those early years: the fight over the legality of the Balfour Declaration and the Mandate for Palestine, and the clash over the parties' respective legal rights and claims to the Western or Wailing Wall[2] in Jerusalem. Both issues were the subject of a wide variety of legal conflicts between the parties during the 1920s and 1930s, and both issues continue resonating today. One historian, writing in the late 1970s about the Wall, noted:

> "Wall politics" seem to be very much a part of the current antagonism between occupier and occupied. And it is not surprising that … the interpretations which the various historians give to the incidents of fifty years ago are closely tied to the solutions which they recommend for the larger political problems, which include the disposition of Jerusalem and the nature of the entity(ies) to be constituted as the solution to the Israel/Palestine conflict. Israeli retention of at least the Wall and plaza is put forth as a minimum requisite by Zionists … And a Jerusalem restored to its fundamentally Arab characteristics is envisioned by those who retain the hope for a democratic secular state liberated from Zionist control … Thus, to Arab and Israeli political leaders as well as policy-makers elsewhere who seek sponsorship of a peace settlement, the "battle for the Wall" and the manner in which it has been waged are inescapable issues of "contemporary history."[3]

By examining how the Arabs, Jews, and British used legal arguments and legal procedures during the early years of the conflict, we can gain an understanding of the foundations of many of the arguments framing the legal debate today, as well as the political context in which the legal battles were fought.

Indeed, the Palestinians have repeatedly turned to the law in the modern era, evoking the

memory of the early legal struggles and the key role of the law in today's conflict. For example, in October 2016 the official Palestinian news agency announced a year-long campaign marking the 100th anniversary of the Balfour Declaration, demanding the United Kingdom "atone for the big crime Britain had committed against the Palestinian people."[4] In 2017, as part of that campaign, the Palestinians increased the pressure, insisting Britain either voluntarily apologize for and rescind the Balfour Declaration, *or face litigation* forcing it to do so.[5]

The Palestinians have also continually resorted to legal formulations in expressing their opposition to the Israeli occupation of the West Bank, describing the occupation and Israeli settlement activity as "illegal" and lacking "respect for the law."[6] The Palestinians successfully challenged the legality of Israel's "Wall of Separation," obtaining a nearly unanimous advisory ruling from the International Court of Justice in 2004.[7] The Palestinian-founded Boycott, Divestment, and Sanctions (BDS) movement of recent years justifies itself as a *legal* response to *illegal* Israeli settlement activity.[8]

The Palestinians also successfully persuaded the United Nations Security Council in December 2016 to adopt Resolution 2334 (with the United States abstaining), declaring Israeli settlement activity a "flagrant violation" of international law.[9] The Palestinians increased the legal pressure on Israel even further by successfully joining the International Criminal Court (ICC) in January 2015,[10] and then in May 2018 formally demanding the ICC's Chief Prosecutor investigate potential criminal charges against Israeli military and civilian officials for alleged violations of international law in the West Bank and Gaza.[11]

These more recent legal battles demonstrate how the Palestinians, in particular, continue to view the law as a key resource and weapon in the conflict with Israel, and as a key lever to influence international public opinion, just as they, the Jews, and the British authorities each used the law during the early years of the conflict.[12]

To understand the root of these legal issues requires an examination of the relevant historical background to the Balfour/Mandate and Wailing Wall issues.

History records the ancient presence of both Israelite (later Jewish) and non-Israelite peoples in the areas including modern-day Israel, the West Bank, Gaza, and Jordan. Following the Roman conquest in 70 A.D., a small number of Jews remained more or less continuously in Jerusalem, Tzfat, Hebron, and Tiberias, including after the Muslim conquest in the first half of the 7th century. Zionist Jews began arriving in Ottoman Palestine from Europe in the late 19th and early 20th centuries, buying land, draining swamps, establishing small settlements, and building nascent cities, sparking occasional conflicts with the local Arab population.[13]

The parties to those early conflicts availed themselves of the Ottoman Petition (*Arzuhal*) system as a means of taking their grievances directly to the Sublime Porte for adjudication.[14] For example, in 1891 several Arab notables from Jerusalem petitioned the Ottoman government in Constantinople, "demanding the prevention of further immigration of Jews and purchase of land by them."[15] Arab small farmers also used the petition process to complain about Jewish land purchases from absentee landowners in Rehovot and the Jezreel Valley, asking either to remain on the purchased land or receive compensation with grants of alternative Imperial land.[16]

Jews also resorted to the petition process, in one instance seeking permission from the Sultan to construct agricultural buildings in Rishon Le'Zion, Nes-Ziona, and Rehovot, and to drain swamps near Petach Tikvah.[17] The Jewish community of Jerusalem also used the petition

process in approximately 1890 to obtain permission from the local Ottoman authorities to repair and replace the pavement in front of the Wailing Wall.[18]

In addition to disputes over land use, the Muslim[19] community also petitioned in 1911 for a ruling banning Jews from bringing chairs to prayer services at the Wailing Wall. The Muslim petitioners feared the Jews were bringing chairs and benches to the Wall as a first step toward asserting Jewish ownership over the entire *Haram al-Sharif* (Temple Mount area) and eventually rebuilding the ancient Jewish Temple. The Ottoman Authorities granted the Petition, ruling it "*inadmissible by Law* in all respects that there should be placed chairs, screens, and similar articles, or any innovation be made which may indicate ownership."[20] This ruling and the dispute over the parties' respective legal rights at the Wall and the pavement in front of the Wall received considerable attention during later legal proceedings between the parties.

These early legal encounters established a pattern in which both Arabs and Jews, lacking military, economic, or diplomatic power, repeatedly turned to the law and legal procedure as a means of pressing their grievances and claims against each other. The parties also used the law as a means of jockeying for political leverage both with the British government and the broader international community, especially the Permanent Mandates Commission of the League of Nations, vested with oversight authority over the British administration of Palestine.

The Jewish and Muslim practice of raising legal issues via the petition process continued following the collapse of the Ottoman Empire and the arrival of British military rule at the end of World War I. For example, a 4 November 1918 Arab petition to the British military authorities protested a Jewish celebration of the first anniversary of the Balfour Declaration.[21] Two weeks later another Arab petition protested Jewish immigration to Palestine.[22]

The positions advanced during these early years of legal conflict between the parties contained the seeds of many of the arguments still asserted today. Occasionally, however, the positions the parties took during the early years of the conflict differed sharply from the positions they take today. For example, in today's world it would be difficult to imagine the Jews disclaiming ownership of the Wailing Wall, yet that was exactly the position they took during the early 1930s.[23]

Likewise, it would be equally difficult to imagine the Palestinian Authority or Hamas demanding the West Bank and Gaza be merged into Syria, rather than forming a stand-alone Palestinian State. But in late November 1918 a Palestinian Arab group filed a petition with the French Commissariat in Jerusalem, "begging that Palestine might be formally included in Syria."[24] In February 1919, moreover, the Arab Delegation from Palestine to the Versailles Peace Conference submitted a formal petition (labeled as a "Decision"), urging that rather than be recognized as an independent Arab state, Palestine be deemed part of and merged into Syria:

> We consider Palestine as part of Arabic Syria as it has never been separated from it at any time. We are connected with it by national, religious, linguistic, natural, economical and geographic bonds … In view of the above we desire that our distinct Southern Syria or Palestine should not be separated from the Independent Arabic Syrian Government.[25]

We will see additional examples of interesting and sometime surprising legal arguments and concessions made by the parties in our examination of various legal proceedings during the Mandate years.

Following the onset of British civilian rule in 1920, Arabs and Jews in Palestine (and the British authorities themselves) increasingly relied on and invoked legal procedures and legal

arguments on a broad range of issues, most notably (i) the proper interpretation of Britain's promises in 1915 to entice the Arabs to rebel against Turkey in return for independence, and the impact of those promises on the legality of the November 1917 Balfour Declaration and the 1922 Mandate for Palestine; (ii) the separate Arab assertion that the Mandate was unlawful because it conflicted with the Covenant of the League of Nations; (iii) whether Britain was implementing the Mandate in a manner consistent with its terms; (iv) the respective rights and claims of the parties to the Wailing Wall and the then-narrow strip of pavement in front of the Wall; and (v) the causes of violent outbreaks in Palestine during the 1920s and 1930s.[26] We will examine the historical and legal background to these issues in Chapter 1 and Chapter 2.

The first major outbreak of violence in British Palestine occurred during the *Nebi Musa* pilgrimage in and near Jerusalem in early April 1920. The British High Commissioner for Palestine, Sir Herbert Samuel, appointed the first of a series of Commissions of Enquiry established during British rule to investigate Arab–Jewish disputes. This first Commission, a Military Court of Inquiry chaired by Major General P.C. Palin, took testimony from 152 witnesses over 50 days and issued a lengthy report.[27]

The next Commission, chaired by Palestine Chief Justice Sir Thomas Haycraft, to investigate the causes of the Jaffa riots during the first week of May 1921 and subsequent incidents in June and July 1921 conducted ten weeks of hearings from 12 May to 26 July 1921, taking testimony from 291 witnesses. The Palin Court of Inquiry allowed the parties to be represented by counsel,[28] but the Haycraft Commission did not, relying instead on three "assessors" to represent the Muslim, Christian, and Jewish communities and assist with witness examinations.[29] The Palin report was issued as a secret document, while the Haycraft report was made public.

The British Government also realized during the 1920s that the holy places in Jerusalem, especially the Wailing Wall, represented potential flash-points for controversy and confrontation. Article 13 of the Palestine Mandate required Britain as the Mandatory Power to preserve the *Status Quo*, essentially a legal concept governing the rights of the various religious communities at the holy sites. The British defined the *Status Quo* by reference to the pre-existing *legally authorized* practices of the Muslim and Jewish communities under Ottoman rule.[30] A Mandatory Government official wrote a comprehensive memorandum in July 1927 attempting to define the *Status Quo* for all Palestinian holy sites (Muslim, Christian, and Jewish), including the Wailing Wall.[31] This memorandum became the baseline legal document for implementing the Mandate's requirement that Britain safeguard the pre-existing, legally recognized rights of the different religious communities at the holy sites.

The Mandatory Government's interpretation of the *Status Quo* as an enforceable legal principle frequently led to controversy regarding the Wailing Wall, particularly during Passover 1922,[32] Yom Kippur 1923,[33] and Yom Kippur 1925.[34] The most notable confrontation occurred on Yom Kippur 1928, when the British Deputy District Commissioner for Jerusalem ordered the forcible removal of a screen the Jews had placed on the pavement in front of the Wall to divide men from women during prayer services.[35] The ensuing controversy led the Jews to resort once again to a legal remedy, this time filing a Petition with the League of Nations seeking redress.[36]

The Muslims, for their part, began filing petitions "at the rate of probably one protest a month" with the British authorities from 1922 onward, objecting to "illegal Jewish activities at the Wall."[37] The British Government also responded with a legal document, issuing a White Paper in November 1928 officially defining the *Status Quo* regarding the respective rights of Muslims

and Jews at the Wailing Wall.[38] In August 1929 another series of incidents occurred at the Wall, culminating in a bloody week of rioting and violence in Jerusalem, Hebron and elsewhere in Palestine.

These disputes and the accompanying violence ultimately led the British (with strong lobbying from the Zionist leadership, and over initial Arab opposition) to convene two Commissions of Enquiry. The first, known as the Shaw Commission, was formed in the fall of 1929 to determine the causes of the August 1929 violence in Palestine. The second, known as the Lofgren Commission, was tasked several months later with the approval of the League of Nations to determine the respective rights and claims of Muslims and Jews to the Wailing Wall.

The Shaw and Lofgren Commissions conducted lengthy, intensive, and heavily litigated quasi-judicial, trial-type public proceedings. The parties treated the proceedings as full-blown trials, engaging outside lawyers to make opening statements and closing arguments, to introduce documents, photographs, and other exhibits, and to cross-examine each other's witnesses under oath.

While some scholars have mentioned these proceedings (particularly the Shaw Commission) in passing or somewhat briefly in various studies of the Mandate period, thus far neither Commission has received the in-depth attention they deserve. Close study of the very lengthy transcripts of those proceedings, including the opening statements and closing arguments of counsel, the testimony of witnesses (especially the public testimony of the Grand Mufti of Jerusalem, Haj Amin al-Husseini, and the secret, *in camera* testimony of Sir Winston Churchill, Chaim Weizmann, David Ben-Gurion, and others), the highly adversarial cross-examinations, and the documentary evidence reveals the foundations for many of the same arguments the parties continue to invoke to the present day. The transcripts read very much like any modern-day, hard-fought, high profile courtroom drama, with the lawyers frequently clashing bitterly with each other, with witnesses, and even with the Commissioners themselves.

The Shaw Commission proceedings were also noteworthy because the Mandatory Government itself appeared as a party. The Government bypassed its own Attorney General (Norman Bentwich, disqualified because he was a Jew) and appointed a pugnacious junior barrister to represent its interests before the Commission. One of the many fascinating aspects of the Shaw Commission hearings was how the Mandatory Government, which initially proclaimed its neutrality, quickly became a highly partisan player in the proceedings, joining the fray as both accused and accuser, once it became clear the lawyers for both the Arab and Jewish sides were challenging the actions and policies of the Mandatory Government and the competence of various Mandatory Government officials.

The Shaw Commission conducted a total of 47 public sessions in Jerusalem between 24 October and 27 December 1929, finally issuing its report in late March 1930.[39] The report, which found fault on both sides but exonerated the Mandatory Government and the Mufti, provoked bitter reactions from the Zionist leadership.

The Report of the Shaw Commission also attracted the interest of the Permanent Mandates Commission (PMC) of the League of Nations, responsible on behalf of the Council of the League for overseeing all Mandatories in the performance of their duties. The PMC met in June 1930 in Extraordinary Session to consider the Shaw Commission's findings, as well as a broad range of other issues the Muslims and Jews had raised via the petition process.[40] The Minutes of the PMC's deliberations on the Shaw Commission report, including the manner in which the

PMC grilled various British officials, provide a fascinating window into the international community's view of the Arab–Jewish conflict in Palestine at the time, contrasting sharply and quite dramatically with the modern-day United Nations approach to the conflict. We will examine the Shaw Commission and reactions to its report in Chapter 3.

The Lofgren Commission has been all but forgotten by historians.[41] The Commission was constituted soon after the completion of the Shaw Commission hearings, and represented Britain's attempt to comply with its obligation under Article 14 of the Mandate[42] to determine the rights and claims of the Muslim and Jewish communities to the Wailing Wall and the pavement in front of the Wall. At that time, unlike today, there was only a narrow strip of pavement sandwiched between the Wall on one side and an area of small dwellings for Moroccan/Moghrabi pilgrims and workers on the other side. Britain asked the League of Nations for approval to appoint the Commission, which the Council of the League granted on condition that no Britons be members.[43] The British government appointed the Swedish lawyer and diplomat Eliel Lofgren to Chair the Commission, along with a Swiss judge and a Dutch official.[44]

The Lofgren Commission conducted hearings for an entire month in Jerusalem (June–July 1930).[45] Once again the Arab and Jewish sides were represented by counsel who made opening statements and closing arguments and cross-examined each other's witnesses. While the Shaw Commission published the transcripts of the public testimony, the Lofgren Commission chose not to publish any transcripts, sending the typewritten record of the proceedings to the Colonial Office Library for posterity.[46]

The Lofgren Commission transcript reveals much of the same legal sparring as occurred before the Shaw Commission, with some of the same lawyers and witnesses appearing before both commissions. The Lofgren Commission issued its report and verdict in December 1930. Neither side was happy with the outcome, but both seemed grudgingly to accept it.[47] We will examine the Lofgren Commission in detail in Chapter 4.

No discussion of the legal disputes of the 1920s and 1930s regarding the Wailing Wall would be complete without examining the various attempts by the parties to settle their differences outside the courtroom. The Jews had made several unsuccessful overtures beginning in the late 1800s about buying the Wall and the pavement area (including the Moghrabi dwellings), and in the late 1920s they tried again, only to be rebuffed by the Mufti. Those overtures are well-known and have been written about several times. Also well-known were the efforts by some Jews to urge the British Government to use the legal power of eminent domain to expropriate the Wall and sell it to the Jews.

Less-known, but revealed in the files of the Colonial Office, in the published diary of the head of the Palestine Zionist Executive and the unpublished letters of the former British High Commissioner for Palestine, were the unsuccessful efforts of the Lofgren Commission and a Mandatory Government official to broker a settlement of the Wailing Wall dispute during and after the completion of the Lofgren Commission hearings.

But even less-known, and never previously revealed, was an extraordinary offer from a prominent member of the Egyptian royal family, Prince Mohammed Ali Tewfik Pasha (builder of the famous Manial Palace on Rhoda Island on the Nile River in Cairo), to *sell* the Wall to the Jews for an asking price of £100,000.[48] The Prince conveyed his offer in a letter addressed to the British High Commissioner for Palestine in late August 1929, which the Prince hand-delivered to

the British Ambassador in Istanbul. The Ambassador did not forward the letter to his colleague in Jerusalem, sending it instead directly to London, where it remained filed away for the next 90 years.[49] This appears to be the only *Muslim* offer ever to *sell* the Wall to the Jews as a means of settling their legal dispute. We will examine in Chapter 2 this hitherto unknown and perhaps Quixotic attempt to settle the conflicting Muslim and Jewish legal claims regarding the Wailing Wall.

Even after the Shaw and Lofgren Commissions completed their work, the British Government once again felt compelled in 1936 to appoint another Commission, this time a Royal Commission chaired by Lord Peel. The Peel Commission's Terms of Reference were laden with legal language and legal inquiry. The Commission was asked to determine the causes of recent violence in Palestine, to examine how Britain was "implementing the Mandate" and "complying with its obligations" as Mandatory to both the Jewish and Arab communities, to decide whether either community had any "legitimate grievances" based upon a "proper construction" of the Mandate's terms, and, to the extent any such grievances were "well-founded," to make remedial recommendations.[50]

Unlike the Shaw and Lofgren Commissions, the Peel Commission, which ultimately recommended the original version of the "two-state solution," partitioning Palestine into separate Jewish and Arab states, did not allow the parties to engage counsel, or to cross-examine each other's witnesses.[51] Nevertheless, the Peel Commission spent months hearing testimony, both in public and secretly *in camera*, from the most prominent figures on both sides, including David Ben-Gurion, Chaim Weizmann, Golda Meir, the Grand Mufti Haj Amin al-Husseini, as well as Winston Churchill and David Lloyd George. The Commissioners questioned the witnesses as effectively as would any lawyers or judges. The testimony sometimes produced surprising and unexpected results, which we will examine in Chapter 5.

The legal issues examined by the Shaw, Lofgren, and Peel Commissions continue to reverberate today. Accordingly, Chapter 6 will examine how both sides have continued using the law and the legal process to gain leverage against each other and influence international opinion in the conflict. Chapter 6 and the concluding chapter will also examine whether any lessons can be gleaned from the parties' early experiences using the law and the legal process as a tool or weapon in the conflict, including whether any role exists for the law to play in helping resolve the conflict today. Is there any possibility of achieving peace through litigation? Or should the parties realize, based on their experiences before the Shaw, Lofgren, and Peel Commissions, that the law can provide only a limited framework for conflict resolution, given the extraordinary religious and political issues at stake?

The trials before the Shaw, Lofgren, and Peel Commissions form a vital part of the history of Mandatory Palestine, shedding much light on the key role of the law and the interplay between law and politics during the early years of the conflict and today.

Notes

1 *See, e.g.* Y. Porath, *The Emergence of the Palestinian-Arab National Movement*, 1918–1929 (Frank Cass, 1974); H. Cattan, *Palestine and International Law: The Legal Aspects of the Arab–Israeli Conflict* (Longmans, 1976).

2 The terms "Western Wall" and "Wailing Wall" are used interchangeably in this study. The Arabic name for the Wall, "*al Buraq*," is also used, as well as the Hebrew "*Kotel Ha'Maaravi*."

3 M.E. Lundtsen, *Wall Politics: Zionist and Palestinian Strategies in Jerusalem, 1928*, Journal of Palestine Studies 8:1 at 5 (1978).

4 Palestinian News and Information Agency (WAFA), "Palestinians Prepare to Mark One Hundred Years of Balfour Declaration" (24 Oct. 2016), http://english.wafa.ps/page.aspx?id=G8NFN5a50719869123aG8NFN5, accessed 25 August 2019.

5 "Palestinian Authority Plans to Sue UK over Balfour Declaration," Arab News, 4 Nov. 2017, www.arabnews.com/node/1187831/middle-east, accessed 25 August 2019 ("The Palestinian Authority plans to sue the UK over the 100-year-old Balfour Declaration, which paved the way for the creation of Israel. It will hire a British law firm to pursue an apology, and plans to explore similar actions in European and other international courts, according to Foreign Minister Riad Malki. 'The Palestinian government has made every effort to persuade the British government to abandon its decision to celebrate the centennial of the Balfour Declaration,' Malki said in an emailed statement quoted by Bloomberg. Palestinians 'will exhaust all possibilities for a partial realization of the stolen justice that was executed by Britain through its ominous promise.'").

6 *See, e.g.* Palestinian News and Information Agency press release, "Ashrawi: 'With the Expansion of its Illegal Settlement Enterprise, Israel Seeks not only to Defy but to Defeat the Whole World'" (23 Aug. 2018), http://english.wafa.ps/page.aspx?id=55Kui6a98880474429a55Kui6, accessed 25 August 2019; Palestine Liberation Organization website, Dr. Saeb Erakat, Secretary General of the P.L.O., "The Grinch 'Occupation' who Decided to Steal the Spirit of Christmas," (26 September 2018) (describing Israeli settlement activity in the West Bank as "part of Israel's bank of violations to international law," and calling upon the International Criminal Court with the "utmost urgency and importance" to "accelerat[e] the process of investigating Israeli crimes"), www.plo.ps/en/article/119/DrSaeb-Erakat-Secretary-General-Of-the-P-LOThe-Grinch-%E2%80%98occupation%E2%80%99-who-decided-to-steal-the-spirt-of-Christmas, accessed 25 August 2019.

7 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 at 136 (International Court of Justice, 9 July 2004).

8 The BDS Website describes the purpose of the movement: "The Boycott, Divestment, Sanctions (BDS) movement works to end international support for Israel's oppression of Palestinians *and pressure Israel to comply with international law*" [emphasis added], https://bdsmovement.net/, accessed 25 August 2019; see also J. Sperber, *BDS, Israel, and the World System*, Journal of Palestine Studies 45:1 (177) at 8 (Autumn 2015) (BDS "represents a series of strategies designed *to force Israel to comply with international law*") [emphasis added].

9 U.N. Sec. Council Resolution 2334, S/Res/2334 (23 Dec. 2016).

10 *See* International Criminal Court website, "Preliminary Examination: Palestine," www.icc-cpi.int/palestine ("On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force on 1 April 2015."), accessed 25 August 2019.

11 *See, e.g.* Al Jazeera, "Palestine submits ICC referral to open probe into 'Israel crimes,'" 22 May 2018, www.aljazeera.com/news/2018/05/palestine-submits-icc-referral-open-probe-israel-crimes-180522101121093.html, accessed 25 August 2019. The ICC Prosecutor announced on 19 December 2019 her decision to open an investigation regarding alleged war crimes in the West Bank, East Jerusalem and Gaza. https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine, accessed 28 December 2019.

12 For additional background on how the Palestinians and Israelis have used the law against each other in more recent years, *see* O. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford Univ. Press, 2016).

13 *See generally* Palestine Royal Commission, *Palestine Royal Commission Report*, Cmd. 5479 (July 1937, hereafter "Peel Commission Report") at 2–15.

14 *See generally* Y. Ben-Bassat, *Petitioning the Sultan: Protests and Justice in Late Ottoman Palestine 1865–1908*, (I.B. Tauris, 2013).

15 Porath, *op. cit.* at 26.

16 Ben-Bassat, *op. cit.* at 168–69.

17 Ben-Bassat, *op. cit.* at 195–98 (Petition by Four Members of the Bedouin Group Abu-Hataba from Mazra'at Duran to the Grand Vizier Against the Establishment of the Colony of Rehovot, 15 December 1890); 168–69 (Petition regarding sale in 1910 of land in the Village of al-Fula to the Jewish National Fund); 171 (Jewish petitions).

18 Wailing Wall Commission, *Minutes of the Session at Jerusalem* (unpublished typescript, hereafter "Lofgren Commission Transcript") at 83–84 (testimony of Joseph Giva Goldsmith, 26 June 1930).

19 The correct term today is "Muslim," and that is the term used in this study, except where the term "Moslem" appears in quoted documents and transcripts, or as part of the name of organizations, such as the "Supreme Moslem Council" or "Society for the Protection of Moslem Holy Places." The accepted usage in the 1920s and 1930s was "Moslem" according to a Muslim scholarly publication of that era. *See Muslim or Moslem?*, Moslem World 14 at 186–87 (1924) ("One who follows the religion of Islam is known in Arabic as a *Muslim*, plural *Muslimim*. Yet both of these words need diacritical marks to be pronounced correctly. *Muslims* is as incorrect in Arabic as *Moslem* or *Moslems*; but for over two centuries the common word in English usage has been Moslems [listing dictionaries and other reference works using 'Moslem'] … In view of this usage, The Moslem World Quarterly will continue to spell its title with o and not u."). By using the term "Moslem" solely when referring to relevant organizational names and quoting from contemporaneous documents and transcripts, the author intends no disrespect to Muslims.

20 *Report of the Commission Appointed by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, with the Approval of the Council of the League of Nations, to Determine the Rights and Claims of Moslems and*

Jews in connection with the Western or Wailing Wall at Jerusalem, 58–9096 (Dec. 1930; hereafter "Lofgren Commission Report"), Moslem Exhibit No. 7 (English translation of Decision by the *Majles Idarah* (Administrative Council) of the *Lawa* in response to a Petition filed by the *Mutawalli of the Awakaf of Abu Median al-Ghoth Shua'ib*, 12 November 1911) [emphasis added].

21 J. Priestland (ed.), *Records of Jerusalem 1917–1971*, Vol. I (1917–20) at 285 (Cambridge Univ. Press, Archive Editions 2002) (Petition filed by "inhabitants of Jerusalem and villages attached thereto, speaking for themselves and on behalf of all the Arabs, Moslem and Christian, residing in Palestine").

22 *Id.* at 291–93 (Petition dated 16 November 1918, submitted to British Military Governor Col. Ronald Storrs by the "[m]embers of the Moslem and Christian Committee for all the Moslems and Christians of Jaffa District … [i]t is surely incredible to us, that Great Britain who liberated us from the Turks, should tolerate to see us fall into the grip of the Jews.").

23 Lofgren Commission Report, *op. cit.* at 17; see also King's College London, Foyle Special Collections Library, Foreign and Commonwealth Office Historical Collection FOL. DS126 INT, International Commission for the Wailing Wall, *Minutes of the Session at Jerusalem* (typescript; hereafter "Lofgren Commission Transcript") at 905 *et seq.*

24 *Id.* at 152. Storrs commented disapprovingly on this Petition in his report to London, noting "it is significant and none too agreeable that the same persons who five or six months ago concluded their meetings by singing God Save the King and calling for cheers for "Our King Emperor" have now to be dissuaded from presenting petitions for an Arab Government to the political representatives of France." (Report no. 2611A, 24 November 1918); *see also* Porath, *op. cit.* at 79–82.

25 Priestland, *op. cit.*, Vol. I at 324. This position, unthinkable today for any Palestinian, reflected the majority Palestinian view at the time, as well as the politico-geographic reality of the early 20th century. It should be noted, however, that the Arab delegates from Jerusalem, Gaza, and Haifa dissented from the "Decision," preferring instead that Palestine be granted independence as a stand-alone Arab state. Nevertheless, many prominent Arabs of the day argued Palestine should have been regarded as part of Syria. George Antonius, the famous Palestinian Christian and author of the widely acclaimed 1939 book *The Arab Awakening*, wrote a Memorandum noting "[t]he term *Syria* in those days [pre-World War I] … included that part of the country which was afterwards detached from it to form the mandated territory of Palestine." *Correspondence Between Sir Henry McMahon, His Majesty's High Commissioner at Cairo and the Sherif Hussein of Mecca, July 1915-March 1916*, Cmd. 5957, Annex A (Memorandum, 23 Feb. 1939). Non-Arab observers, such as the American Section of the International Commission on Mandates in Turkey (otherwise known as the "King-Crane Commission," whose work is otherwise beyond the scope of this study) agreed "there should be no separation of the southern part of Syria, known as Palestine or the littoral western zone which includes Lebanon from the Syrian country." *Report of the American Section of the International Commission on Mandates in Turkey*, (28 Aug. 1919) Recommendation 8, https://ecf.org.il/media_items/951, accessed 25 August 2019. Ben-Bassat also notes "[a]t the end of the 19th century, Palestine did not constitute a separate geo-political entity or a recognized well-defined national state, as is often erroneously implied or assumed in research. Above all, it was an integral part of the Ottoman territories, a region with shifting administrative borders." Ben-Bassat, *op. cit.* at 6.

26 In 1925 the Executive Committee of the Palestine Arab Congress filed a Petition with the League of Nations raising eleven separate issues, including the grants of various concessions for utilities and salt mining, the conduct of elections, police interrogation practices, the Jerusalem drainage system, etc. Those issues lie beyond the scope of this study, but are illustrative of the broad range of matters pursued via the Petition process during the early years of the Conflict. *See* Letter to Chairman, Permanent Mandates Commission from Jamal Husseini, General Secretary of the Executive Committee, Palestine Arab Congress, 8 April 1925, discussed in C. 405.M.144.1926 vi (C.P.M./9th Sess./P.V.), League of Nations, Permanent Mandates Commission, *Minutes of the Ninth Session held at Geneva from 8–25 June 1926*, App. (19 June 1926).

27 FO 371/5121, *Secret Report of the Court of Inquiry Convened by Order of H.E. the High Commissioner and Commander-in-Chief* (12 April 1920, hereafter "Palin Commission Report").

28 "A feature of the inquiry was the vigorous attack made upon the administration … by the Zionist Commission, who were legally represented by Mr. S. Alexander of the firm of R.S. Devonshire & Co., Advocates, Cairo. The case for the Arab and Christian population was by no means so well prepared and apparently presented with some reluctance. There was a marked contrast between the keen interest displayed by the Jews throughout the hearing, and the lack of interest of the Moslem and Christian population, who hardly ever attended the Court." *Id.* at 2.

29 Cmd. 1540, *Palestine Disturbances in May 1921, Report of the Commission of Inquiry with Correspondence Relating Thereto* (October 1921; hereafter "Haycraft Commission Report") at 3, 17; *see also* Weizmann Archives 5–645, Memorandum from Zionist Commission, Jerusalem to Zionist Executive, London (29 May 1921) ("no lawyers are allowed to appear" before the Haycraft Commission). Sir Harry Luke, who would later serve as the Chief Secretary of the Mandatory Government in Palestine and as the Officer in Charge (Acting High Commissioner) of the Palestine Government during the crucial months of September 1928 and August 1929, was one of the appointed members of the Haycraft Commission. Dr. Mordechai Eliash, a Jerusalem-based lawyer, served as one of the Assessors for the Haycraft Commission. Dr. Eliash acted as lead counsel for the Jewish side in the Lofgren Commission trial nine years later.

30 Cmd. 1785, League of Nations, *Mandate for Palestine, Together with a Note by the Secretary General Relating to its Application to the Territory Known as Transjordan, Under the Provisions of Article 25* (hereafter "Palestine Mandate") (Dec. 1922) art. 13 ("All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and securing free access to the Holy Places, religious buildings and sites and the

free exercise of worship … is assumed by the Mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith … provided also that nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed."). As will be seen, the Arabs, the Jews, the British Government and the Shaw, Lofgren and Peel Commissions all spent considerable time and resources attempting to determine exactly what this and other language in the Mandate meant regarding the rights of the parties to the Wailing Wall and the narrow strip of pavement in front of the Wall.

31 L.G.A. Cust, District Administrator, Jerusalem, *The Status Quo, Its Origin and History Till the Present Time* (July 1927), original printed copy located in Chancellor Papers, MSS. Brit. Emp. S.284, Bodleian Libraries, Oxford (hereafter "Chancellor Papers"), Box 24/2.

32 CO 733/179/4, *Memorandum on the Wailing Wall*, Enclosure I to Confidential Despatch to Secretary of State, para. 10 (17 January 1930).

33 *Id.*

34 Cmd. 3229, *The Western or Wailing Wall at Jerusalem, Memorandum by the Secretary of State for the Colonies*, at 4 (19 November 1928).

35 E. Keith Roach, Deputy District Commissioner, Jerusalem, Despatch 10/24 (25 September 1928), *reprinted in* Priestland, *op. cit.* Vol. II at 623–27.

36 Letter dated 12 October 1928 from the Palestine Zionist Executive to the Officer Administering the Government of Palestine, "request[ing] that this petition may be transmitted through the proper channels to the Secretary General of the League of Nations for the information of the Permanent Mandates Commission," *reprinted in* Priestland, *op. cit.* Vol. II at 628–32.

37 Lofgren Commission Transcript, *op. cit.* at 768.

38 Cmd. 3229, *op. cit.* at 6 (Jews have a "right of access to the pavement in front of the Wall for the purposes of their devotions and also … to bring to the Wall those appurtenances that they were allowed to take to the Wall under the Turkish regime. It would be inconsistent with [the British Government's] duty under the Mandate were they to endeavour to compel the Moslem owners of the pavement to accord any further privileges or rights to the Jewish community.").

39 Cmd. 3530, *Report of the Commission on the Palestine Disturbances of August, 1929* (Mar. 1930; hereafter "Shaw Commission Report"). The original typewritten version of the Report can be found in file CO 733/177/4 at the British National Archives.

40 League of Nations, Permanent Mandates Commission, *Seventeenth (Extraordinary) Session of the Commission* (Geneva, 3–21 June 1930), Official No. C 355. M. 147. 1930 VI and accompanying Minutes thereto.

41 One exception is Professor Yitzhak Reiter, who discussed the Lofgren Commission Report (but not the transcripts of the testimony) in the first chapter of his recent book, *Contested Holy Places in Israel-Palestine: Sharing and Conflict Resolution* at 10–17 (Routledge, 2017).

42 Palestine Mandate, Art. 14 ("A special commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.") Neither the British Government nor the Mandatory Government took any steps to comply with Article 14 prior to seeking permission from the Council of the League of Nations in 1930 to appoint the Lofgren Commission.

43 Lofgren Commission Report, *op. cit.* at 4.

44 *Id.*

45 *Id.*, Appendix II.

46 The Colonial Office Library later transferred custody of the Lofgren Commission Transcript (where it remains today) to the Foyle Special Collections Library, Foreign and Commonwealth Office Historical Collection, King's College, London.

47 CO 733/195/5, Paraphrase Telegram No. 157 from the High Commissioner of Palestine to the Secretary of State for the Colonies (16 June 1931).

48 CO 733/163/5, letter from Prince Mohamed Ali Pacha (with enclosed calling card) to High Commissioner for Palestine John Chancellor (29 August 1929).

49 *Id.*, letter from Sir George R. Clerk, British Ambassador, Istanbul, to Foreign Secretary Arthur Henderson (3 September 1929) (enclosing letter and calling card from Prince Mohamed Ali Pacha and commenting, "recent events seem scarcely favourable to the idea of the Moslems accepting even so fancy a price as £100,000.").

50 Cmd. 5479, Peel Commission Report, *op. cit.* at ix.

51 *Id.* at 380–93.

1

MCMAHON-HUSSEIN, BALFOUR, AND THE LEGALITY OF THE JEWISH NATIONAL HOME

Introduction

The background to the early legal history of the Arab–Israeli conflict begins with the tension between the famous (or infamous) McMahon-Hussein Correspondence of 1915–16 and the famous (or infamous) Balfour Declaration of 1917. Were they incompatible and mutually exclusive, or non-conflicting and reconcilable?

As early as 1920 the Arabs had formed the legal argument, and have continued refining it to this day,[1] that Britain irrevocably promised Palestine to the Arabs in a 24 October 1915 letter from McMahon to Hussein; the promise remains legally enforceable; and therefore the subsequent and diametrically conflicting Balfour Declaration and everything following in its wake, including the relevant provisions of the Palestine Mandate, were legally null and void *ab initio*.

The British and the Jews argued, on the other hand, that none of the correspondence between McMahon and Hussein formed a treaty or an otherwise legally binding instrument, but even if it did, nothing in the correspondence supports the Arab claim that Britain promised Palestine to the Arabs in 1915. Therefore, everything subsequent to the correspondence, including the Balfour Declaration and the Palestine Mandate, were legally valid and enforceable in their own right.

We will see in later chapters how this essentially legal dispute played out in the litigation before the Shaw Commission and in the testimony before the Peel Commission. First, however, it is essential to understand the historical background, "without which it is quite impossible to study the problem of Palestine."[2]

The McMahon-Hussein correspondence

Palestine had been under Turkish (Ottoman) rule since 1516, but the Ottomans saw their grip on the Middle East waning by the early 20th century. In September 1914, shortly after the outbreak of World War I, Lord Kitchener, the newly appointed British Secretary of State for War, directed British officials in Cairo to make a secret overture to the Sherif Hussein of Mecca, later King of the Hejaz and father of the future Jordanian King Abdullah I and the future Iraqi King Feisal. The British first approached the Sherif's son Abdullah to ascertain whether the Arabs would side with Britain in the event Turkey allied with Germany.[3]

Abdullah responded favorably, writing the Arabs would be

> well satisfied with a more close union with Great Britain … so long as she protects the rights of our country and the rights of the person his Highness our present Emir and Lord and the rights of his Emirate and its independence in all respects

without any exceptions or restrictions.[4]

The British Government replied "[i]f the Emir of Mecca is willing to assist Great Britain with this conflict, Great Britain is willing … to guarantee the independence, rights and privileges of the Sherifate."[5]

FIGURE 1.1 Abdullah, first King of Jordan, seated at right

(Matson Photograph Collection, Library of Congress).[6]

In April 1915 the Foreign Office authorized British officials in the region to

let it be known … that His Majesty's Government will make it an essential condition in the terms of peace that the

> Arabian peninsula and its Mohammedan Holy Places should remain in the hands of an independent sovereign state. It is not possible to define at this stage exactly how much territory should be included in this State.[7]

By the end of June the British were distributing proclamations announcing this policy in Egypt and Sudan, and air-dropping the same proclamations over Arabia.[8]

Against this background, Sherif Hussein wrote directly to Sir Henry McMahon, the British High Commissioner in Cairo, in mid-July 1915, initiating what was to become known as the "McMahon-Hussein Correspondence." McMahon and the Sherif wrote a total of ten letters to each other between July 1915 and March 1916.[9] The correspondence was conducted completely in Arabic, with McMahon's English originals translated into Arabic for transmission to the Sherif.[10]

The letters reveal the Sherif's willingness to lead a British-funded Arab revolt against the Turks in exchange for Britain promising independence and self-determination for the Arabs.[11] The Sherif wanted Britain to agree on the outer boundaries of the territory encompassing the future Arab states. The Sherif also insisted Britain not sell out the Arabs in any future peace negotiations with Turkey.

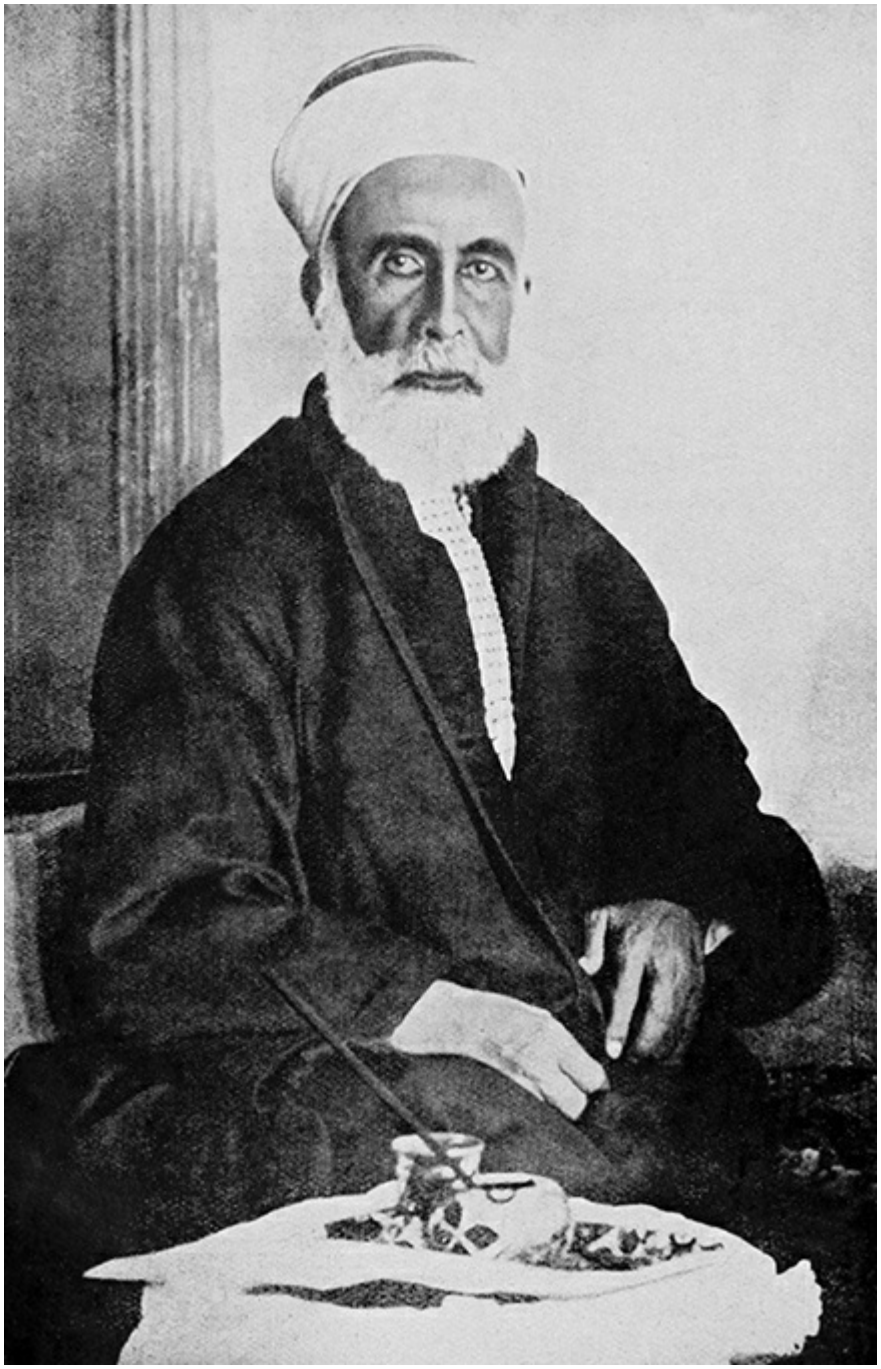

FIGURE 1.2 Sherif Hussein of Mecca

(Alamy Images).[12]

McMahon, acting on instructions from London, first tried to delay any discussion of borders, but eventually agreed to the Sherif's terms, subject to a specific carve-out for certain geographic areas. McMahon, however, used ambiguous language to describe those areas. The proper interpretation of that language, as we will see, became the subject of heated legal debate between the Arabs, British, and Jews for the next 25 years, and continues to provoke legal arguments to

this day.

McMahon also added a general carve-out, excluding from Arab independence any areas where France's traditional interests were implicated.[13] French suspicion of British aspirations in the Middle East had been a source of tension between the two allies in the years immediately preceding World War I.[14] McMahon needed to exercise caution not to exacerbate those tensions by promising territory to the Sherif in which French interests were at stake.

One commentator recently noted the importance of placing the McMahon-Hussein correspondence in the proper historical context:

> When McMahon and Hussein were secretly writing to one another between 1915 and 1916, the Balfour Declaration had not yet been written; there was no mandate in Palestine and no dispute between British, Zionists and Arabs over the control of Palestine. The letters were part of a different story of Arab–British wartime diplomacy. The correspondence therefore cannot properly be understood as the first step in the dispute over Palestine. It is, however, a part of broader regional politics that was overshadowed by the later conflict.[15]

The key question raised by the correspondence, and that has raged on ever since, is whether or not McMahon's pledge to the Sherif *included* or *excluded* Palestine.[16] We will explore in Chapters 3 and 5 how the Arabs and Jews litigated that issue before the Shaw and Peel Commissions, and how both sides linked the proper interpretation of the McMahon pledge to the validity of the Balfour Declaration. We examine here the foundation for those legal arguments.

The letters

Before analyzing the correspondence, we will summarize the relevant portions of the letters:[17]

14 July 1915, from the Sherif of Mecca to McMahon[18]

Sherif Hussein proposed six points for agreement: (i) England to "acknowledge the independence of the Arab countries" from the Persian border in the east to the Mediterranean and the Red Sea in the west, and from Mersina and Adana in the north to the Indian Ocean in the south, except for Aden ("to remain as it is") and "England to approve the proclamation of an Arab Khalifate of Islam"; (ii) England shall receive economic preference in all Arab countries; (iii) "both *high contracting parties* to offer mutual assistance" during the war and not proclaim peace without mutual agreement; (iv) if one party embarks on offensive operations, the other to remain neutral pending consultations; (v) England to acknowledge the abolition of foreign privileges in the Arab countries; and (vi) "Articles 3 and 4 *of this treaty*" to remain in force for 15 years, with one year's notice for renewal negotiations.[19]

30 August 1915, from McMahon to the Sherif of Mecca[20]

McMahon reaffirmed a message from Lord Kitchener that had been hand-delivered to the Sherif, in which Britain "stated clearly our desire for the independence of Arabia and its inhabitants, together with our approval of the Arab Khalifate when it should be proclaimed."[21] McMahon pushed back on reaching any agreement on boundaries for the future Arab state(s), saying

> it would appear to be premature to consume our time in discussing such details in the heat of war … especially as we have

> learned, with surprise and regret, that some of the Arabs in those very parts, far from assisting us, are … lending their arms to the German and the Turk.

The letter closes with an offer to send the Sherif and the Arab nobles "the charitable offerings of Egypt."

9 September 1915, from the Sherif of Mecca to McMahon[22]

The Sherif expressed dissatisfaction with McMahon's "coolness and hesitation … in the question of the limits and boundaries," saying the Arabs are demanding "limits which include only our race." The Sherif bluntly stated the Arab decision whether to join Britain in the fight against the Turks awaits "the result of these negotiations, which are dependent only on your refusal or acceptance of the [boundary] limits."

****

In early October 1915, before McMahon had responded to the Sherif's 9 September letter, an Arab (or possibly Kurdish) Officer in the Turkish Army named Mohammed al Farouki deserted and crossed over to the British lines in the Dardanelles. The British brought Farouki to Cairo for interrogation. Farouki, who belonged to a secret society within the Young Arab Party known as "*Fatat al Arab*,"[23] eventually met with McMahon. During the meeting Farouki told McMahon the Germans had made an overture to the Arabs, offering to meet all their demands, including independence, in exchange for helping Germany and Turkey against the British.

McMahon sent a report to Foreign Secretary Sir Edward Grey (later Lord Falladon) of the conversation. According to McMahon, Farouki said the Arabs would be willing to reject the German offer and align with Britain if:

> In so far as she is free to without detriment to the interest of her present Allies, Great Britain accepts the principle of the independence of Arabia within limits propounded by the Sherif of Mecca … England to guarantee the Holy Places against external aggression and recognize their inviolability. The occupation by France of purely Arab *districts* of Aleppo, Hama, Homs and Damascus would be opposed by Arabs with force of arms, but with this exception Faroki thinks they would accept some modification of the north-western boundaries proposed by the Sherif of Mecca.[24]

General Gilbert Clayton, who worked with McMahon in Cairo, wrote a longer summary of the meeting with Farouki, noting:

> [Farouki said a] guarantee of the independence of the Arabian peninsula would not satisfy them, but this, together with the institution of an increasing measure of autonomous government, under British guidance and control, in Palestine and Mesopotamia, would probably secure their friendship … In El Faroki's own words, "our scheme embraces all the Arab countries, including Syria and Mesopotamia, but, if we cannot have all, we want as much as we can get." … A favourable reply to the Arab proposals, even though it did not satisfy their aspirations entirely, would probably put the seal on their friendship. The [Arab Party] would at once begin to work actively, and their operations, begun in the Hedjaz where the Sherif is a great power, would soon extend to Syria and Palestine … [25]

The Foreign Office cabled McMahon on 20 October, authorizing him to convey to the Sherif "your suggested reserve about our allies," and

> unless something more precise is required, and in that case you may give it, the simplest plan would be to give assurance of Arab independence, adding that, if they will send their representatives, we will proceed at once to discussion of boundaries.[26]

The Foreign Office emphasized giving "an assurance that will prevent the alienation of the Arabs

is the most important thing."[27] But McMahon did not quite follow those instructions.

24 October 1915, from McMahon to the Sherif of Mecca[28]

McMahon began this, the most important letter of the entire correspondence, by sympathizing with the Sherif's desire to discuss the issue of boundaries sooner rather than later, agreeing it was an issue "of vital and urgent importance." McMahon indicated he had sought and received authority from the British Government to communicate the following (this is the single most important passage in the entire series of letters, and whose exact meaning has been hotly debated ever since):

> The two districts west of Mersina and Alexandretta and *portions of Syria lying to the west of the Districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab*, and should be excluded from the limits demanded. With the above modifications, and without prejudice to our existing treaties with Arab chiefs, we accept those limits. As for those regions lying within those frontiers wherein Great Britain is free to act *without detriment to the interests of her ally France*, I am empowered to give the following assurances … (2) Great Britain will guarantee the Holy Places against all external aggression and will recognize their inviolability.[29]

Two days later, McMahon sent copies of his 24 October letter to the relevant British officials in London, along with a cover note marked "Secret," in which he described what he had written to the Sherif, but in terms which seemed to vary from the actual text of the letter. Following are relevant excerpts from McMahon's cover note:

> I have the honour to enclose herewith the English text of the reply which I have despatched in Arabic to the Sherif of Mecca. The matter appeared to me to admit of no delay, and I have therefore lost no time in answering the Sherif's letter, and have availed myself of the authority to act without further reference, accorded to me in your telegram No. 796 of the 20th instant. The composition of a reply which would be acceptable to the Arab Party and which would at the same time leave as free a hand as possible to His Majesty's Government in the future, has been a difficult task. I have been definite in stating that Great Britain will recognize the principal of Arab independence in purely Arab territory, this being the main point on which agreement depends, but have been equally definite in excluding … those districts on the northern coasts of Syria, which cannot be said to be Arab, and where I understand that French interests have been recognized. I am not aware of the extent of French claims in Syria. … Hence, *while recognizing the towns of Damascus, Hama, Homs and Aleppo as being within the circle of Arab countries*, I have endeavoured to provide for possible French pretensions to those places by a general modification to the effect that His Majesty's Government can only give assurances in regard to those territories in which she can act without detriment to the interests of her ally, France.[30]

Over the next few days attention continued to focus on Damascus, Hama, Homs, and Aleppo. On 7 November, the Foreign Office advised McMahon it was working to persuade the French Government to include the four Syrian cities within the Arab boundaries.[31] McMahon cabled back the same day, noting "Great weight is laid by Arabs on the inclusion in the new independent Arab State of the cities of Aleppo, Homs, Hama and Damascus."[32]

FIGURE 1.3 Sir Henry McMahon

(Getty Images).[33]

McMahon also noted, in the context of a discussion of the Arab desire for assistance from British but not French advisers,

> the Arab representatives admitted and fully understood that the … provision holds good only so far as concerns those parts of Arab territory where the British can act freely and without prejudice to their French allies: this limitation being due to the fact that our obligations toward the latter do not give us a free hand as regards the whole of Arabia.[34]

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We turn now to the remainder of the correspondence:

5 November 1916, from the Sherif of Mecca to McMahon[35]

The Sherif opened his letter by stating the Arabs

> renounce our insistence on the inclusion of the vilayets of Mersina and Adana in the Arab Kingdom. But the two vilayets of Aleppo and Beirut and their sea coasts are purely Arab vilayets, and there is no difference between a Moslem and a Christian Arab …[36]

14 December 1915, from McMahon to the Sherif of Mecca[37]

McMahon began by thanking the Sherif for agreeing "to the exclusion of the *districts* [emphasis added] of Mersina and Adana" from the boundaries of the future Arab states. McMahon then addressed the Sherif's comments regarding Aleppo and Beirut, taking care to preserve Britain's options:

> With regard to the vilayets of Aleppo and Beirut, the Government of Great Britain have fully understood and taken careful note of your observations, but, as the interests of our ally France, are involved in them both, the question will require careful consideration and a further communication on the subject will be addressed to you in due course.

But McMahon sent no such "further communication." At the end of the letter McMahon said he was sending £20,000 with the Sherif's messenger "[a]s an earnest of our intentions, and in order to aid you in your efforts in our joint cause."

1 January 1916, from the Sherif of Mecca to McMahon[38]

The Sherif explained "as regards the northern parts and their coasts, we have already stated in our previous letter what were the utmost possible modifications." The Sherif expressed sympathy for Britain's desire not to harm its wartime alliance with France, but he made clear that "at the first opportunity after this war is finished, we shall ask you … for what we now leave to France in Beirut and its coasts."

25 January 1916, from McMahon to the Sherif of Mecca[39]

McMahon thanked the Sherif for respecting the importance of Britain's alliance with France, but he did not respond substantively to the Sherif's 1 January letter.

18 February 1916 from the Sherif of Mecca to McMahon, and 10 March 1916 from McMahon to the Sherif of Mecca[40]

These last two letters focused on military and financial preparations for the Arab Revolt, which eventually began in June 1916.

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As noted above, McMahon's 24 October 1915 letter accepted the Sherif's proposed boundary limits for the territory containing the future Arab states, subject to two somewhat ambiguous exceptions: first, a specific exception applicable to "portions of Syria lying to the west of the Districts of Damascus, Homs, Hama and Aleppo"; and second, a general exception applicable to those areas where Britain was not "free to act without detriment to the interests of her ally France." The precise meaning of those two exceptions has dominated the legal debate ever since regarding the legitimacy of the Balfour Declaration, the portions of the Mandate for Palestine implementing the Balfour Declaration, the United Nations November 1947 partition resolution, and ultimately the legitimacy of the State of Israel itself.

We will examine each exception as we analyze the McMahon-Hussein correspondence closely from a legal perspective. We begin with the general reservation in favor of French interests.

General reservation: French interests

French involvement in the Middle East and the Levant began centuries ago. France had long regarded itself as the protector of the Maronite Catholics in Lebanon, and had always claimed an interest in the Holy Land.[41] Those interests remained as strong as ever at the beginning of the 20th century.

In late 1912 tensions flared between Britain and France after French agents in Syria noted the presence of a number of Cairo-based British personnel in Syria. France suspected the British were engaged in efforts to undermine French interests in the Middle East, including plotting a British occupation of Syria. French Foreign Minister Paul Cambon sought and received assurances from his British counterpart, Foreign Secretary Grey, that such was not the case.

A few days later (21 December 1912) the French Prime Minister, Raymond Poincare, gave a speech to the French Senate reiterating French aspirations in Syria and Lebanon, and disclosing Britain's concession to those interests:

> I have no need to tell the Senate that in Syria and Lebanon we have traditional interests and that we intend to see they are respected. I am happy to be able to add that the rumours about the existence of some disaffection between the English Government and us on this point are completely baseless. The English Government has declared to us in a very friendly manner that in these regions it has neither intentions nor designs, nor political aspirations of any sort. We ourselves are resolved to maintain, in Asia, the integrity of the Ottoman Empire, but we shall not abandon any of our traditions there, nor repudiate any of the sympathies we have acquired.[42]

In mid-March 1915 the French government informed the British government it claimed all of Syria, which at that time included Palestine.[43] A British Government Committee (the de Bunsen Committee) noted the claim in its report of June 1915, just one month before the Sherif's first letter to McMahon, and four months before McMahon's 24 October 1915 letter.[44] French interests in the Middle East were, therefore, high on the radar of British wartime diplomacy in the summer and fall of 1915.

The English version of McMahon's 24 October 1915 letter indicated Britain was willing to promise Arab independence in those areas of the Middle East where Britain was "free to act *without* detriment to the interests of her ally France." That seemingly unambiguous reservation on behalf of French interests, however, came out less clearly when the letter was translated into Arabic for transmission to the Sherif: "We accept those limits and boundaries, and in regard to the areas (or provinces) which those boundaries enclose, where (or whereas) Great Britain is free

to act without affecting the interests (or policy) of her ally France … ”[45]

One could argue, as did a Foreign Office lawyer nearly 25 years later, that this

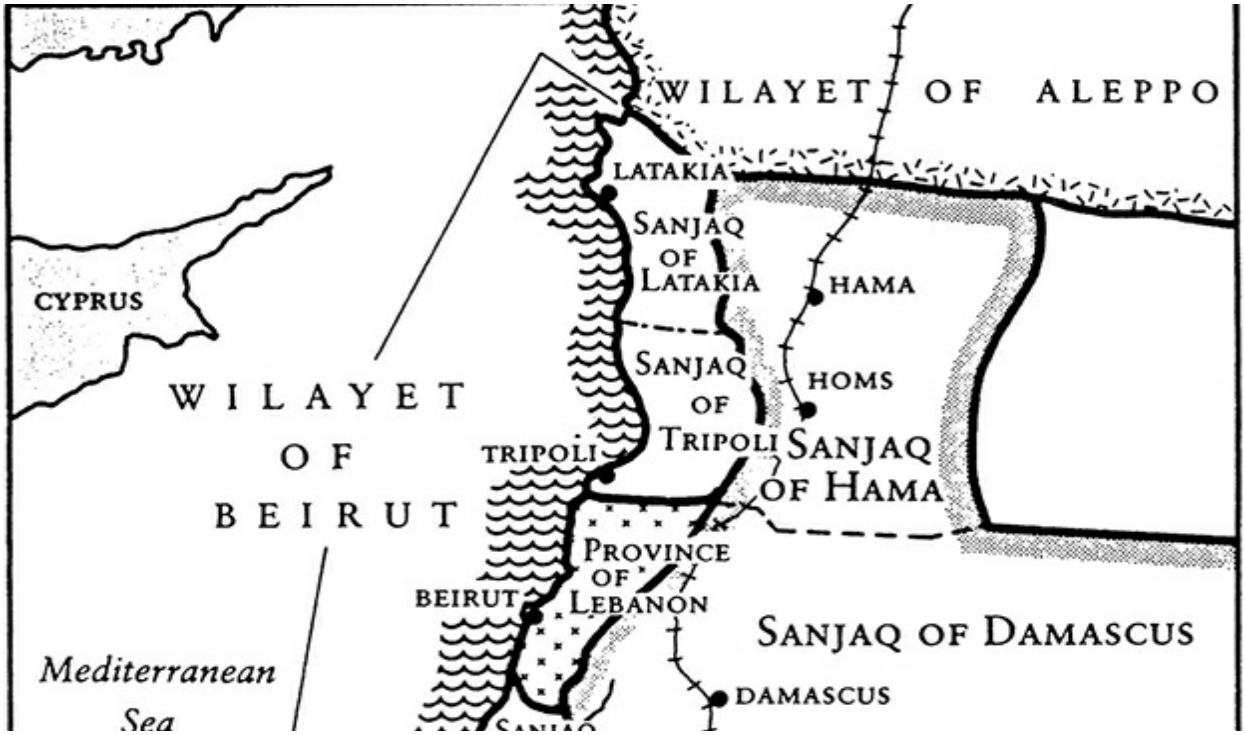
> careless translation completely changes the meaning, or at least makes the meaning exceedingly ambiguous, entitling the Sherif to think the reservation merely meant the British were free to act in the area covered by the specific reservation without regard to French interests.[46]

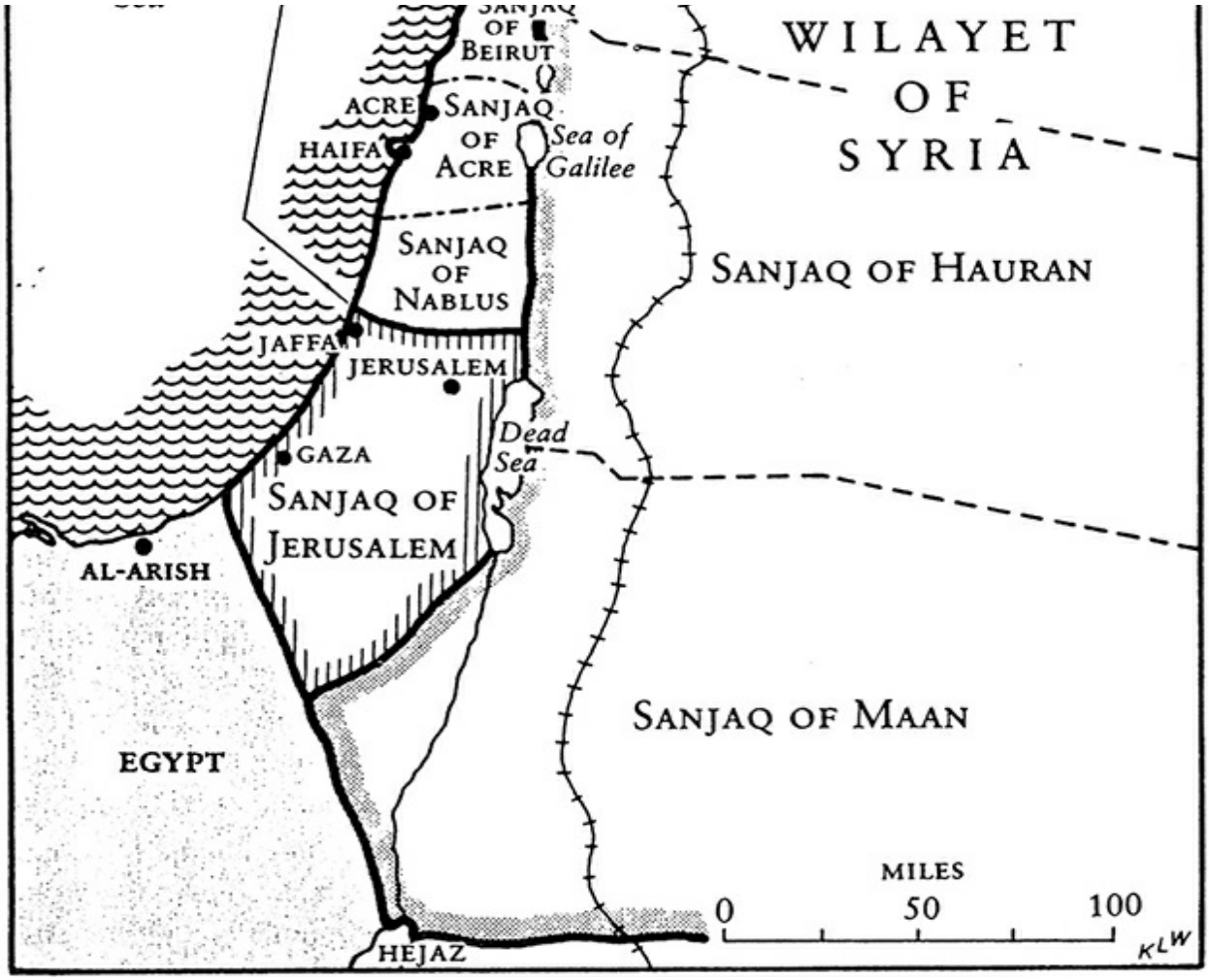
But the Arab side never pursued this line of argument, preferring instead to claim the general reservation in favor of France had simply lapsed once France declared its support for the Balfour Declaration in 1918 and voted for the British Mandate in 1922, thereby abandoning its claims to Palestine.[47]

Specific reservation: districts of Damascus, Homs, Hama, and Aleppo

The Ottomans governed their empire through a system of administrative/geographic divisions. In 1864, the Sublime Porte promulgated an edict establishing the *Vilayet* system, in which the Empire was divided into *Vilayets* (Provinces) comprised of subdivisions known as *Sanjaks*.[48] Several *Sanjaks*, including the *Sanjak* of Jerusalem, were “independent,” meaning they were not part of a larger *Vilayet* and instead reported directly to Constantinople for strategic reasons or, in the case of Jerusalem, for religious and political reasons.[49] By 1905 the Empire outside Constantinople contained 29 *Vilayets* containing a total of 120 subordinate *Sanjaks*, plus six independent *Sanjaks*.[50]

As shown on the following map, the independent *Sanjak* of Jerusalem comprised portions of ancient Judea and the northern Negev Desert. Palestine itself, however, was not a *Vilayet* and had no recognized political or geographic status in the Ottoman empire. The remainder of Palestine outside the independent *Sanjak* of Jerusalem was subsumed within the *Vilayet* of Beirut:





MAP 1.1 Ottoman administrative districts

(Cmd. 5957)[51]

As the map also demonstrates, Damascus, Homs, and Hama were part of the *Vilayet* of Syria. Aleppo was considered both a *Vilayet* and a *Sanjak*. Damascus was the capital of the *Vilayet* of Syria, and the City of Aleppo was also the capital of the *Vilayet* of Aleppo.

A traditional legal analysis of McMahon's 24 October 1915 letter would begin by examining the wording of the letter and determining its meaning based solely on the plain, ordinary meaning of McMahon's words. The map, however, shows the difficulty in using this traditional mode of legal analysis to ascertain the meaning of McMahon's letter.

First, McMahon's use of the word "District" has caused great interpretational difficulty, as there was no such thing as a "District" in the Ottoman governance system. Neither the Turkish words *Vilayet* or *Sanjak* translate into English as "District." Moreover, when McMahon's letters were translated into Arabic, the word "District" was translated as *Wilaya*. The word *Wilaya* could have been read as *Vilayet*, but that would not necessarily have made sense given Damascus, Homs, and Hama were *towns*, not *Vilayets*.

Wilaya could also have meant a "region or district," implying a smaller geographic area than a

Vilayet. In 1920 a British official who had served in the Arab Bureau in Cairo during the war studied the Arabic version of the correspondence and determined the Arabic for "District of Damascus" meant "*Vilayet* of Damascus." Thus, he argued, it would not be unreasonable to read the incorrectly rendered term *Vilayet of Damascus* to mean the actual *Vilayet of Syria*, of which Damascus was the capital.[52] Moreover, "Turkish usage frequently employed 'Sham' (Damascus) as a general appellation for Syria," further supporting the interpretation of *Vilayet of Damascus* as equivalent to *Vilayet of Syria*.[53]

The issue, therefore, depends on whether the words "District of Damascus" should be read broadly, as equivalent to "*Vilayet* of Syria," or narrowly, as equivalent to "vicinity of Damascus" or "Damascus and environs" or "regions of Damascus."[54]

If read broadly, then *all* of Palestine would have been *excluded* from McMahon's pledge to the Arabs, because Palestine lies to the west of the *Vilayet* of Syria. However, reading "District" as synonymous with *Vilayet* ignores the geographic fact that there is nothing "lying to the west" of the *Vilayet* of Aleppo except water – the Mediterranean Sea. So the broad reading of "District" is somewhat problematic from that perspective.

On the other hand, a narrow reading of the word "District" would have meant Palestine was *included* in McMahon's pledge, as the area lying to the west of the immediate vicinity of Damascus, Homs, Hama, and Aleppo was Lebanon and northern Syria, but *not* Palestine. The Arab side pursued this line of argument throughout the 1920s–1930s and beyond.

However, this narrow reading of the word "District" also creates a difficult legal problem for the Arab side. If we accept the Arab interpretation that McMahon meant to exclude all areas lying to the west of the immediate environs of the four towns, then the Lebanese-Syrian border would have ended up along the north-south line connecting Aleppo to Damascus, much further east than Syria's eventual border with Lebanon. Syria thus would have lost a large amount of its future territory; namely, all of modern Syria falling between the Aleppo to Damascus line on the east and the Lebanese border on the west. This would have created a true conundrum for the Arab side: either accept a much smaller Syria that included Palestine, or a much larger Syria that did not include Palestine.

Lord Frederic Maugham, the Lord Chancellor of England, highlighted this dilemma after reviewing the McMahon-Hussein correspondence more than two decades later:

> [T]he phrase "districts of Damascus, etc." would hardly have been desired by the Sharif to mean small areas immediately surrounding the towns in question … since if this had been the case the territory in which the Arabs would have been denied independence would have been brought much further east than on a more liberal interpretation of the phrase. The non-Arab territory would in fact have reached eastwards almost to the outskirts of Damascus and the other towns, and have covered substantial portions of Transjordan and considerable sections of the Hejaz Railway.[55]

Second, neither McMahon's 24 October 1915 letter, nor any of the other letters McMahon and the Sherif wrote to each other, ever mention the words "Palestine" or "Jerusalem," thereby making it extremely difficult to ascribe a particular meaning to the letter based solely on the language contained in the letter itself.

Given the ambiguities in the 24 October 1915 letter, including the problems with both the broad and narrow readings of the word *Vilayet*, as well as the absence one way or the other of any specific reference to Palestine, the next step in the legal inquiry would be to determine the intent and understanding of both parties to the correspondence. The intent of the parties at the time, as well as their subsequent conduct relative to the correspondence could help shed light on

the proper meaning of the 24 October 1915 letter.

The Arab, British, and Jewish sides all spent considerable time and effort in the proceedings before the Shaw and Peel Commissions marshaling their evidence on these issues and presenting their legal arguments to the two commissions. We now consider that evidence.

Arab reaction and legal interpretation

The Arab legal arguments developed over time. Initially the Arabs – at least the Sherifians – did not press the Palestine issue, as they were more concerned with the Hejaz and the future of Syria and Iraq. Within a few short years, however, the Arab focus turned to Palestine.

Initial Arab reaction: Palestine excluded

Prior to 1921 the Arabs did not claim the McMahon pledge included Palestine. In fact, some historians argue the Arabs' statements and conduct showed they understood and *accepted* the exclusion of Palestine from the pledge. For example, the Sherif refused to condemn the Balfour Declaration for more than two years after it was issued, ignoring calls from Syrian notables to do so. The Sherif even ordered his sons Abdullah and Feisal to calm their followers and allay their fears about the Balfour Declaration.[56] This conduct, argue the British and Jewish sides, demonstrates the Sherif knew and understood Palestine was *not* included in McMahon's pledges.

In January 1918 Commander David Hogarth, Head of the Arab Bureau in Cairo, met with Hussein in Cairo, delivering what became known as the "Hogarth Message," stating in part:

> So far as Palestine is concerned we are determined that no people shall be subject to another, but … In view of the fact that there are in Palestine shrines, Wakfs and Holy places, sacred in some cases to Moslems alone, to Jews alone, to Christians alone, and in others to two or all three, and inasmuch as these places are of interest to vast masses of people outside Palestine and Arabia, there must be a special regime to deal with these places approved of by the world … As regards the Mosque of Omar it shall be considered as a Moslem concern alone and shall not be subjected directly or indirectly to any non-Moslem authority … Since the Jewish opinion of the world is in favour of a return of Jews to Palestine and inasmuch as this opinion must remain a constant factor, and further as His Majesty's Government view with favour the realisation of this aspiration, His Majesty's Government are determined that in so far as is compatible with the freedom of the existing population both economic and political, no obstacle should be put in the way of the realisation of this ideal.[57]

Clayton cabled the Foreign Office to report on Hogarth's meeting with Hussein, reporting "Commander Hogarth has interviewed King of Hedjaz and sounded him on the subject of the Zionist movement. King Hussein was evidently prepared for development of Zionism and declared himself ready to welcome Jews to any Arab country."[58]

In March 1918 the Sherif caused an article to be published in his official newspaper welcoming the Jewish return to Palestine. Clayton, however, reported to London that same month that the Arabs were "nervous" about the Zionist movement, fearing "British authorities intend to set up a Jewish Government."[59] Those fears seemed to diminish by the end of the month, as William Ormsby-Gore[60] sent a report to Sykes on 31 March regarding Weizmann's visit to the region, noting Weizmann had met with local Arab leaders and "with great skill" had "said just what they wanted to hear,"[61] namely that Palestine would remain British.

By the summer of 1918 the Arabs again raised concerns about Jewish land purchases in Palestine, reprising for the new British rulers many of the same arguments they had made in

petitions to the Sultan prior to the War. Some Arab landowners, however, only paid lip service to these concerns while secretly hoping to sell their own land to the Jewish newcomers and their financial supporters. As Ormsby-Gore related in a confidential report to London:

> There is of course a pretty wide-spread fear among the Moslem landowners that the progress of Zionism is inimical to their interests. Societies have been formed to organize resistance to the sale of land to the Jews, but it is a significant fact that one of the principal movers in this association paid a visit to the head office of the Zionist Bank in Jaffa in order to intimate that while he was openly advocating a policy of resistance to land sales, he was anxious to sell his land either to Baron Edmund de Rothschild or the Zionists as soon as transfers of land are permitted by the [British] Administration.[62]

More evidence supporting the British/Jewish claim that Feisal understood McMahon had excluded Palestine arose from an October 1918 discussion between Feisal and General Allenby. Feisal said he understood from Colonel Lawrence the Arabs were to have the whole of Syria, *including Lebanon but excluding Palestine*.[63]

In January 1919 Feisal seemed to confirm this understanding by signing an agreement with Chaim Weizmann, in which Feisal largely acceded to Zionist aims in Palestine on condition the Arabs obtained independence in Syria.[64] The Palestine Royal Commission many years later reflected on the Weizmann-Feisal Agreement as marking "the one brief moment in the whole story at which a genuine harmony was established between Arab and Jewish statesmanship."[65] In one of the many ironies characterizing the history of the period, Weizmann and the Jewish Agency later portrayed the agreement with Feisal as a "treaty," just as the Sherif and other Arab leaders would later describe McMahon's 24 October 1915 letter as a legally binding "treaty."[66]

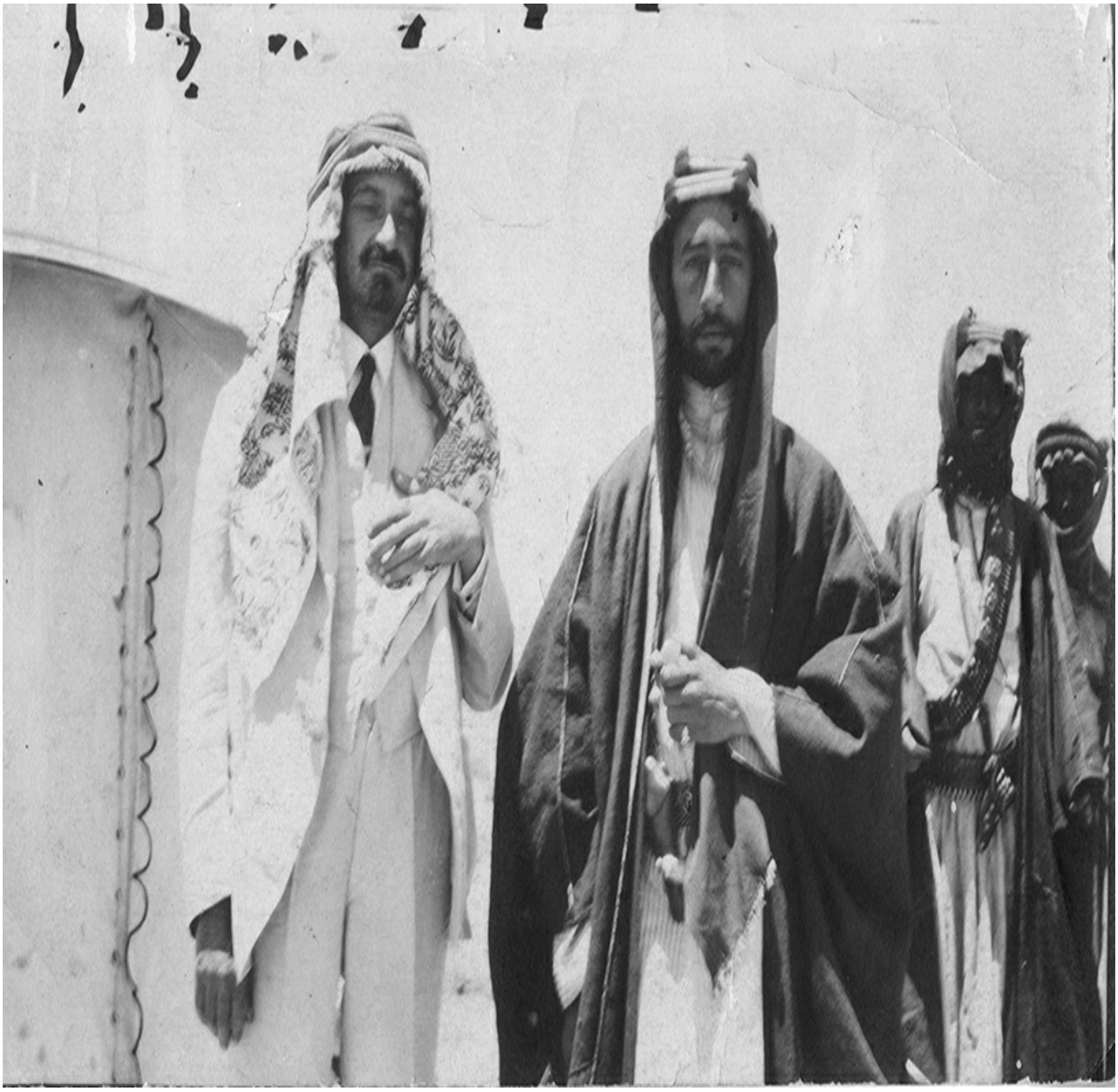


FIGURE 1.4 Weizmann and Feisal, 1919

(Courtesy of Weizmann Archives).[67]

Soon thereafter, Feisal told the Supreme Council at the Versailles Conference he was willing to leave out Palestine from the Arabs' request for independence, "for its universal character" and for the "mutual consideration of all parties concerned."[68] Feisal also expressed a willingness to accept a solution under which the Zionists would be allowed to pursue the establishment of a National Home in Palestine so long as Feisal achieved his aims in Syria.[69]

FIGURE 1.5 Feisal

(Library of Congress, Prints and Photographs Division).[70]

Furthermore, on 3 March 1919, while still at Versailles, Feisal (with help from Colonel Lawrence) signed a very conciliatory letter to Felix Frankfurter, proclaiming

> [w]e Arabs, especially the educated among us, look with deepest sympathy on the Zionist movement … We will wish the Jews a hearty welcome home … We are working together for a reformed and revised Near East, and our two movements complement one another.[71]

As we will see in Chapter 3, the authenticity of this letter became an important issue during the

Grand Mufti's testimony before the Shaw Commission.

Kedourie (1976) idenjpgies further evidence demonstrating the Sherif understood Palestine was not included in the McMahon pledge. Hussein in 1918–19 showed "lack of interest in Palestine … lack of concern over the Balfour Declaration and Zionist aims"; instead, Hussein's top priority was to be recognized as the leader of the Arab race over his rival Ibn Saud.[72] Feisal also wrote a letter to his father Hussein on 19 January 1918 describing the correspondence with McMahon as nothing more than a "preliminary and limited contract."[73]

Kedourie also cites Feisal's 27 December 1918 meeting with Edwin Montagu, then Secretary of State for India, as evidence the Arabs understood Palestine was not included in the McMahon Pledge. According to John Shuckburgh, a Colonial Office representative who prepared a memorandum of the meeting three days later, Feisal said "the Arabs recognize that many conflicting interests are centered in Palestine. They admit the moral claims of the Zionists. They regard the Jews as kinsmen whose just claims they will be glad to see satisfied."[74]

Less well-known was a letter written in French from Feisal to Sir Herbert Samuel dated 1 December 1919 on the letterhead of the Hedjazi Delegation to the Versailles Peace Conference. Feisal expressed solidarity with both Weizmann and Samuel in pursuit of the common Arab–Jewish cause:

> *J'ai la ferme conviction que la confiance reciproque etablie entre nous et le parfait accord de notre point de vue qui a permis une parfait comprehension entre Dr. Weizman [sic] et moi, empecheront a l'avenir de areils malentendus et maintiendront entre nous cette harmonie si necessaire pour le success de notre cause commune.*[75]

Finally, according to another historian, as late as Versailles, Hussein was "probably … aware that the McMahon letters did not constitute a binding obligation on the part of the British."[76]

The weight of the evidence, therefore, suggests the Sherif and his sons well understood McMahon's 24 October 1915 letter did not include Palestine within the pledged areas for future Arab independence.

Subsequent Arab reaction: Palestine included

Feisal's attitude, however, changed dramatically in early 1920, soon after the French expelled him from Syria. Almost immediately Feisal turned his attention to Palestine, seizing on McMahon's correspondence with his father as having formed a legally binding "treaty," creating a legal basis for the Arabs to claim McMahon had promised them independence in Palestine.[77] Moreover, the Arabs argued, because the McMahon-Hussein correspondence should be regarded as forming a binding treaty, Britain had a legal obligation to uphold and comply with the treaty by ensuring Palestine became part of the areas designated for Arab independence.

But, according to the Arab argument, Britain violated the McMahon-Hussein "treaty" by promising Palestine to the Jews when it issued the Balfour Declaration two years later. Therefore, the Arabs argued, the Balfour Declaration was null and void as a matter of law:

> [T]he McMahon promises included Palestine and had the force of a treaty, [and] they inevitably utilized the argument that the Balfour Declaration was contrary to this treaty. And inasmuch as the "treaty" preceded the "Declaration" and since the "treaty" was made with a recognized monarch while the Declaration was given to an amorphous body lacking political form and juridical definition, the "treaty" was obviously to be preferred and the Declaration was void *ab initio*.[78]

The first time Feisal formally suggested Palestine was included in the McMahon pledge occurred

during a meeting with R.C. Lindsay of the Foreign Office on 20 January 1921. Feisal claimed Palestine had been promised to the Arabs because the language of the McMahon-Hussein correspondence never specifically mentioned or excluded Palestine. The relevant portions from McMahon's 24 October 1915 letter were read aloud in Arabic to Feisal. Lindsay noted Palestine *was* excluded because it lay to the west of the *Vilayet* of Damascus.[79]

Feisal responded by noting "if the word 'vilayet' was to be interpreted strictly as applicable to Damascus, the word must also be interpreted to mean 'vilayet' with regard to Homs and Hama, neither of which was or ever had been a vilayet."[80] Feisal demanded "these pledges now be fulfilled."[81] Lindsay replied with a veiled threat, noting Hussein's refusal to sign the Treaty of Versailles meant the British Government "could not possibly" recognize Hussein's "right to discuss the disposal of the areas liberated from the Turks."[82]

As will be seen, Feisal's assertion regarding the interplay between "District" and "*Vilayet*" represented the first in a long series of arguments underpinning the Arab legal interpretation of McMahon's 24 October 1915 letter as including Palestine in the pledge. The arguments formed the core of the Arab legal strategy to attack the subsequently issued Balfour Declaration as unlawful because it conflicted with McMahon's pre-existing, legally enforceable promise of Palestine to the Arabs. If the Balfour Declaration were rendered null and void, then all subsequent instruments incorporating the Balfour Declaration, including the relevant provisions of the San Remo Resolution, the Palestine Mandate and even the 29 November 1947 United Nations Resolution 181 approving the partition of Palestine into Jewish and Arab states would also be null and void.

After Lindsay's threat Feisal seemed to back away, saying

> he was quite prepared to accept that it had been the original intention of H.M.G. to exclude Palestine. He was merely acting in this respect in strict accordance with instructions received from his father [Hussein], the King of the Hedjaz. The matter was then dropped.[83]

But the matter was not dropped for long, as the Arabs continued to press their new interpretation of the correspondence as promising Palestine to them. For example, at a high-level 28 March 1921 meeting at Government House in Jerusalem, then Colonial Secretary Winston Churchill explained Britain's support for Arab nationalism to Feisal's brother Abdullah by "using the Sherifian family as a medium."[84] Churchill, however, noted there were "parts of the Arab world in which His Majesty's Government were not able to carry out this policy, owing to the decisions of the Allies and to promises made to third parties. These parts were Syria and Palestine."[85]

Abdullah acknowledged Britain was not free to act in Syria and "Western Palestine." But he demanded Churchill and High Commissioner Herbert Samuel disclose Britain's "true intentions" in Palestine, including whether Britain intended to establish a "Jewish Kingdom."[86] Abdullah wanted Palestine and Transjordan combined under the sovereignty of a single Emir, namely himself. At this point a clearly exasperated Churchill threatened Abdullah that Britain could "go in a different direction" and divide the Arab world into smaller pieces if Abdullah were uncooperative.[87]

Undaunted, the Arab side continued insisting Palestine was rightfully theirs. In a March 1922 letter from the Palestine Arab delegation to Churchill discussing the ongoing consultations between the British Government, the Zionist Organization, and the Palestinian Arabs regarding the governance system for the future British Mandate, the Arab delegation said they could not

accept the creation of a Jewish National Home in Palestine:

> In 1915, before the Balfour Declaration was published, His Majesty's Government made a pledge to the Arabs in which it undertook to recognise the independence of those Arab States which had formerly belonged to Turkey. Palestine is one of those States as is clearly seen by reference to King Hussein's letter dated 14th July, 1915, in which the western boundary is denoted by the "Red Sea and Mediterranean." There can be no question that Palestine comes within these boundaries.[88]

Churchill responded to this argument in a 3 June 1922 official statement of British policy in Palestine, which became known as the "Churchill White Paper."[89] Commenting on the apparent ambiguity in McMahon's 24 October 1915 letter, Churchill said:

> [I]t is not the case, as has been represented by the Arab Delegation, that during the war His Majesty's Government gave an undertaking that an independent national government should at once be established in Palestine. This representation mainly rests upon a letter dated 24th October, 1915 from Sir Henry McMahon, then His Majesty's High Commissioner in Egypt, to the Sherif of Mecca, now King Hussein of the Kingdom of the Hejaz. That letter is quoted as conveying the promise to the Sherif of Mecca to recognize and support the independence of the Arabs within the territories proposed by him. But this promise was given subject to a reservation made in the same letter, which excluded from its scope, among other territories, the portions of Syria lying to the West of Damascus. This reservation has always been regarded by His Majesty's Government as covering the Vilayet of Beirut and the independent Sanjak of Jerusalem. The whole of Palestine west of Jordan was thus excluded from Sir H. McMahon's pledge.[90]

The Arab Delegation had previously replied to a draft of the Churchill White Paper with a more detailed legal argument about McMahon's 24 October 1915 letter. They noted the use of the word "District" in the English version of the letter, arguing McMahon must have intended the narrower geographic meaning of "district" rather than the broader meaning of *vilayet*, because it would have been superfluous to mention Homs and Hama in the same category as Aleppo and Damascus. Moreover, if McMahon meant to refer to the actual *Vilayet of Syria*, then he could have said so, as there was no such thing as a *Vilayet of Damascus*. Thus, the only logical reading of McMahon's letter was that Palestine was *included* in the pledge. The only area *excluded* was Lebanon, which lies directly to the west of the line running from Aleppo southward through Hama and Homs to Damascus.[91]

The Arabs continued to press this and other arguments of a more legal nature over the next few decades, as we shall see in the testimony of their witnesses and the cross-examinations conducted by their lawyers before the Shaw Commission, as well as the Mufti's testimony before both the Shaw and Peel Commissions. The Arab legal position evolved to the point of great sophistication and subtlety, ably argued and presented by many of the leading Arab and British advocates of the first half of the 20th century.[92] Those arguments have continued to this day, including:

- First, the McMahon-Hussein correspondence had the legal status of a binding treaty, imposing a solemn legal obligation on Britain to comply.[93]
- Second, Sherif Hussein had claimed all Arab lands, including by implication Palestine in his first letter to McMahon of 14 July 1915, and despite multiple opportunities to do so, McMahon never explicitly excluded Palestine (much less mentioned the word "Palestine") in *any* of the subsequent exchanges with the Sherif.
- Third, British legal precedents require the correspondence (especially the 24 October 1915 letter) to be construed based on the ordinary and plain meaning of the words used, thereby rendering irrelevant any consideration of intent, but if anyone's intent were deemed relevant it would be the British Government's and not McMahon's personal intent.

- Fourth, the plain meaning and ordinary usage of the phrase "portions of Syria lying to the west of the Districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab" could not reasonably be read as referring to or including Palestine.
- Fifth, any construction of the correspondence that would lead to an absurd result would violate principles of British and International law. As the former Chief Justice of Palestine would later say when the Arab side retained him to review the McMahon-Hussein correspondence,

> [t]o say that when Sir Henry McMahon wrote of the 'district of Damascus' he meant the Ottoman Vilayet of Syria is exactly as though one should be asked to believe that a reference to the district of Maidstone meant the County of Kent.[94]

- Sixth, the ordinary and plain meaning of "district" or *wilaya* was the "environs," "vicinity" or "regions" of each of the four named towns in McMahon's 24 October 1915 letter, and thus could not have encompassed the larger geographic area of Palestine.
- Seventh, excluding certain areas west of the four named towns "as not purely Arab" cannot logically have meant Palestine, which (except for Jerusalem) was predominantly Arab at the time.
- Eighth, applying the general exception in favor of French interests may have made sense as to Lebanon, but *not* as to Palestine. This was especially so because in June 1915, prior to the McMahon-Hussein correspondence, Lord Kitchener had recommended southern Syria (including Palestine) be *separated* from the area of French influence. Thus, by October 1915 Britain could *not* have intended the exception in favor of French interests be applied to Palestine.
- Ninth, in any event, France subsequently renounced whatever interests it may have had in Palestine when it endorsed the Balfour Declaration and subsequently voted in favor of awarding the Mandate for Palestine to Great Britain.[95]

British legal interpretation

The British government, initially adamant in its interpretation of McMahon's 24 October 1915 letter as excluding Palestine, eventually began to harbor certain doubts about the validity of that interpretation. One early skeptic was the Palin Commission, set up as a Military Court of Inquiry to examine the causes of the 1920 *Nebi Musa* riots in Jerusalem. According to the Commission:

> The tendency of the evidence is to show that in spite of the fact that nothing had been said about Palestine being included in the Hedjaz Empire and the fact that the Balfour Declaration had been published in 1917, the early impression left upon the Arabs generally was that the British were going to set up an independent Arab State which would include Palestine.[96]

Another early skeptical British official was the famous historian Arnold Toynbee, then serving as a temporary office clerk in the Political Intelligence Department of the Foreign Office. Toynbee wrote two memoranda in the fall of 1918, arguing McMahon's 24 October 1915 letter did not exclude Palestine.[97]

Toynbee's early interpretation of the correspondence, however, represented a minority viewpoint within the British Government at that time. As noted, the Churchill White Paper, issued in July 1922, declared Britain's official position that McMahon's 24 October 1915 letter "excluded from its scope, among other territories, the portions of Syria lying to the West of Damascus. This reservation has always been regarded by His Majesty's Government as covering

the Vilayet of Beirut and the independent Sanjak of Jerusalem."[98] Thus, according to Churchill and the British Government, *all* of Palestine was *excluded* from the McMahon pledge.[99]

The Churchill White Paper's reading of McMahon's 24 October 1915 letter was based on an examination of the Arabic version of the correspondence in 1920 by Major Hubert Young of the Foreign Office, who had previously served in the Arab Bureau in Cairo. According to Major Young, the Arabic word *Wilaya* meant the same thing as the Turkish word *Vilayet*. Although there was no such thing as the *Vilayet of Damascus*, Major Young, in a bit of linguistic gymnastics, argued that because Damascus itself was the capital of the *Vilayet of Syria*, and because Palestine lay to the west of the *Vilayet of Syria*, that meant Palestine had been excluded from the McMahon pledge.[100]

Interestingly, the drafters of the Churchill White Paper chose not to rely on Major Young's stretched formulation, instead positioning the argument from another angle by focusing on the location of the *Vilayet* of Beirut as "a portion of Syria lying to the west of the district of Damascus." Because the *Vilayet* of Beirut encompassed a large portion of Palestine, McMahon's pledge therefore must be read as excluding *all* of Palestine, including the independent *Sanjak* of Jerusalem (which lay *southwest*, but not *due west* of the "District of Damascus"). Although this formulation was somewhat more plausible than Major Young's, it still failed to satisfy the Arab side, as they claimed it ignored the plain language of McMahon's 24 October 1915 letter.

The behind-the-scenes activity during the months preceding the issuance of the July 1922 Churchill White Paper helps explain why the British Government was so confident McMahon's 24 October 1915 letter excluded Palestine. The written exchanges between the Palestine Arab Delegation and the Colonial Office began on 21 February 1922 with a letter from the Arab Delegation to the Colonial Secretary, in which the Arabs claimed Palestine had been promised to them.[101] Shuckburgh of the Colonial Office replied to the Arab Delegation on 1 March 1922, rejecting their claim.[102]

Nine days later, however, Shuckburgh met with McMahon to make sure the British Government stood on solid ground. Shuckburgh asked McMahon point-blank whether or not he had intended to include or exclude Palestine from his 24 October 1915 letter to Hussein. McMahon said his and the British Government's intent was to *exclude* Palestine from the areas pledged to the Arabs. Shuckburgh asked McMahon to write him a private letter so confirming. McMahon obliged and sent the following letter to Shuckburgh on 12 March 1922:

> My dear Shuckburgh;
>
> With reference to our conversation on Friday (10th), I write you these few lines to place on record the fact that in my letter of the 24 October 1915 to the Sherif of Mecca, it was my intention to exclude Palestine from independent Arabia, and I hoped that I had so worded the letter as to make this sufficiently clear for all practical purposes.
>
> My reasons for restricting myself to specific mention of Damascus, Hama, Homs and Aleppo in that connection in my letter were (1) that these were places to which the Arabs attached vital importance and (2) that there was no place I could think of at the time of sufficient importance for purposes of definition further South of the above.
>
> It was as fully my intention to exclude Palestine as it was to exclude the more Northern coastal tract of Syria.
>
> I did not make use of the Jordan to define the limits of the Southern area, because I thought it might possible [sic] be considered desirable at some later stage of negotiations to endeavor to find some more suitable frontier line east of the Jordan and between that river and the Hedjaz Railway. At that moment moreover very detailed definitions did not seem called for.

> I may mention that I have no recollection of ever having anything from the Sherif of Mecca, by letter or message, to make me suppose that he did not also understand Palestine to be excluded from independent Arabia.
>
> I trust that I have made my intention clear.
>
> Yours sincerely,
>
> (Signed) A. Henry McMahon[103]

Shuckburgh forwarded McMahon's letter the following day to Eric Forbes Adam, First Secretary at the Foreign Office. Shuckburgh mentioned in his cover note "the vexed question whether Palestine was or was not excluded from the scope of the McMahon pledge." Noting McMahon was "quite clear on the point that the intention was to exclude Palestine," Shuckburgh expressed hope the issue would not be raised, "but it is just as well that we should have all the evidence at our disposal in case we are definitely challenged on the subject."[104]

As it happened, the Arab Delegation raised the McMahon-Hussein correspondence in their very next letter to the Colonial Office only three days later, on 16 March 1922,[105] leading to the Government's response in the 1 July 1922 Churchill White Paper. The White Paper, however, made no mention of McMahon's 12 March 1922 letter to Shuckburgh, which remained confidential until McMahon himself went public 15 years later.

But the White Paper was not the end of the McMahon-Hussein story from the British perspective. On 27 March 1923, former Foreign Secretary Grey (now Lord Falladon) commented in the House of Lords that Britain had made inconsistent promises to the Jews and Arabs during the War.[106] Sir Herbert Samuel, then serving as the High Commissioner in Palestine, asked Gilbert Clayton, who had served alongside McMahon in Cairo during the McMahon-Hussein correspondence, whether he could "throw any light" on the issue. Clayton responded with a memorandum to Samuel dated 12 April 1923.

The Clayton Memorandum to Samuel provides additional evidence supporting the British legal interpretation that McMahon's 24 October 1915 letter excluded Palestine from the areas pledged to the Arabs. Clayton said he was in daily contact with McMahon during their service together in Cairo. Clayton said he wrote the preliminary drafts of McMahon's letters to Hussein. "I can bear out the statement," said Clayton in his Memorandum to Samuel,

> that it was never the intention that Palestine should be included in the general pledge given to the Sherif; the introductory words of Sir Henry's letter were thought at the time – perhaps erroneously – clearly to cover that point. It was, I think, obvious that the peculiar interests involved in Palestine precluded any definite pledges in regard to its future at so early a stage.[107]

Several years later, on 24 October 1930, W.J. Childs, a temporary clerk at the Foreign Office, wrote a lengthy analysis described as "the best and most comprehensive historical survey of the McMahon-Hussein correspondence to be produced by a British official."[108] Childs concluded that McMahon's 24 October 1915 letter had excluded Palestine.

First, Childs noted, McMahon used the word "districts" in his letter to the Sherif because Farouki himself had used the *same* word during his meeting with McMahon. Second, the word "district" should properly have been understood as referring to a broad "administrative area," also based on language Farouki used with McMahon in their Cairo meeting. Thus, Childs argued, it was "beyond question" and "perfectly clear" Farouki intended the word "districts" to convey the broader geographic equivalent of Vilayets.[109] Third, Childs concluded Palestine had

been excluded from the pledge based on both the specific geographic reservation and especially the general reservation in favor of France.[110]

Nearly three months before Childs wrote his memo, Dr. Drummond Shiels, the Undersecretary of State for the Colonies, made the following statement on the floor of the House of Commons regarding whether the McMahon-Hussein correspondence should be published:

> His Majesty's Government have been impressed by the feeling shown in the House of Commons on various occasions, and especially in the debate on the Adjournment on the 7th May, with regard to the correspondence which took place in 1915–16 between Sir Henry McMahon and the Sherif Hussein of Mecca. They have, therefore, thought it necessary to re-examine this correspondence fully in the light of the history of the period and the interpretations which have been put upon it. There are still valid reasons, entirely unconnected with the question of Palestine, which render it in the highest degree undesirable in the public interest to publish the correspondence. These reasons may be expected to retain their force for many years to come. There are not sufficient grounds for holding that by this correspondence His Majesty's Government intended to pledge themselves, or did, in fact, pledge themselves, to the inclusion of Palestine in the projected Arab State. Sir H. McMahon has himself denied that this was his intention. The ambiguous and inconclusive nature of the correspondence may well, however, have left an impression among those who were aware of the correspondence that His Majesty's Government had such an intention.[111]

As the Arab side continued to press their interpretation over the next few years, including, as we shall see, before both the Shaw and Peel Commissions, pressure mounted on the British Government to publish the correspondence and for McMahon to make a public statement clearing the air about his intentions regarding Palestine.

Portions of the correspondence eventually were made public in the Peel Commission report,[112] prompting another round of public debate in Britain. On 20 July 1937, the former British High Commissioner in Palestine, Sir (now Viscount) Herbert Samuel, gave a speech to the House of Lords generally praising the Peel Commission Report. Samuel felt, however, the need to add context to the Report's criticism of the ambiguity in McMahon's 24 October 1915 letter.

FIGURE 1.6 Herbert Samuel

(Library of Congress, Prints and Photographs Division).[113]

During his speech, Samuel read the full text of Clayton's April 1923 Memorandum, just as Samuel had done during his secret testimony before the Peel Commission only a few weeks earlier. Samuel had previously sent a copy of both Clayton's 1923 Memorandum and Feisal's 1919 letter to Samuel to the Secretary of the Peel Commission, hoping the Commission would rely on both documents as proving the British never intended to include Palestine in the McMahon pledge.[114] But the Report contained no mention of the information Samuel had

provided, prompting Samuel to make everything public when he rose to address the House of Lords:

> The Commission say, in their Report: The Arabs understood (before and after the revolt in the Hedjaz) that in the event of an Allied victory Palestine would be included in the sphere of Arab independence … I can throw some light on this matter [reads Clayton Memorandum for the record] … At the time of the Versailles Conference the Arabs were represented in Paris by the Emir Feisal, afterwards King of Iraq, who was head of the Arab Delegation … I had occasion at that time to have correspondence with Feisal, and in the course of a letter which he wrote to me about another matter into which I need not enter, he used this language … "The mutual confidence between Dr. Weizmann and myself and the perfect accord in our point of view has permitted a perfect understanding between us, and will maintain that harmony between us which is so necessary for the success of our common cause." That was two years after the Balfour Declaration, and four years after the McMahon correspondence.[115]

The next day, 21 July 1937, the Colonial Secretary, William Ormsby-Gore, who had served in the Arab Bureau in Cairo working for McMahon, made the following statement in the House of Commons:

> I served in 1916 in the Arab Bureau in Cairo on Sir Henry McMahon's staff, and I wish myself to tesjpgy to the fact that it never was in the mind of anyone on that staff that Palestine west of the Jordan was in the area within which the British Government then undertook to further the cause of Arab independence. [116]

Two days later, on 23 July 1937, *The Times* published a letter to the editor from McMahon himself:[117]

> Sir,
>
> Many references have been made in the Palestine Royal Commission [Peel Commission] Report and in the course of the recent debates in both Houses of Parliament to the 'McMahon Pledge,' especially to that portion of the pledge which concerns Palestine and of which one interpretation has been claimed by the Jews and another by the Arabs.
>
> It has been suggested to me that continued silence on the part of the giver of the pledge may itself be misunderstood.
>
> I feel, therefore, called upon to make some statement on the subject, but I will confine myself in doing so to the point now at issue – i.e., whether that portion of Syria now known as Palestine was or was not intended to be included in the territories in which the independence of the Arabs was guaranteed by my pledge.
>
> I feel it is my duty to state, and I do so definitely and emphatically, that it was not intended by me in giving this pledge to King Hussein to include Palestine in the area in which Arab independence was promised.
>
> I also had every reason to believe at the time that the fact that Palestine was not included in my pledge was well understood by King Hussein.
>
> Yours faithfully,
>
> A. Henry McMahon

Ormsby-Gore sent a private letter to McMahon that same day, expressing "cordial thanks" for McMahon's letter to the *Times*. "This authoritative statement by the giver of the famous 'Pledge' to King Hussein," wrote Ormsby-Gore,

> is of great value to the Government, and particularly to myself, corroborating as it does all I said in the House on Wednesday, as to the intention to exclude the country now known as Palestine from the area in which Arab independance [sic] was to be guaranteed.[118]

At least one British official, however, disapproved of McMahon's letter to the *Times*. George W. Rendell, the Head of the Eastern Department of the Foreign Office, minuted his reaction three days later:

> This is rather a remarkable letter, and has already been freely quoted. My own impression from reading the [McMahon-Hussein] correspondence has always been that it is stretching the interpretation of our *caveat* to the breaking point to say that we definitely did not include Palestine, and the short answer is that if we did not want to include Palestine we might have said so in terms, instead of referring vaguely to areas west of Damascus and to extremely shadowy arrangements with the French, which in any case ceased to be operative shortly afterwards. We have not yet been asked to publish the McMahon correspondence, and so long as this request is not formally put forward matters must clearly be allowed to rest where they are. But I shall be surprised if this letter does not lead to a good deal of eventual controversy.[119]

In January 1939, the Foreign Office prepared a Secret Memorandum for the Secretary of State for Foreign Affairs, who circulated it among the British Cabinet, entitled "The Juridical Basis of the Arab Claim to Palestine." The Memorandum was prepared to assist the British side in the upcoming Roundtable Conference at St. James's Palace with Arab and Jewish representatives regarding Palestine, as it was anticipated the Arabs would again raise the McMahon-Hussein correspondence.[120]

The Memorandum describes certain "weak points" in the British legal case for defending its interpretation of the word "District" in McMahon's 24 October 1915 letter. The Memorandum noted "[i]t may be possible to produce arguments designed to explain away some of these difficulties individually … but it is hardly possible to explain them away collectively."[121]

The Memorandum also criticized the general reservation in favor of French interests as having "little, if any validity," given Britain felt unconstrained regarding French interests when it issued the Balfour Declaration.[122] The Memorandum summed up by noting "there are points of serious weakness in the government's case … the correspondence lacks that self-evident and decisive clarity which ought to form the basis of international acts."[123]

"The best that can be done," according to the Memorandum, would be for the government to argue the ambiguous language in McMahon's 24 October 1915 letter entitled the government to rely on its *own* intentions at the time, while acknowledging McMahon's own statements in his letters to Shuckburgh and to the *Times* are "not evidence."[124]

Lacy Baggallay of the Foreign Office sent the Memorandum to H.F. Downie at the Colonial Office for his review before an upcoming series of meetings with the Arabs to discuss the McMahon-Hussein correspondence. Baggallay commented in his cover letter, "I must say that, after going into the whole question of the McMahon-Hussein correspondence again, our position in regard to this correspondence seems to me even weaker than it did before!"[125]

Downie, however, felt no need to reconsider the Government's position:

> The idea that the fundamental issue whether or not Palestine is to be turned into an Arab state can be decided (or even seriously affected by) a legal interpretation of the McMahon correspondence is too ridiculous to need refutation … Surely we need only concerns ourselves with refuting the offensive insinuation (which constitutes the sting of the Arab case) that HMG has been guilty of bad faith in the matter. On this point there is no reason why we should condescend to argument with the Arabs. We have always maintained that our intention was to exclude Palestine from the pledges given to the Sharif.[126]

Several days later, Baggallay and Beckett from the Foreign Office met with the Lord Chancellor (Lord Frederic Maugham) to discuss the Memorandum. The Lord Chancellor had seen the Memorandum and requested the meeting to express his view that "the memorandum did not state the [legal] case for His Majesty's government as well as it could be stated."[127] Regarding the specific reservation in McMahon's 24 October 1915 letter, the Lord Chancellor noted that while McMahon's intent might not be "strictly relevant to any construction of the letter … it was permissible to take into account the whole of the surrounding circumstances when attempting to

get at the true meaning of the words used."[128]

According to the Lord Chancellor, those circumstances included the enormous importance to Britain and France of the strategically crucial ports of Acre, Haifa, and Jaffa and the extreme unlikelihood that McMahon would have promised those ports to the Sherif. The Lord Chancellor also viewed as relevant the even more remote likelihood that McMahon would have ceded the Holy Sites throughout Palestine to solely Muslim control.

The Lord Chancellor further argued the general reservation in favor of French interests supported the Government's position that Palestine had been excluded from the pledge, and "if the Sherif of Mecca was unaware of the fact that the claims of France extended to Palestine at that time, the onus lay on him, to make sure of the extent of those claims."[129]

Another first-hand recollection, made public in February 1939, came from Colonel C.E. Vickery, who served as the British Agent at Jeddah to Sherif Hussein (now King of the Hedjaz) from 1919–20. Vickery described a meeting with King Hussein in 1920, during which they discussed McMahon's 24 October 1915 letter. According to Vickery:

> I read the letter through very slowly; it was not written in very scholarly Arabic and had no English translation in the margin, and it was quite evident that Palestine was not included in the proposals to the King. I can say most definitely that the whole of the King's demands were centred round Syria, and only round Syria. Time after time he referred to that vineyard, to the exclusion of any other claim of interest. He stated most emphatically that he did not concern himself at all with Palestine, and had no desire to have suzerainty over it for himself or for his successors.[130]

Following the failure of the Arab–Jewish Conference in 1939, the British Government issued the most famous (or perhaps infamous) of its many Palestine-related White Papers, the so-called MacDonald White Paper of 1939.[131] The White Paper noted the discussions at the conference regarding the McMahon-Hussein correspondence:

> In the recent discussions the Arab delegations have repeated the contention that Palestine was included within the area in which Sir Henry McMahon, on behalf of the British Government, in October, 1915, undertook to recognise and support Arab independence. The validity of this claim, based on the terms of the correspondence which passed between Sir Henry McMahon and the Sharif of Mecca, was thoroughly and carefully investigated by the British and Arab representatives during the recent conferences in London. Their report, which has been published, states that both the Arab and the British representatives endeavoured to understand the point of view of the other party but that they were unable to reach agreement upon an interpretation of the correspondence. There is no need to summarize here the arguments presented by each side. His Majesty's Government regret the misunderstandings which have arisen as regards some of the phrases used. For their part they can only adhere, for the reasons given by their representatives in the Report, to the view that the whole of Palestine west of Jordan was excluded from Sir Henry McMahon's pledge, and they therefore cannot agree that the McMahon correspondence forms a just basis for the claim that Palestine should be converted into an Arab State.[132]

The British Government feared publishing the correspondence not so much because of the potential public reaction to McMahon's 24 October 1915 letter, but more so because of McMahon's language in his first letter to the Sherif (20 August 1915), in which McMahon accepted the Sherif's demand for British recognition of an Arab Caliphate. The British Government, and the India Office in particular, were extremely worried about provoking a backlash among the very large non-Arab Muslim population in India (including present day Pakistan) if the 20 August letter were ever made public.[133]

Nevertheless, portions of the correspondence first became public in a series of pro-Palestinian Arab articles in the Daily Mail, beginning 12 January 1923.[134] The British Government resisted pressure in both Houses of Parliament to come clean and publish the correspondence. Eventually, after much internal debate, the Peel Commission was allowed to publish excerpts

from the letters,[135] and the full correspondence appeared one year later (1938) in George Antonius' book *The Arab Awakening*.[136] The British Government finally published an official version of the correspondence in 1939 in Command Paper 5957.

Legal principles applicable to Arab and British arguments

Notwithstanding the Arab view of the McMahon-Hussein correspondence as constituting a "treaty," it clearly was not a Treaty between states, as the Sherif in October 1915 was not the ruler of a sovereign state.[137] But if one accepts the Arab view that a treaty was formed, then it still becomes necessary to interpret the treaty's meaning. Given the ambiguous language of the McMahon-Hussein correspondence, the international law of treaty interpretation provides a useful framework for assessing the validity of the Arab and British positions regarding whether McMahon's and the British Government's intent was relevant.

Article 31 of the Vienna Convention on the Law of Treaties provides, "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*." Article 31 further states, "A special meaning shall be given to a term if it is established that the parties so intended." [138]

Article 32 of the Vienna Convention permits resort to "supplementary means of interpretation" to determine the meaning of a treaty, including the circumstances of the Treaty's conclusion, to avoid a result which is "ambiguous or obscure" or "manifestly absurd or unreasonable."[139]

The Vienna Convention is based on customary international law, requiring treaties to be interpreted "according to their reasonable, in contradistinction to their literal, sense." In the event of ambiguity, "[i]f two meanings of a provision are admissible according to the text of a treaty, such meaning is to prevail as the party imposing the stipulation knew at the time to be the meaning preferred by the party accepting it," and "if two meanings of a provision are admissible, that which is least to the advantage of the party for whose benefit the provision was intended in the treaty should be preferred."[140]

Writing a few years prior to the adoption of the Vienna Convention, one commentator noted the difference between British and International law for interpreting legal documents such as treaties:

> There are no technical rules in international law for the interpretation of treaties; its object can only be to give effect to the intention of the parties as fully and fairly as possible. But lawyers who are trained in the methods of interpretation applied by the English courts should bear in mind that English draftsmanship tends to be more detailed than continental, and it receives, and perhaps demands, more literal interpretation.[141]

In his advocacy on behalf of the Arab side to the Joint Arab–British Committee in 1939, Michael McDonnell, the former Chief Justice of Palestine, argued British legal precedents and British law required the McMahon-Hussein correspondence be interpreted by reference to what he described as the clear and unambiguous language of the correspondence, without regard to McMahon's or the British Government's intent.[142] But customary international law and the Vienna Convention take a somewhat broader view, emphasizing both the ordinary meaning of the language as well as the object and purpose of the document, which may need to be interpreted in light of what the parties intended.

The Permanent Court of Arbitration, adjudicating a dispute between France and the

Netherlands, made the following point regarding the role of intent in interpreting a treaty:

> In so far as the text is not sufficiently clear, it is allowable to have recourse to the intention of the parties concerned. If, in this case, the intentions are clear and unanimous, they must prevail over every other possible interpretation. If, on the contrary, they diverge or are not clear, that meaning must be sought which, within the context [*dans le cadre du texte*], best gives either a reasonable solution of the controversy, or the impression which the offer of the party which took the initiative must reasonably and in good faith have made on the mind of the other party.[143]

The Arab side would argue, based on the above legal principles, and whether British or international law were applied, the phrase "lying to the west of the Districts of Damascus, Homs, Hama and Aleppo" was *not* ambiguous and should be interpreted literally to mean *only* Lebanon, but *not* Palestine was excluded from the pledge. But even if the phrase were deemed ambiguous, the Arab side would argue the ambiguity should be construed *against* the British drafters of the 24 October 1915 letter and resolved in favor of the Sherif.

The British, on the other hand, would argue the phrase was not ambiguous, because both they and the Sherif knew and intended that the *sole* purpose of the 24 October 1915 letter was to reassure the Sherif that the four Syrian towns would be included in the future Arab state. The entire correspondence, the British would argue, had *nothing* to do with Palestine.

Shuckburgh best described the McMahon-Hussein correspondence as "troublesome."[144] Perhaps the most honest assessment from the British side came from the Peel Commission, which found "[i]t was in the highest degree unfortunate that, in the exigencies of war, the British Government was unable to make their intention clear to the Sherif."[145]

The McMahon-Hussein correspondence continues to provoke controversy to this day, and continues to form the foundation of Arab legal arguments against the legitimacy of the Balfour Declaration and the Mandate. We will see in Chapters 3 and 5 how the Arabs and Jews litigated the correspondence before both the Shaw and Peel Commissions.[146]

Subsequent developments

Following the McMahon-Hussein correspondence, Britain and its allies concluded a series of agreements during and after World War I, setting the stage for British rule in Palestine for more than two decades. Key to those agreements was Britain's 2 November 1917 statement in the Balfour Declaration that it viewed "with favour the establishment in Palestine of a national home for the Jewish people," along with its corollary commitment in the same Declaration that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine."[147]

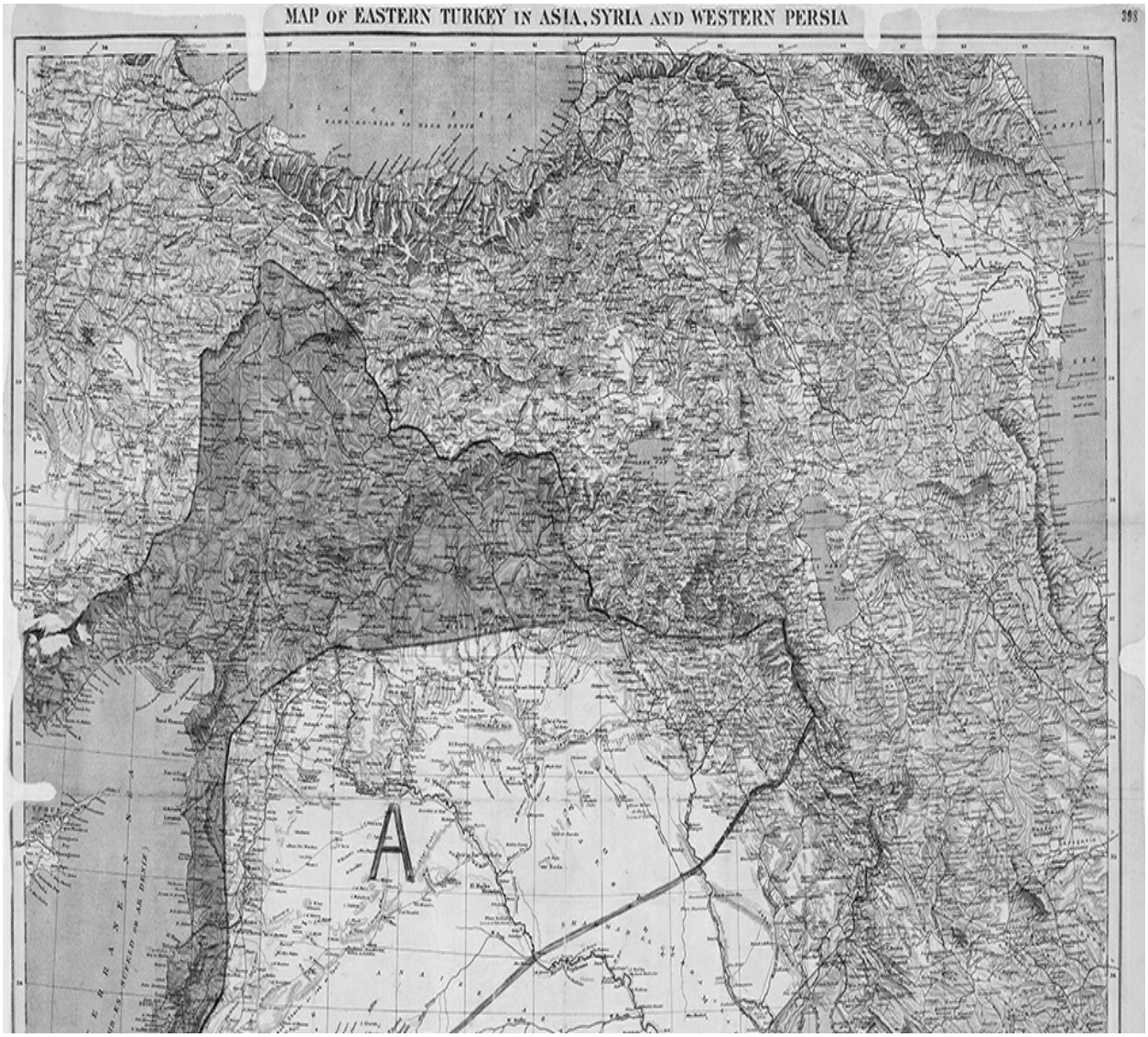
The Balfour Declaration was later incorporated into the San Remo Resolutions, the Treaty of Sevres, and ultimately the Mandate for Palestine, vesting it with legal status, at least according to the Jewish side.

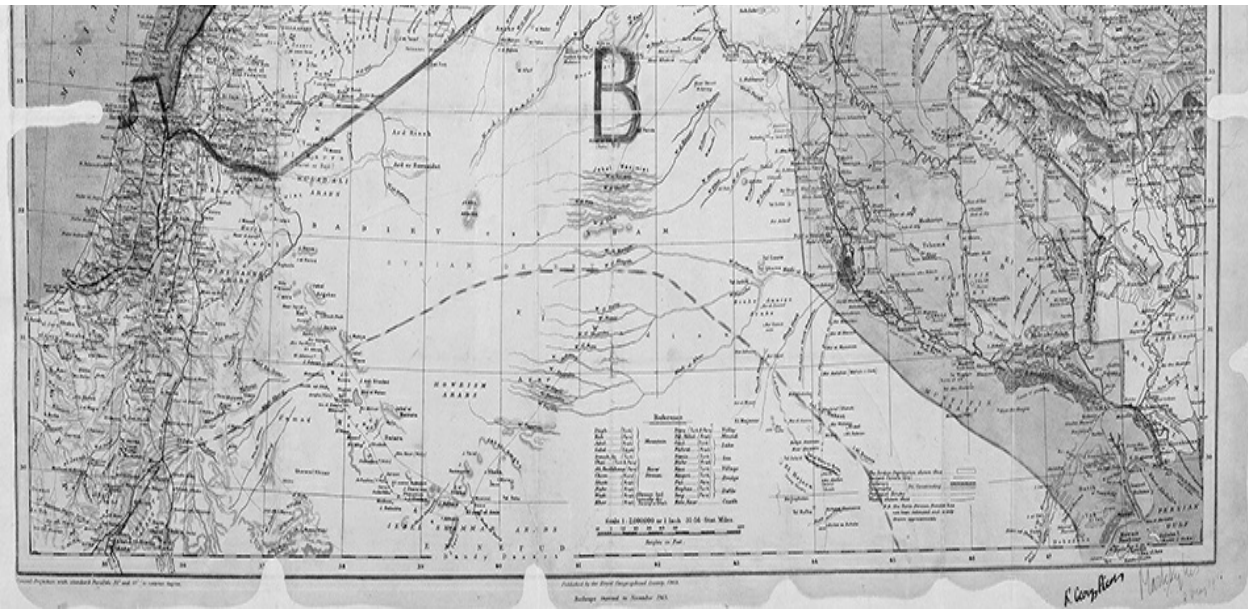
In later legal proceedings before the Shaw and Lofgren Commissions, and in testimony before the Peel Commission, the parties spent enormous amounts of time and effort arguing over the meaning of the Balfour Declaration and the Mandate for Palestine. The key Arab legal argument (among many others, as we shall see) was that both the Balfour Declaration and the ensuing Mandate for Palestine were null and void because they conflicted with Britain's pre-existing pledge of Palestine to the Arabs and with various provisions of the Covenant of the League of Nations.

In the meantime, the British and French began meeting secretly during the ongoing McMahon-Hussein correspondence to strike a deal carving up the anticipated post-war Middle East between them. Those negotiations culminated in the Sykes-Picot Agreement of 1916.

The Sykes-Picot Agreement

In November 1915, only one month after McMahon's key letter to the Sherif, the British Government opened discussions with the French Government regarding the post-War fate of the Middle East.[148] By the spring of 1916, the British and French governments had concluded a secret wartime agreement dividing the Middle East into British, French and Russian spheres of influence, assuming eventual victory over the Ottoman Empire. Negotiated by Sir Mark Sykes for Britain and François Georges-Picot for France, the agreement was memorialized in a letter dated 16 May 1916 from British Foreign Secretary Sir Edward Grey to French Foreign Minister Paul Cambot.[149] The following map was attached to the letter and signed by both Sykes and Picot in the lower right-hand corner:





MAP 1.2 Sykes-Picot Agreement

(Wikipedia).[150]

In the areas marked “A” and “B,” France and Britain agreed to recognize “an independent Arab state or confederation of states under the suzerainty of an Arab chief.” France and Britain would retain “direct or indirect administration or control as they desire” in Areas A (France) and B (Britain). In the Blue Area (France) and Red Area (Britain) the parties were free to “establish such direct or indirect administration or control as they desire,” but without recognizing Arab independence in those areas. Most of what eventually became mandatory Palestine (the yellow area) was designated for control by an “international administration, the form of which is to be decided upon after consultation with Russia,” and subsequently in consultation with other British and French allies, as well as Sherif Hussein.[151]

The Sykes-Picot Agreement remained secret until the Bolsheviks discovered it and published it in November 1917, shortly after the Balfour Declaration had been issued.[152]

Did the Sykes-Picot Agreement conflict with the McMahon pledge? In certain respects it undermined the concept of Arab “independence” in the territories covered by the McMahon pledge, setting aside for the moment whether Palestine was or was not included in those territories.[153] Not surprisingly, the Arabs came to view the Sykes-Picot Agreement, signed less than seven months after McMahon’s 24 October 1915 letter to the Sherif, as a “breach of faith.”[154]

Indeed, the very notion of dividing those territories into British and French spheres of influence and control could not be squared with McMahon’s prior promise of independence, unless, as some have argued, McMahon meant a very limited and constrained version of “independence.” If that were the case, then the Sykes-Picot Agreement could be regarded as perfectly consistent with McMahon’s promises to the Sherif:

> The dominant theme in the [McMahon-Hussein] correspondence is “Arab independence.” This loosely used phrase caused much misunderstanding. What did it mean? … [I]t would be fair to deduce that apart from the Holy Places, Britain (as well as the Allied governments) was not pledged to the establishment of an independent Arab state or confederation of

> states. It was up to the Arabs themselves to make good their aspirations to independence. But as there was no likelihood of their being able to stand on their own feet, it was natural for the British and French governments to fill the vacuum and assume the role of "protectors" [citing Sykes-Picot Agreement] … It was to make the creation of an Arab entity possible, as well as harmonize it with their own legitimate interests in the region, that the British and French governments concluded the Sykes-Picot Agreement. Although this document became notorious in ensuing years, there was nothing in it that was inconsistent with McMahon's pledge.[155]

Whether or not one agrees with this assessment, three other aspects of the Sykes-Picot Agreement were consistent with McMahon's 24 October 1915 letter to Hussein.

First, Britain included language in the introductory portion of the Sykes-Picot Agreement making clear the Arabs were to "obtain" the towns of Damascus, Homs, Hama, and Aleppo.[156]

Second, the treatment of most of Palestine as an international zone supports the notion that France had strong interests there,[157] and therefore Palestine was one of the areas where Britain was not free to act "without detriment to the interests of her ally France."[158] This of course lends support to the British argument that Palestine was covered by the general exclusion in favor of French interests in McMahon's 24 October 1915 letter to Hussein.[159]

Third, as noted, the Sykes-Picot Agreement provided the Sherif would be consulted regarding the future of Palestine, just as McMahon's 24 October 1915 letter said Britain would guarantee the Holy Places. To the extent the reference to "Holy Places" meant not just Mecca and Medina but also the Muslim Holy Places in Jerusalem, then it would have made sense to include the Sherif in discussions about the future governance of Palestine in general and Jerusalem in particular.[160]

Notably, the Sykes-Picot Agreement contained no corollary provision permitting Jewish involvement in consultations regarding Palestine's future governance. Did the absence of such a provision mean Sykes understood McMahon indeed had promised Palestine to the Arabs? No reference has been found to any subsequent Arab legal arguments to that effect. In any event, from the Jewish perspective the Balfour Declaration more than made up for the omission of any Jewish role in the Sykes-Picot Agreement.

The Balfour Declaration

The Balfour Declaration represents the first time any major world power formally endorsed the concept of a Jewish national home in Palestine. The "Declaration" was actually a 67-word letter from British Foreign Secretary Arthur J. Balfour to Lord Lionel Walter Rothschild, dated 2 November 1917. Balfour sent the letter following the British Cabinet's approval and with the support of U.S. President Woodrow Wilson.

Background

Arthur Balfour was a member of the Conservative Party and had previously served as Prime Minister of Britain from July 1902 to December 1905. Lord Rothschild was the heir to the British branch of the Rothschild family and had announced his support for the Zionist cause in a letter to *The Times* on 28 May 1917.[161]

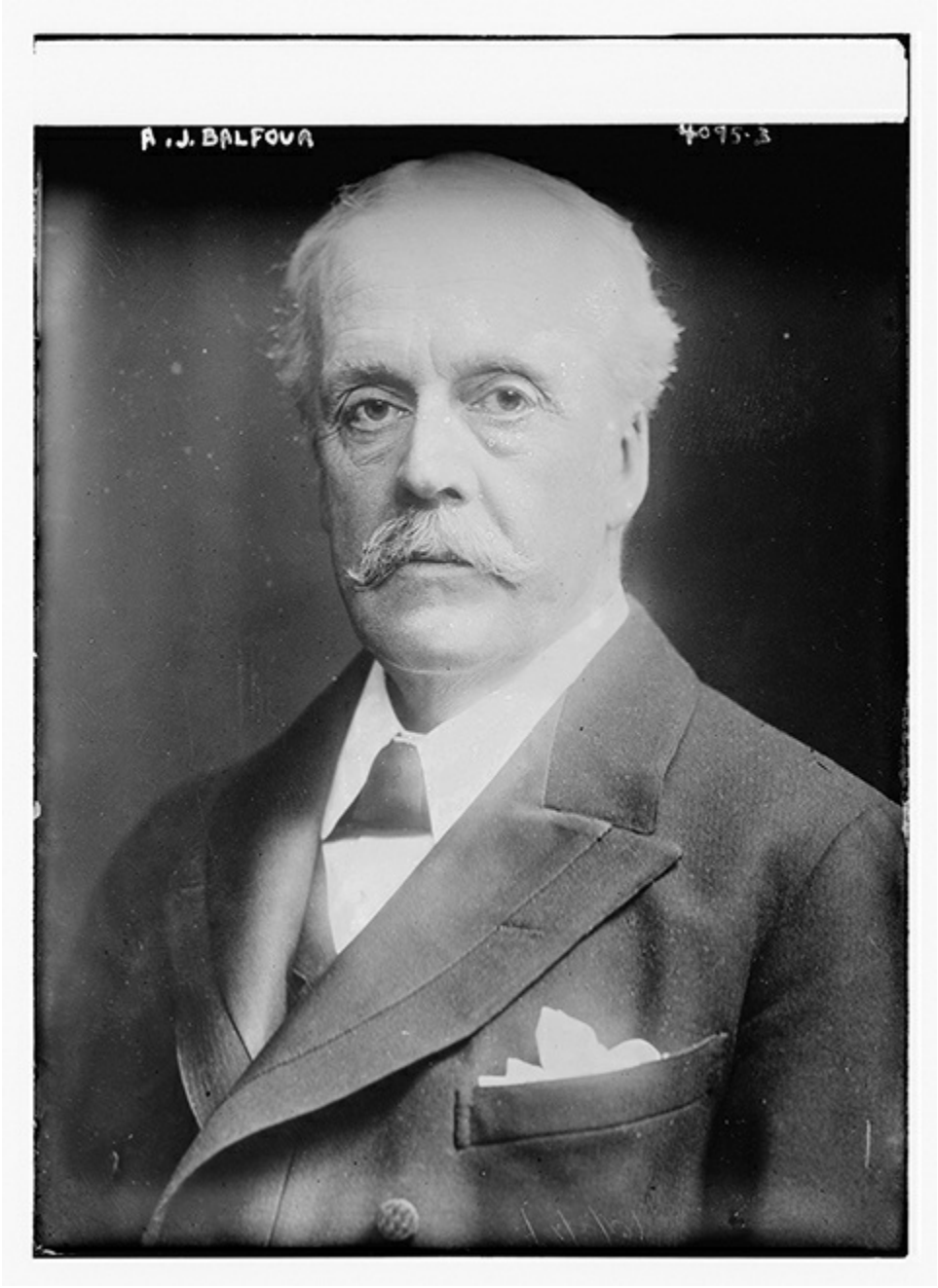


FIGURE 1.7 Lord Balfour

(Library of Congress, Prints and Photographs Division).[162]

Zionism was not a new phenomenon in Britain in 1917. Throughout the 1800s, British evangelical Christians supported the return of the Jews to the Holy Land as a necessary precursor to fulfill the prophesized second coming of Christ.[163] Britain also had key strategic and economic interests in Palestine as a sea/land bridge linking Europe and North Africa with India and the Far East.[164] A secret memorandum written by the General Staff of the War Office in 1918 provides a post-hoc window into the British government's politico-strategic calculus,

explaining that

> the creation of a buffer Jewish state in Palestine, though … weak in itself, is strategically desirable for Great Britain so long as it can be created without disturbing Mohammedan sentiment and is not controlled by a power which is potentially hostile to [Britain].[165]

The Zionist leadership, based in London, focused during 1915–1917 on convincing the British Government to announce public support for establishing a Jewish Homeland in Palestine. The Zionists knew they would have to convince several key British Ministers who were highly skeptical of the idea of a Jewish homeland in Palestine. Chaim Weizmann met repeatedly with high-ranking British officials, lobbying for support for the Zionist cause.[166]

Interestingly, according to a secret history of the negotiations leading to the Balfour Declaration written several years later for the Cabinet, Weizmann (similar to what Farouki had done with Clayton, McMahon and Sykes in 1915) told the British government the Germans had reached out to the Jews to "drive a wedge into the Zionist organization, to influence Jewish opinion, especially in America and Russia, and to utilize it in the interests of German propaganda against the Entente."[167] Weizmann urged the British government to issue a statement in support of Zionist aims to counter the German initiative. The British Government, in turn, needed to secure Jewish support, especially in the United States and Russia, for a war effort that was foundering throughout most of 1917.[168]

But the Zionists also encountered severe opposition from several prominent members of the Jewish Community in Britain. For example, Sir Edwin Montagu, a member of the British Cabinet, strongly opposed the proposed declaration, denying the Jews had any special claim to Palestine and expressing concerns about how the declaration would impact Jews who chose to stay in their adopted countries rather than emigrate to Palestine.[169]

L.L. Cohen, Chairman of the Jewish Board of Guardians, expressed concern that Jews throughout Europe, especially in Russia and Romania, would suffer increased anti-Semitism and persecution as a backlash against any British pledge of support for a Jewish homeland in Palestine. He said "[t]he establishment of a 'national home for the Jewish race' in Palestine, presupposes that the Jews are a nation, which I deny …"[170]

Sir Philip Magnus, a Jewish Member of Parliament, did not mince words in decrying the concept of a Jewish National Home in Palestine. Magnus proclaimed, "I do not gather that I am expected to distinguish my views as a Jew from those I hold as a British subject." He criticized "Zionist agitation," saying "I cannot agree that the Jews regard themselves as a nation." Magnus would only be willing to support "the establishment in Palestine of a centre of Jewish culture."[171]

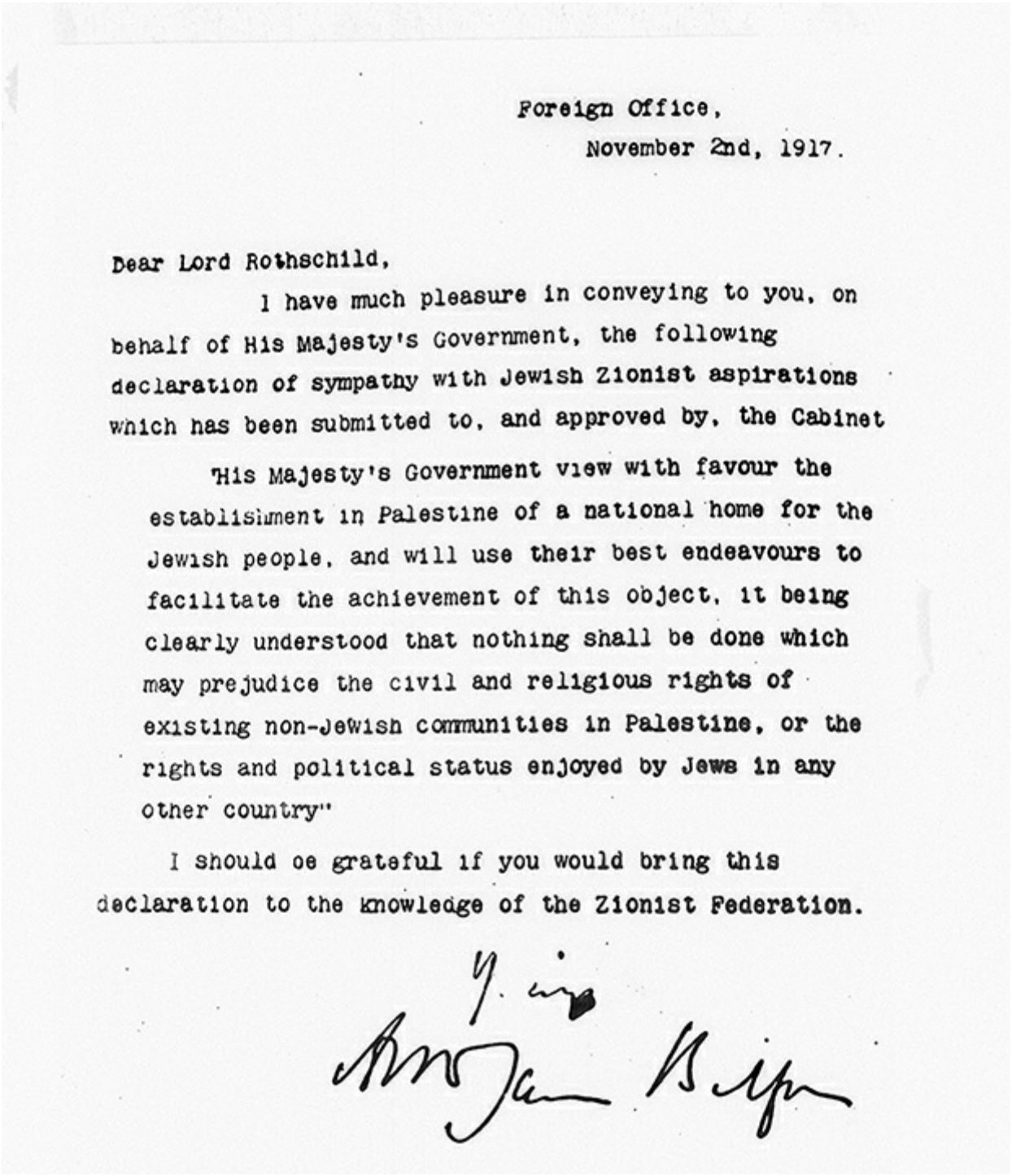
On 19 June 1917, Weizmann and Lord Rothschild met with Balfour to discuss their request for a public endorsement of Zionism by the British Government. In July 1917, Weizmann sent Balfour a draft declaration. During the following months other British government officials and British Jews weighed in with comments and changes to the various drafts. Weizmann unsuccessfully pushed for the Declaration to use the term "re-establishment" rather than the mere "establishment" of a National Home for the Jewish people in Palestine: "By this small alteration the historical connection with the ancient tradition would be indicated and the whole matter put in its true light."[172]

U.S. President Woodrow Wilson endorsed the declaration on 6 October 1917.[173] The British War Cabinet met on 31 October 1917 to consider the Declaration. According to the minutes of

that meeting, Lord Balfour began by saying "that everyone was now agreed that, from a purely diplomatic and political point of view, it was desirable that some declaration favourable to the aspirations of the Jewish nationalists should now be made."[174] Lord Curzon (who was to replace Balfour as Foreign Secretary two years later) observed, "some expression of sympathy with Jewish aspirations would be a valuable adjunct to [British] propaganda …"[175]

The War Cabinet approved the declaration, and Lord Balfour sent his letter to Lord Rothschild three days later containing the famous Declaration:

> 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, 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.[176]



Foreign Office,
November 2nd, 1917.

Dear Lord Rothschild,

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet

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

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

Yours sincerely,
Arthur James Balfour

FIGURE 1.8 The Balfour Declaration

(Zoltan Kluger, Israel Government Press Office).[177]

General Jan Smuts, a member of the War Cabinet who favored the Balfour Declaration, recounted the events surrounding the Balfour Declaration in a January 1930 speech in New York:

> As we were involved in the darkest hours of history, our thoughts turned to the Jewish people, and we made a vow, one of the greatest vows in history, and it shall be kept. The document [the Balfour Declaration] was a very brief one, but very carefully considered. I remember that those of us who labored on the great formula took our time about it, we elaborated on it, advised on it, went over it …[178]

The Peel Commission, writing 20 years later, proclaimed the Balfour Declaration a key strategic contributor to the Allied victory in World War I and Arab independence from the Turks:

> The fact that the Balfour Declaration was issued in 1917 in order to enlist Jewish support for the Allies and the fact that this support was forthcoming are not sufficiently appreciated in Palestine. The Arabs do not appear to realise in the first place that the present position of the Arab world as a whole is mainly due to the great sacrifices made by the Allied and Associated Powers in the War, and secondly, that, in so far as the Balfour Declaration helped to bring about the Allies' victory, it helped to bring about the emancipation of all the Arab countries from Turkish rule. If the Turks and their German allies had won the War, it is improbable that all the Arab countries, except Palestine, would now have become or be about to become independent States.[179]

Reactions and legal interpretations

The wording of the Balfour Declaration was a model of ambiguity and compromise, much like McMahon's 24 October 1915 letter to Hussein. As one historian has noted, "[t]he precise meaning of the Balfour Declaration was not known to anyone and it is doubtful if its formulators knew themselves exactly what they had declared. This lack of clarity left much room for interpretation."[180]

At least six issues emerge on even a cursory first reading of the Declaration.

First, what was meant by the word "Palestine?" Palestine, as we have seen, was not a recognized political entity at that time and had no recognized borders. As of 2 November 1917 it was still part of the Ottoman Empire.

Second, what did Balfour mean by "*in* Palestine?" In *all* of Palestine? Or only *part* of Palestine?[181] If so, *which* part or parts? Interestingly, documents from the time show the Zionists realized they would not end up with all of what was then considered "Palestine," namely both Cisjordan (modern day Israel, the West Bank and Gaza) and Transjordan (modern day Jordan), but were hoping to win the cultivable land on both the west and east banks of the Jordan River.

Third, what did the term "National Home" mean? An independent country or nation-state? Or something less, such as an entity under Zionist suzerainty with British protection/tutelage, along the same lines as the Arab territories designated as Areas A and B in the Sykes-Picot Agreement? Or perhaps something even less, such as a semi-autonomous region within a larger state under Arab or British (or dual Arab–British) dominion? In an October 1917 memorandum for the War Cabinet, Lord Curzon said the Jews merely viewed "the ideal of a Jewish state" in Palestine as a "distant goal."[182] The Peel Commission said the language was "the outcome of a compromise between those Ministers who contemplated the ultimate establishment of a Jewish State and those who did not."[183]

Fourth, what was meant by the word "establishment?" Weizmann had pushed for the word "re-establishment," to indicate Palestine *already* belonged to the Jews, and they were simply returning to reclaim what was rightfully theirs.[184] But the British chose "establishment" over "re-establishment," preferring diplomatic vagueness to the more far-reaching and definitive formulation Weizmann and the Zionists wanted.

Fifth, what was meant by the phrase "existing non-Jewish communities in Palestine?" Why

was the word “Arabs” omitted? Why was no mention made of Arab *political* rights, such as the right to a separate homeland, perhaps somewhere else “in Palestine?” Did the drafters intend the Jews eventually would become the majority in Palestine, leaving the existing communities as a protected but relatively powerless minority? Moreover, unlike the affirmative obligation the British undertook, to “use their best endeavors to facilitate the achievement” of a Jewish National Home in Palestine, why did the Declaration not include any parallel, affirmative obligation on behalf of the existing non-Jewish communities, other than the passive obligation *not* to prejudice the Arabs’ civil and religious rights?

Sixth, on what legal basis did Britain issue the Balfour Declaration, given Palestine belonged to the Ottoman Empire as of November 1917, and Britain arguably had already committed Palestine to the Arabs in the McMahon-Hussein correspondence?

All these issues were the subject of extensive testimony before the Shaw and Peel Commissions, as we shall see.

Initially, the Zionists were somewhat disappointed with the final version of the Balfour Declaration. Weizmann reacted less than favorably, noting, “I did not like the boy at first. He was not the one I expected.”[185] But Weizmann and the Zionists quickly came around, realizing they had won an enormous triumph.

Reaction among British and American Jews was mostly positive.[186] On 24 June 1919, U.S. Supreme Court Justice Louis Brandeis and future Supreme Court Justice Felix Frankfurter traveled to Paris to meet Lord Balfour. According to Frankfurter’s minutes of the meeting, “No statesman could have been more sympathetic than Mr. Balfour was with the underlying philosophy and aims of Zionism.”[187] The French and Italian Governments both endorsed the Balfour Declaration publicly during the first half of 1918.[188] Japan offered its endorsement in January 1919.[189]

Even Feisal’s initial reaction to the Balfour Declaration was positive, but as noted above, by 1920 his opinion had changed dramatically.

Not long after the issuance of the Balfour Declaration, some British officials seemed uneasy with the government’s endorsement of Zionism, just as some British officials had developed second thoughts about whether Palestine had been excluded from the McMahon pledge. Several months after the Declaration was issued, a Lieutenant Colonel assigned to the General Staff of the British War office wrote a secret memorandum in which he candidly discussed how Britain had made “divergent commitments” to the French, the Arabs and the Jews.[190]

The memorandum said the Balfour Declaration “appears to have been made without other parties immediately concerned having been sufficiently consulted.” The memorandum then discussed those other parties, starting with the French, who it described as “quite intransigent,” and the Arabs, who are, “as they always will be, jealous of each other and at each other’s throats.”[191] The memorandum concluded by suggesting Zionism should no longer be relevant, and the Jews and Arabs in Palestine should learn to coexist under British rule.

Another British official, Lord Lloyd, made a similar comment 20 years later, telling Ben Gurion in October 1938 that Britain “gave the Arabs and the Jews conflicting promises. We sold the same horse twice.”[192]

The United States also seemed to harbor second thoughts. Even though President Woodrow Wilson initially supported the Balfour Declaration, several months later he appointed a Commission, known as the “King-Crane Commission,” to visit Palestine and report its findings.

After traveling through Palestine and becoming concerned about the impact of Zionism on the local Arab population, the Commission published a report on 28 August 1919 criticizing what it called the "extreme Zionist program" and urging the "project for making Palestine a distinctly Jewish commonwealth should be given up."[193]

Codifying Balfour: Versailles, Covenant of the League, San Remo, and Sevres

Treaty of Versailles and the Covenant of the League of Nations

Following the end of World War I, the Treaty of Versailles, including the Covenant of the League of Nations (Part I of the Treaty itself) was signed on 28 June 1919, and the League of Nations established 10 January 1920. Article 20 of the Covenant provided:

> The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.
>
> In case any Member of the League shall, before becoming a Member of the League, have 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.[194]

Article 22 of the Covenant provided for creating various Mandates around the world to administer former Ottoman and German territories and colonies "as a sacred trust of civilization" which had ceased to be under the sovereignty of the nations who had governed them before World War I.[195] Paragraph 4 of Article 22 specifically addressed the Middle East, as follows:

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where 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.

As we will see, one of the principal Arab legal arguments against the Balfour Declaration concerned the alleged conflict between the Balfour Declaration and Article 22. The Jewish People, to whom the Balfour Declaration had promised a National Home in Palestine, were not a "communit[y] formerly belonging to the Turkish Empire," and thus had no rights under Article 22 to eventual self-determination in any former Turkish areas, including Palestine. Thus, according to the Arab legal argument, because Article 20 abrogated all existing obligations or undertakings inconsistent with the Covenant, the Balfour Declaration must be deemed to have been nullified because it conflicted with Article 22.[196]

The prominent Arab lawyer Auni Bey Abdul Hadi (about whom we shall hear much more in Chapters 3 through 5) summarized the Arab legal argument on this point in a 1932 article, written after he had participated as both a lawyer and witness in the Shaw and Lofgren Commission hearings:

> The truth is that European diplomacy deceived the Arabs on three different occasions. In the first instance the Arabs were promised independence if they would join the Allies in their attack on the Turks. And when the Turks were defeated through the cooperation of the Arabs their reward was Article 22 of the Covenant of the League of Nations, placing portions of former Turkish Territory under a Mandate, which was anything but the promised liberty and independence. Not content with this blow, the Allies inflicted a foreign government [Britain] which has shattered all Arab hopes of independence. As a *coup de grace*, the Allies devised the obnoxious "Balfour Declaration" which is in utter disregard of

> Article 22 and, if continued to be carried out, will wipe out the Arab nationality in Palestine and replace it by the national home for the Jews.[197]

San Remo Conference

Three months following the establishment of the League of Nations, at the San Remo Conference on 25 April 1920, the Principal Allied Powers (Britain, France, Italy, and Japan) issued a Resolution representing the first official international adoption of the Balfour Declaration:

> The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory, to be selected by the said Powers. The Mandatory *will be responsible for putting into effect* the [Balfour] declaration originally made on November 2, 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 communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[198]

This international recognition and acceptance of the Balfour Declaration represented the first step in rendering the Declaration part of international law.[199]

Treaty of Sevres

Less than four months later, on 10 August 1920, the Treaty of Sevres was adopted (but annulled three years later after Turkey refused to sign), essentially converting the San Remo Resolution into an international Treaty. Article 95 of the Treaty provided as follows:

> The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory to be selected by the said Powers. The Mandatory *will be responsible for putting into effect the declaration originally made on November 2, 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 communities in Palestine, or the rights and political status enjoyed by Jews in any other country.
>
> The Mandatory undertakes to appoint as soon as possible a special Commission to study and regulate all questions and claims relating to the different religious communities. In the composition of this Commission the religious interests concerned will be taken into account. The Chairman of the Commission will be appointed by the Council of the League of Nations."[200]

Article 129 of the Treaty provided that

> Jews of other than Turkish nationality who are habitually resident, on the coming into force of the present Treaty, within the boundaries of Palestine, as determined in accordance with Article 95 will ipso facto become citizens of Palestine to the exclusion of any other nationality.[201]

The Palestine Mandate

Britain maintained military rule in Palestine from December 1917 through 1 July 1920, when a civilian government was established in its place.[202] On 24 July 1922, the Council of the League of Nations voted to designate Palestine as a Mandate and to appoint Britain as the Mandatory.[203] Turkey signed the Treaty of Lausanne on 24 July 1923, officially ending World War I and

formally renouncing its territorial claims to Palestine.[204] The British Mandate officially took effect two months later, on 29 September 1923.

The Preamble to the Mandate also incorporated and expanded upon the Balfour declaration:

> Whereas the Principal Allied Powers have also agreed that the Mandatory *should be responsible for putting into effect* the [Balfour] declaration originally made on November 2, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might 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 … [205]

The incorporation of the Balfour Declaration in the Mandate, following the codifications of the Balfour Declaration at San Remo and Sevres, established the Balfour Declaration as part of customary international law.[206] One of the Members of the Permanent Mandates Commission of the League of Nations, D.F.W. Van Rees of the Netherlands, noted several years later, "the Balfour Declaration, especially confirmed by the [M]andate for Palestine … accorded to the Jews a special legal position and special legal conditions."[207]

This point was also made clear in another paragraph of the Preamble, noting "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for *reconstituting* their national home in that country."[208] Weizmann had finally obtained his long-desired concept of "re-establishment," adding further weight and legitimacy to the Jewish claim to Palestine.

Key provisions of the Mandate

The most important provisions of the Mandate were as follows:[209]

Article 2:

> The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions *as will secure the establishment of the Jewish national home*, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Article 4:

> An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration to assist and take part in the development of the country.
>
> The Zionist organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.

Article 6:

> The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

Article 9:

> Respect for the personal status of the various peoples and communities *and for their religious interests shall be fully*

guaranteed. In particular, the control and administration of Wakfs shall be exercised in accordance with religious law and the dispositions of the founders. [Emphasis added]

Article 13:

All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of *preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship*, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible *solely to the League of Nations* in all matters connected herewith, provided that nothing in this article shall prevent the Mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this article into effect; and provided also that *nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.* [Emphasis added]

Article 14:

A special commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.[210]

Article 15:

The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief …

Article 16:

The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality.

Article 22:

English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew and any statement or inscription in Hebrew shall be repeated in Arabic.

Early legal arguments regarding the Mandate

As we will see, many of these key provisions were the subject of extensive testimony and legal argument before the Shaw Commission, the Lofgren Commission, and especially the Peel Commission. But even before those Commissions were formed, the parties – continuing their previous practice of using the Ottoman Petition procedure – once again turned to the law to gain the upper hand in the emerging political conflict, initially challenging the manner in which Britain was implementing the Mandate.

The Palestine Arab Delegation made many of these early arguments in a letter to Prime Minister David Lloyd George on 22 January 1922, protesting the provisions of the draft Mandate prior to its promulgation. The letter requested a plebiscite, an elected national government based on majority rule, abandonment of a National Home for the Jews in Palestine, and that Palestine "not be separated from her Arab neighbouring sister states."[211]

In later years the Arabs would lodge additional legal arguments against the Mandate. One of the more interesting arguments was that under the Covenant of the League of Nations, Palestine, like the other Arab Mandates (Syria/Lebanon, Iraq, and Transjordan) was supposed to have been treated as a "Class A" mandate. "Class A" status applied to those formerly Ottoman-controlled territories that, pursuant to Article 22 of the Covenant, had "reached a stage of development where 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 can stand alone."[212]

Instead, however, because of the Balfour Declaration and the reference to it in Article 2 of the Covenant of the League of Nations, Britain had ended up treating Palestine as a "Class B" mandate (like the territories in West and Central Africa), where "the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion."[213] This inconsistency between treating Palestine as a *de facto* Class B mandate instead of a *de jure* Class A mandate should have been resolved, according to the Arab argument, by treating Article 22 of the Covenant as equivalent to a "charter," and the Mandate as merely the "by-laws" implementing the charter. In this case, the "by-laws" conflicted with the "charter" and thus should be invalidated.[214]

We will examine this and other Arab legal challenges to the Mandate in Chapters 3 and 5.

Early Mandate-related litigation

During the early years of the Mandate, the Arabs and Jews of Palestine continued their custom and practice of invoking the law and the legal process to gain leverage against each other, including by asking the local courts to interpret various provisions of the Mandate in their favor.[215]

The Mandate-related litigation can be traced to 1922, when the newly installed British High Commissioner in Palestine, Sir Herbert Samuel, issued a Public Notice under Article 22 of the Mandate, permitting telegrams to be sent in any of the three official languages of Palestine (including Hebrew), "but, if in Hebrew, they must be written in Latin characters, it not being practicable for the Post Office to transmit telegrams in Hebrew characters."[216]

Several years later, Dr. Moshe Lehrer, a Jewish Palestinian, petitioned the Supreme Court of Palestine (sitting as the High Court of Justice) to require the Postmaster General to transmit telegrams in Hebrew characters. Dr. Lehrer argued the High Commissioner's order to the contrary conflicted with Article 22 of the Mandate. The Court denied the petition, holding "[a] message in Hebrew does not cease to be in Hebrew because it is rendered in Latin characters, any more than a message in English ceases to be in English because it is rendered in Morse Code."[217]

Another early lawsuit involved a challenge to the way in which the Hebrew name for "Palestine" was used on postage stamps. The litigation began even before the Mandate took effect, based on a 1920 discussion at the High Commissioner's Advisory Council about the proper way to idenjpgy the country's name on postage stamps. The English and Arabic renderings for "Palestine" were not controversial, but a debate erupted over the Hebrew name. The Arabs wanted the Hebrew version to be a simple transliteration of the word "Palestine," while the Jews argued for *Eretz Israel* ("Land of Israel"). The High Commissioner eventually

decided on “Palestine E.I.” as a compromise.

Five years later a prominent Palestinian Arab, Jamal Effendi-Husseini, challenged the High Commissioner’s decision in court, arguing it conflicted with the subsequently promulgated provisions of Article 22 of the Mandate, because the Hebrew description was not the same (did not “repeat,” as required by Article 22 of the Mandate) the Arabic and English descriptions. The well-known Arab lawyer Auni Bey Abdul Hadi, one of the Sherif’s two representatives at Versailles and who we will encounter much more extensively in our examination of the Shaw, Lofgren, and Peel Commissions, represented the plainjpgf. The court summarized Auni Bey’s argument as follows:

> [T]he Petitioner says he is an Arab and that he together with persons of his race complain that they cannot exercise the legal right of sending letters by post without purchasing and using a document in which their country is described as the land of Israel, that this is an offence to the Arabs including the Petitioner and a moral injury for which the High Court ought to find a remedy.[218]

Auni Bey argued the correct name for the country should have been “Southern Syria,” and that “Palestine” was “not an Arab word” and was in fact part of Syria. Nevertheless, his client was willing to accept the word “Palestine” as the official country name on postage stamps, so long as the Hebrew version said the same thing.

During his testimony years later before the Peel Commission, Auni Bey explained why he had filed the case:

> I brought an action before the High Court in Palestine on the ground that the words Eretz Israel were inscribed on the stamps and applied for the cancellation of all the stamps which had that inscription because I must buy stamps for my letters and I refuse to touch anything upon which the inscription appears Eretz Israel … I prefer that Arabic should be the only official language.[219]

Although many of the legal arguments Auni Bey developed and argued on behalf of the Arab side during the 1920s and 1930s formed the basis for many of the key Palestinian legal positions to the present day, it is highly doubtful any Palestinian today would argue the proper name for Palestine is “Southern Syria” and that “Palestine” is not a real Arab word. We will also see examples of Jewish legal arguments at the time that similarly would never be made in the present day.

In any event, the court dismissed the petition on a legal technicality, holding the Mandate had the force of a treaty obligation between the British Government and the League of Nations, and was not itself incorporated into the law of Palestine. Therefore, the Palestine courts lacked jurisdiction to enforce it. [220]

In another important early legal test of the Mandate, a group of Arab villagers from Urtas, a small village near Bethlehem, filed a lawsuit in 1925 against the Mandatory Government, challenging a local ordinance permitting the diversion of water from their spring to Jerusalem during a severe drought. Although the villagers received full compensation for their diverted water, they argued the ordinance discriminated against them, in violation of Britain’s obligation to “safeguard[] the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion” under Article 2 of the Mandate.

The Palestine High Court granted the villagers’ request for an injunction against further diversions of water from their spring. But the Judicial Committee of the Privy Council in London reversed the High Court, holding the Palestine Government had the right to divert the spring for the benefit of the public, and that in doing so they had not violated Article 2 of the Mandate

because there had been no discrimination against any particular segment of the population.[221]

These early legal skirmishes provide an interesting and important window into how both the Jewish and Arab sides used the law early in the conflict to assert not just grievances against the British for the way they were implementing the Mandate, but also to use the law as a means of gaining leverage against each other in the political battle that began emerging for primacy in Palestine. Those early legal skirmishes eventually escalated into full-blown legal combat over the parties' respective claims to the Wailing Wall, to which we now turn.

Notes

1 *See, e.g.* Cattan, *op. cit.* at 65–68 (arguing the Palestine Mandate was legally invalid because it (i) violated the sovereign rights of the Palestinian Arabs; (ii) conflicted with Article 22 of the Covenant of the League of Nations; and (iii) contradicted the British pledges to the Arabs in the McMahon-Hussein correspondence).

2 William Ormsby-Gore, Secretary of State for the Colonies, Speech before House of Commons (21 July 1937), Hansard, HC Deb., 21 July 1937, vol. 326 at 2236.

3 FO 371/6247, Telegram No. 219, 24 September 1914, reproduced and discussed in Foreign Office, Arab Bureau, *Summary (Secret) of Historical Documents from the Outbreak of War between Great Britain and Turkey, 1914, to the Outbreak of the Revolt of the Sherif of Mecca in June 1916* (Jan. 1921, hereafter "*Foreign Office Historical Summary*") at 8.

4 *Id.* (Telegram No. 233, 30 October 1914, reporting on reply letter from Abdullah).

5 *Id.* at 9 (Telegram No. 303, 31 October 2014, sent the same day Great Britain and Turkey formally declared war on each other).

6 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.20879, accessed 7 September 2019.

7 *Id.* at 11 (Telegram No. 173, 14 April 1915).

8 *Id.* at 13. The full text of the air-dropped proclamation can be found in the Shaw Commission Report, *op. cit.* at 126.

9 *Correspondence Between Sir Henry McMahon, His Majesty's High Commissioner at Cairo and the Sherif Hussein of Mecca, July 1915-March 1916*, Cmd. 5957 (1939).

10 *Id.* at 1 (Explanatory note).

11 One historian argues the Sherif did not uphold his end of the bargain, as the promised Arab Revolt never truly materialized to the extent promised: "the deal was not a unilateral one. Its permanence and strength depended on how the Arabs fulfilled their part … when the general Arab uprising in the regions of the Fertile Crescent failed to materialize, the corresponding part of the understanding, pledging the recognition of Arab independence east of the Jordan and in the Syrian hinterland, lapsed." I. Friedman, *The McMahon-Hussein Correspondence and the Question of Palestine*, Journal of Contemporary History 5(2) at 96–103, 121 (1970).

12 Photograph reproduced under license from Alamy images.

13 French interests were particularly acute in Syria, which at that time included all of modern-day Palestine. *See* Introduction at nn. 24–25 and accompanying text, noting Palestine was not a recognized geographic or political entity as of the early post-World War I period.

14 *See* W. Shorrock, *French Suspicion of British Policy in Syria, 1900–1914*, Journal of European Studies VI at 198–99 (1976).

15 K. Loevy, *Reinventing a Region (1915–22): Visions of the Middle East in Legal and Diplomatic Texts Leading to the Palestine Mandate*, Isr. L. Rev. 49(3) at 309, 316 (2016).

16 *See, e.g.* Cmd. 5974, *Report of a Committee Set up to Consider Certain Correspondence Between Sir Henry McMahon and the Sharif of Mecca in 1915 and 1916*, (March 1939, hereafter "*Report of a Committee*"); CAB/24/282/19, Memorandum (Secret) by Lord Halifax, Secretary of State for Foreign Affairs, *Palestine: Legal Arguments Likely to be Advanced by Arab Representatives* (23 Jan. 1939, hereafter "*Halifax Memorandum*"); E. Kedourie, *In the Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and Its Interpretations 1914–1939* (Frank Cass, 1976); I. Friedman, *op. cit.* at 83–120; A. Toynbee, *The McMahon-Hussein Correspondence: Comments and a Reply*, Journal of Contemporary History 5(4), 185–201 (1970).

17 Command (Cmd.) Paper 5957 (1939) is the official British publication containing the entire McMahon-Hussein correspondence.

18 *Id.* at 3–4.

19 *Id.* at 4 [emphasis added]. This letter was delivered to the High Commission in Cairo by the Sherif's messenger, Mohammed Ibn Oreifan of Qadimah, who arrived in Suez on 18 August 1915. Oriefan told the British their air-dropped proclamations had been read in Jeddah and Rabegh. The Sherif and the Turks had also seen the proclamations. Oreifan said Arab sentiment was growing increasingly hostile to the Turks, and the Sherif's goal was to "consolidate himself as an independent Emir of Mecca and the whole of the Hedjaz and part of the Asir, and thence extend his influence." The Foreign Office directed a reply be sent "in general terms." FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 15. The Sherif's use of the

terms "treaty" and "high contracting parties" would not, under international law, have been sufficient to convert the subsequent exchange of letters between the Sherif and McMahon into an enforceable treaty under international law. *See* B. Oppenheim, H. Lauterpacht (ed.), *International Law: A Treatise*, Vol. I at 877–78 (Longmans, Green & Co., 8th ed. 1955) ("International Treaties are agreements, of a contractual character, between States, or organizations of States, creating legal rights and obligations between the Parties. Even before the Law of Nations … treaties used to be concluded between States."); *see also* Vienna Convention on the Law of Treaties, U.N. Treaty Series vol. 1155, 1–18,232, art. 2(1)(a) (23 May 1969) (defining "treaty" as "an international agreement concluded between States … "). At most, the Sherif's 15 July 1915 letter to McMahon should be viewed as a proposed term sheet for an agreement between a State (Great Britain) and a non-state actor (the Sherif, as ruler of the Hedjaz region of the Ottoman Empire). The remainder of the Hussein Correspondence reflect the negotiations over the term sheet, which ultimately never matured into an actual treaty between anyone.

20 Cmd. 5957, *op. cit.* at 4–5.

21 McMahon's agreement to the establishment of an *Arab* Khalifate caused the British Government to try to keep the correspondence secret for the next two decades, to avoid angering Britain's non-Arab Muslim subjects in India (including modern-day Pakistan). The British Government ultimately published the entire correspondence in 1939, although unofficial versions had been published as early as 1923.

22 Cmd. 5957, *op. cit.* at 5–7.

23 One of the founders of *Fatat al Arab* was the lawyer Auni Bey Abdul Hadi, who years later played a key role as the lawyer for the Muslim side before the Shaw and Lofgren Commissions, and as a tesjpgying witness before the Peel Commission; *see also* Colonial No. 134, Palestine Royal Commission, *Minutes of Evidence Heard at Public Sessions* (hereafter "Peel Public Testimony") at 359, para. 5591 (Testimony of George Antonius, 18 January 1937).

24 FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 17–18, unnumbered telegram dated 18 October 1915 from McMahon to Grey [emphasis added]; *see also id.* at 30 (quoting extensively from memorandum by General Gilbert Clayton reporting on meeting with Farouki, 11 October 1915); Cmd. 5479, Peel Commission Report, *op. cit.* at 18, para. 5; *see also* FO 371/14,495, W.J. Childs, Memorandum (Confidential) No. 13,778, *Memorandum on the Exclusion of Palestine from the Area assigned for Arab Independence by McMahon-Hussein Correspondence of 1915–16* (24 October 1930). McMahon incorporated Farouki's use of the word "districts" in his next letter to Hussein, the crucial letter of 24 October 1915.

25 FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 30–31. Many historians regard Farouki as a huckster who duped Clayton, McMahon and Sykes into making promises to the Arabs by exaggerating, if not inventing out of whole cloth, both the Young Arab Party's interactions with the Germans as well as their ability to galvanize a meaningful Arab revolt against the Turks. *See, e.g.* D. Fromkin, *A Peace to End All Peace: The Fall of the Empire and the Creation of the Modern Middle East* (Henry Holt & Co., 1989) at 199 (describing British officials in Cairo as having been "taken in by al-Faruqi's hoax"); Friedman, *op. cit.* at 90–92 ("al-Faruqi's report about Turco-German overtures to [the Young Arab Party], and the latter's ability to foment a revolt against the Ottoman government, merit[ed] little credence").

26 FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 18, Telegram No. 796 (20 October 1915). According to Kedourie, McMahon had also received instructions from Maxwell and General Clayton at the Foreign Office on 18 October, two days earlier, nojpgying him "[i]n regard to non-western boundaries proposed by Sherif of Mecca, Faroki thinks Arabs would accept modification leaving in Arabia purely Arab *districts* of Aleppo, Damascus, Hama and Homs … " Kedourie, *op. cit.* at 102 [emphasis added]. Kedourie, therefore, argues McMahon's instructions were simply to convey to the Sherif that Britain would be willing to agree the area of independence to be granted to the Arabs would comprise *only*, using Farouki's terminology, the "purely Arab districts" of Aleppo, Hama, Homs and Damascus. Kedourie argues McMahon, "without authority and for reasons which must remain unknown owing to the disappearance of the relevant residency file, significantly modified the formula. Instead of telling the Sherif that the four towns would form the territory of the Arab state in Syria – which is what he, himself, Maxwell and Clayton unanimously declared to be the Arab demand – McMahon chose to tell the Sherif that 'portions of Syria lying to the west of the Districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded.'" Kedourie attributes McMahon's error to carelessness, quoting McMahon's contemporaries in the British Government describing him as "slow[] of mind," (Hardinge to Nicolson), "the laziest man I have ever met" (Graham to Hardinge), "frightfully slow at the uptake and difficult to coach," (Chirol to Hardinge), and "slow[] of mind and lack[ing] interest in his duties … astonishing ignorance" (Herbert, Secretary of the Residency in Cairo). Kedourie, apparently unaware it was Clayton who had actually drafted the letters for McMahon (*see* n.107 *infra* and accompanying text), also condemned McMahon's carelessness in drafting language that "could, in logic, equally include and exclude Palestine." Kedourie, *op. cit.* at 35, 102, 242. Friedman, on the other hand, defends McMahon's use of the formulation in the 24 October 1915 letter: "the fault was not McMahon's. As Childs has shown, this phrase ["purely Arab districts"] originated with al-Faruqi." A. Toynbee and I. Friedman, *The McMahon Hussein Correspondence: Comments and a Reply*, Journal of Contemporary History 5(4) at 190, 198 (1970).

27 Quoted in Childs, *op. cit.* at 49.

28 Cmd. 5957, *op. cit.* at 7–9.

29 *Id.* at 8 [emphasis added].

30 FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 19–20, Despatch No. 131 (26 October 1915) [emphasis added]. H.W. Young of the Foreign Office minuted on 4 January 1921 that this comment from McMahon, as well as his comment in Telegram No. 677 (*see* text accompanying n. 17), "show without any possibility of doubt what Sir H. McMahon meant by

the mistranslated passage in his letter of the 24th October 1915." FO 371/6237, Foreign Office, *Relations between His Majesty's Government and the Arabs* (Jan. 1921). But the files of the Foreign Office (FO 371/20,810) contain a contrary view as well, in the form of an unsigned minute handwritten on 23 September 1937 to G.W. Rendell, Head of the Eastern Department, enclosing a copy of McMahon's Despatch No. 131 of 26 October 1915, and noting "I find it very difficult to square with McMahon's [24 Oct. 1915] letter." Rendell then added his own handwritten minute on 11 October 1937, noting with evident frustration, "It cannot be reconciled. All this consenting and special pleading is a great mistake. We would be far better to recognize and admit that H.M.G. made a mistake & gave flatly contradictory promises – which is of course the fact."

31 FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 21, Telegram No. 860 (7 November 1915).

32 Kedourie, *op. cit.* at 103.

33 Photograph reproduced under license from Getty Images.

34 FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 21, Telegram No. 677 (7 November 1915).

35 Cmd. 5957, *op. cit.* at 9–11.

36 Sykes met with Farouki in Cairo approximately 20 November 1915 on his way back to England from a special mission to Mesopotamia and India. Sykes summarized the discussion in a cable to the Director of Military Operations at the War Office in London:

> I saw Faroki Bey and discussed situation with him from point of view of French difficulty which I foresaw. Following is the best I could get, but it seems to me satisfactory both as regards ourselves and France: – Arabs would agree to accept Alexandretta-Berejik-Urfa-MIdiat-Zakho-Rowanduz as approximate northern frontier. They would agree to a convention with France to allow her monopoly of all concessionary enterprise in Palestine and Syria, the latter being defined as bounded as far south as Deir-el-Zor by the Euphrates, thence to Deraa and to Maan along the Hedjaz Railway. As far south as Maan the Hedjaz Railway could be sold to French concessionaires

Foreign Office Historical Summary, *op. cit.* Telegram No. 19, repeated verbatim in Telegram No. 707 from McMahon to Foreign Office and to India (21 Nov. 1915). At least one commentator has argued the British could reasonably have interpreted Farouki's statement to Sykes as showing the Arabs (including the Sherif) were focused on making sure Damascus, Homs, Hama and Aleppo were *included* in a future Arab state, but *not* that Palestine was *also* to be included in the Arab state. I. Friedman, *op. cit.* at 106–07; *but see* Toynbee and Friedman. *op. cit.* at 190, 199 (characterizing Friedman's interpretation of Farouki's statement to Sykes as "only an inference"; to which Friedman replied, "[t]his is not my inference, as Professor Toynbee suggests; it was so understood at the time by McMahon, Clayton, Sykes, Sir Arthur Nicolson, and Grey (as their respective dispatches and notes show), and it was on the basis of this understanding that the Sykes-Picot Agreement was subsequently outlined").

Sykes continued his report to London in a follow-up cable the next day, 21 November:

> I submit, on hypothesis, that Faroki's interview is basis of our arrangement.
>
> 1. That to get Arabs to concede as much as possible to the French, and to get our Haifa outlet and Palestine included in our sphere of enterprise in the form of a French concession to us, is our task as regards France and Arabs …
>
> 5. Matters, in the event of our giving the Arabs their opportunity, will, I anticipate, shape themselves as follows: – Government in Syria and Palestine will be carried on on [sic] Turkish formulae with local personnel, and owing to the opening of trade and money will keep them quiet.

FO 371/6247, *Foreign Office Historical Summary*, *op. cit.* at 37 (Jan. 1921).

37 Cmd. 5957, *op. cit.* at 11–12.

38 *Id.* at 12–14.

39 *Id.* at 14–15.

40 *Id.* at 15–18.

41 *But see* J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* at 11 (Cambridge Univ. Press, 2010) (suggesting French interests were limited to Lebanon and did not include Palestine).

42 Shorrock, *op. cit.* at 197–98.

43 Cmd. 5479, Peel Commission Report, *op. cit.* at 17, para. 3; *see also* H. Sidebotham, *Great Britain and Palestine* at 236 (MacMillan & Co., 1937) ("Now France had previously informed us that she claimed the whole of Syria including Palestine, which had no separate political existence under Turkey; and the interests of France which were excepted from our promise to Hussein must therefore have included Palestine at that time. The contention of the British Government, confirmed by Sir Henry McMahon's explicit statement recently [in a letter to *The Times*, 23 July 1937], that Palestine was never promised to the Arabs, is sound beyond any question.").

44 CAB/24/282/19, *Halifax Memorandum*, *op. cit.* at 4, para. 19.

45 *Id.* at 6, paras. 27–28.

46 *Id.* On closer inspection, the Arabic translation appears entirely consistent with the English version. The English version indicated Britain could promise independence only in those areas where France had no interests, meaning Britain could not promise independence anywhere else. The Arabic translation says the same thing – Britain could promise independence for

the specific areas within the boundaries of the contemplated Arab state, a state extending eastward from Damascus, Homs, Hama, and Aleppo, simply because France had claimed no interest in those areas.

47 *Report of a Committee*, *op. cit.* Annex A at 15–16, para. 15.

48 A. Heidborn, *Manuel de Droit Public et Administrajpg de l'Empire Ottoman*, Vol. I at 7 (1908), https://archive.org/details/manueldedroitpu00heidgoog/page/n18, accessed 26 August 2019.

49 *Id.*

50 *Id*. at 7–8.

51 Center for Israel Education, https://israeled.org/wp-content/uploads/2015/06/1890s-future-area-of-Palestine.png, accessed 27 September 2019, based on map originally appearing as a color fold-out at the very end of Cmd. 5957. Although not shown on the map, the town of Aleppo lies north of Hama.

52 CAB/24/282/19, *Halifax Memorandum, op. cit.* at 2, para. 7 (23 January 1939).

53 *Id.* at 3, para. 12.

54 The Israeli historian Yehoshua Porath argued the word "*Vilayets*" in McMahon's 24 October 1915 letter should logically have been understood to mean "regions," and thus "the area west of the Damascus region lies north of Palestine and does not include it." Porath, *op. cit.* at 45.

55 *Report of a Committee*, *op. cit.*, Annex B at 25, para. 21.

56 Friedman, *op. cit.* at 117.

57 *Report of a Committee*, *op. cit.* at 10–11, paras. 19–20 and Annex F at 48–49.

58 Telegram No. 93 from Clayton via Wingate (Cairo) to Foreign Office (14 January 1918), *reproduced in* Priestland, *op. cit.* Vol. I at 101–02.

59 Telegram no. IAT 0838/4.9 from Clayton (Jerusalem) to Foreign Office, para. B (9 March 1918), *reproduced in* Priestland, *op. cit.* Vol. I at 105–06.

60 Ormsby-Gore was an intelligence officer attached to the Arab Bureau in Cairo during the War, and would later serve as Colonial Secretary.

61 Letter from William Ormsby-Gore to Mark Sykes, 31 March 1918, *reproduced in* Priestland, *op. cit.* Vol. I at 107–12.

62 *Report (Confidential) on the Existing Political Situation in Palestine and Contiguous Areas by the Political Officer in charge of the Zionists* Commission, No. 147,225 at 5, para. 16 (Aug. 1918), *reproduced in* Priestland, *op. cit.* Vol. I at 127, 131; *see also* CO 967/91, *Commission of Enquiry on Palestine Disturbances of August, 1929, Chairman's Copy of Evidence Taken in Camera* (hereafter "Shaw Commission *In Camera* Transcript"), testimony of Pinchas Rutenberg at 9–10, 16 (1 November 1929) (Rutenberg claimed Arab owners were happy to sell their land at double or triple the market value to Jews without compensating their longstanding tenant farmers, and "Kasim Pasha, the President of the Arab Executive, recently offered, after the [August 1929] riots, to the Jews to buy his land").

63 Friedman, *op. cit.* at 118–19.

64 J.N. Moore, *The Arab–Israeli Conflict, Vol. III (Documents)* at 40–41 (Princeton Univ. Press, 1974). Some British officials were not impressed with the Weizmann-Feisal agreement. *See, e.g.* Report (Secret) M/56 from Major J.N. Camp, Asst. Political Officer, Intelligence Office, Jerusalem to Chief Political Officer, Cairo entitled "Arab Movement and Zionism" at 4 (12 August 1919), *reproduced in* Priestland, *op. cit.* Vol. I at 423:"In my opinion, Dr. Weizmann's agreement with Emir Feisal is not worth the paper it is written on or the energy wasted in the conversation to make it. On the other hand, if it becomes sufficiently known among the Arabs, it will be somewhat in the nature of a noose around Feisal's neck, for he will be regarded by the Arab population as a traitor … it seems that he is capable of making contradictory agreements with the French, the Zionists and ourselves, of receiving money from all three, and then endeavouring to do as he pleases. This is an additional reason why his agreement with Weizmann is of little or no value."

65 Cmd. 5479, Peel Commission Report, *op. cit.* at 27, para. 26. At least one historian has described the standard characterizations of Feisal's seemingly positive attitude toward Zionism as misplaced. Feisal's personal secretary and confidant, the Palestinian lawyer Auni Bey Abdul Hadi (about whom we will hear much more in this study), told various Jewish delegates at the conference that it was "obvious" why Feisal had "said these nice things": Feisal believed Palestine belonged to him, and he was merely expressing a willingness to allow some Jews to live there among the Arab majority. N. Caplan, *Palestine Jewry and the Arab Question, 1917–1925* at 31–32 (Frank Cass, 1973).

66 The text of the agreement appears at Priestland, *op. cit.* Vol. I at 341–44. Weizmann described the agreement with Feisal in his testimony before the Peel Commission as a treaty, claiming "I actually signed a treaty." Peel Public Testimony, *op. cit.* at 37 paras. 702–03 (25 November 1936); the reference to the Weizmann-Feisal Agreement as a "treaty" can also be found at Jewish Agency for Palestine, *Memorandum Submitted to the Palestine Royal Commission on behalf of the Jewish Agency for Palestine* (hereafter "*Jewish Agency Memorandum*") November 1936 at 68 para. 118, reproduced in A. Klieman (ed.), *The Rise of Israel: A Documentary Record from the 19th Century to 1948*, Vol. 23 at 68 (Garland Pub. 1987) ("On January 3rd, 1919, The Emir Feisal and Dr. Weizmann met in London and signed a formal agreement, *sometimes referred to as the Faisal-Weizmann treaty*.") [emphasis added].

67 Photograph reproduced with the kind permission of the Weizmann Archives, Rehovot, Israel.

68 Friedman, *op. cit.* at 119.

69 *Id.*

70 Library of Congress, Prints and Photographs Division, http://hdl.loc.gov/loc.pnp/ggbain.29782, accessed 10 September

2019.

71 *See* www.jewishvirtuallibrary.org/feisal-frankfurter-correspondence-march-1919, accessed 26 August 2019. As we will see in Chapter 3, the Arabs disputed the authenticity of this letter during the hearings before the Shaw Commission.

72 Kedourie, *op. cit.* at 191, 192, 197–99.

73 *Id.* at 223 (Kedourie provides an incomplete citation to "Sulayman Musa, ed., *The Great Arab Revolt: Documents and Records*, document no. 40").

74 *Id.* at 221–22.

75 CO 733/320/3, Letter from Sir Herbert Samuel to Lord Peel dated 3 August 1936, enclosing copy of Clayton Memorandum (*see* nn.107 and 114 and accompanying text, *infra*) and Letter from King Feisal to Samuel dated 1 December 1923 ("I firmly believe the reciprocal trust established between us and the perfect agreement from our point of view which allowed a perfect understanding between Dr. Weizman [sic] and me, will prevent future misunderstandings and will maintain between us this harmony so necessary for the success of our common cause").

76 Porath, *op. cit.* at 47–48.

77 Friedman, *op. cit.* at 119–20 (quoting H.M.V. Temperley, *History of the Peace Conference* (London 1920–24), VI, 175).

78 Porath, *op. cit.* at 52.

79 FO 371/6237, *Conversation with Emir Feisal*, File No. 1-5311-u-1, at 1–3 (Foreign Office, 20 January 1921) (draft minutes, with handwritten notations and corrections, of the meeting between Lindsay and the Emir Feisal).

80 *Id.* at 1–3; CAB/24/28,219, *Halifax Memorandum*, *op. cit.* at 3, para. 9 (discussing the Lindsay-Feisal meeting); FO 371/7797, Foreign Office, *Draft Reply to Parliamentary Inquiry of 11 July 1922*; Friedman, *op. cit.* at 120 (noting W.C. Childs of the Foreign Office regarded Feisal's argument about the word "district" as "deliberately disingenuous"). Although a group of Palestinian Arabs had urged (prior to Feisal's January 1921 meeting at the Foreign Office) the Versailles Peace Conference to treat Palestine as part of the area of Arab independence by merging it into Syria (*see* Introduction at n.6 and accompanying text), the Palestinians did not base that position on any of the language from the McMahon-Hussein correspondence.

81 FO 371/6237, *Conversation with Emir Feisal*, *op. cit.* at 3.

82 *Id.* at 4.

83 FO 371/7797.

84 Toye, *op. cit.* Vol. III at 702.

85 *Id.*

86 *Id.* at 704.

87 *Id.* at 705.

88 Cmd. 1700, *Palestine: Correspondence with the Palestine Arab Delegation and the Zionist Organisation* (hereafter "*Churchill White Paper*") at 11 (16 March 1922).

89 *Id.* at 17–21.

90 *Id.* at 20 (letter from J.E. Shuckburgh, Colonial Office, to the Zionist Organsation dated 3 June 1922 (enclosing at Churchill's request an official statement dealing with British policy in Palestine to be published 1 July 1922).

91 *Id.* at 26.

92 *See, e.g.* Cattan, *op. cit.*,; A. Abdul Hadi, *The Balfour Declaration*, Annals of the American Academy of Political and Social Science 164(1), 12–21 (1932).

93 Porath, *op. cit.* at 46. Although the McMahon-Hussein correspondence was not a treaty between states, references to the international law of treaty interpretation can be useful in assessing the validity of the Arab and British positions regarding whether McMahon's intent was relevant.

94 *Report of a Committee*, *op. cit.*, Annex C at 33 (Statement by Sir Michael McDonnell [former Chief Justice of Palestine] on Certain Legal Points Arising out of the Lord Chancellor's Statement at the Second Meeting of the Committee on the 24th February).

95 *See generally id.* Annexes A and C, where the opposing Arab legal arguments regarding the proper interpretation of the McMahon-Hussein correspondence were made with great force by George Antonious and Michael McDonnell; Kedourie, *op. cit.* at 246, 255, 266–67 (the Arab delegations to the 1939 Palestine Conference "were bent on treating the McMahon-Hussein correspondence as a legal contract to be interpreted as strictly as the courts would interpret a contract drawn up in due form." One of the Palestinian Arab delegates, Jamal al-Husseini, argued "a question of contract was at issue and … such a question could not be discussed on the basis of the intentions of the parties, but the text of the documents.").

96 FO 371/5121, Palin Commission Report, *op. cit.* at para. 5.

97 Friedman, *op. cit.* at 112–14; Toynbee and Friedman, *op. cit.* at 185–91; *see also* I. Friedman, *Palestine, A Twice Promised Land? The British, the Arabs and Zionism 1915–1920* Vol. I at 61–100 (Transaction, 2000); I. Friedman, *The Question of Palestine, 1914–1918: British–Arab–Jewish Relations*, at 88–89 (Schocken, 1973).

98 Cmd. 1700, *op. cit. at* 20.

99 *Id.*

00 CAB/24/282/19, *Halifax Memorandum*, *op. cit.* at 2, para. 7 (23 January 1939).

01 Cmd. 1700, *op. cit.* at 2–4.

02 *Id.* 5–11.

03 FO 371/7797.

04 *Id.* Shuckburgh admitted, several years later in a letter to the British High Commissioner for Palestine, Sir John Chancellor, "I have always felt that, on a strict and literal interpretation of McMahon's famous letter of October, 1915, our case is a weak one, though I do not believe that the intention – so far as His Majesty's Government had any considered intentions in those hectic days – is open to serious doubt." Chancellor Papers, *op. cit.*, Box 16/4, Letter from Shuckburgh to Chancellor (2 January 1930).

05 Cmd. 1700, *op. cit.* at 11–15.

06 Hansard, HL Deb. 27 March 1923 vol. 53 at 653–57 (27 March 1923).

07 CO 733/320/3, Letter from Sir Herbert Samuel to Lord Peel dated 3 August 1936, enclosing copy of Memorandum from Clayton to Samuel dated 12 April 1923. Samuels also read the text of the Clayton Memorandum to the House of Lords on 20 July 1937, Hansard, HL Deb. 20 July 1937 vol. 106 at 630–31.

08 Kedourie, *op. cit.* at 253; FO 371/14,495, E-6491, W.J. Childs, Memorandum (Confidential) No. 13,778, *Memorandum on the Exclusion of Palestine from the Area assigned for Arab Independence by McMahon-Hussein Correspondence of 1915–16* (24 October 1930, hereafter "*Childs Memorandum*.").

09 *Childs Memorandum*, *op. cit.* at 49. Childs added "we can have no view of the elastic sense in which El Faroki spoke of the word 'districts' of the four towns … it is inconceivable that by the 'district of Damascus' Faroki could have intended the 'immediate neighbourhood,' for that would have admitted the possibility of Northern Syria being separated from the Hejaz by French occupation south of Damascus."

10 FO 371/14,495 at 67–68.

11 Hansard, HC Deb. 1 August 1930 vol. 242 at 902–03. The Peel Commission Report adopted Dr. Shiels' position, noting "[i]t was in the highest degree unfortunate that, in the exigencies of war, the British Government was unable to make their intention clear to the Sherif." Cmd. 5479, Peel Commission Report, *op. cit.* at 20.

12 Cmd. 5479, Peel Commission Report, *op. cit.* at 18–20.

13 Library of Congress, Prints and Photographs Division, http://hdl.loc.gov/loc.pnp/ggbain.50424, accessed 7 September 2019.

14 CO 733/320/3, Letter from Samuel to Lord Peel (3 August 1936, enclosing memorandum from G. Clayton to H. Samuel (12 April 1923) regarding McMahon-Hussein correspondence and a copy of a recent lecture by Samuel in which he quoted from the letter Feisal had written to Samuel during the Versailles Peace Conference); Letter from Samuel to John Martin (Secretary, Peel Commission) (7 September 1936) (enclosing memorandum from Samuel regarding McMahon-Hussein correspondence, along with original 12 April 1923 Clayton memorandum and original 10 December 1919 letter from Feisal to Samuel).

15 Hansard, HL Deb. 20 July 1937 vol. 106 at 630–32.

16 Hansard, HC Deb., 21 July 1937, vol. 326 at 2236.

17 *The Times*, Letter to the Editor, "Independence of the Arabs, The 'McMahon Pledge,' A Definite Statement" (23 July 1937).

18 CO 733/353/2, Ormsby-Gore to McMahon, 23 July 1937. Ormsby-Gore's letter has not previously been published.

19 FO 371/20,810, Rendell minute (26 July 1937); *see also* n.28, *supra*, for Rendell's even more harshly critical 11 October 1937 minute, written after he examined a copy of McMahon's 26 October 1915 telegram describing the 24 October 1915 letter to Hussein.

20 CAB/24/282/19, *Halifax Memorandum*, *op. cit.*, According to Kedourie, J. Z. Mackenzie of the Foreign Office wrote the memorandum, which later was endorsed by W.E. Beckett, the legal advisor to the Foreign Office. Kedourie, *op. cit.* at 267–70. *See* Ch. 4, Fig. 4.3, *infra*, for a photograph showing some of the Arab participants at the 1939 Roundtable Conference at St. James's Palace.

21 *Halifax Memorandum*, *op. cit.* at 3, para. 14.

22 The author of the Memorandum failed to mention, and was presumably unaware of the so-called "Cambon Letter" of 4 June 2017, in which Jules Cambon, the head of the political section of the French Foreign Ministry, wrote to the Zionist diplomat Nahum Sokolov that the French Government supported the development of Jewish colonization in Palestine ("Vous avez bien voulu m'exposer le projet auquel vous consacrez vos efforts et qui a pour objet de developer la colonisation israelite en Palestine … Je suis heureux de vous en donner ici l'assurance.") ("You have kindly explained to me the project to which you are devoting your efforts and whose object is to develop Jewish colonization in Palestine … I am happy to give our assurance."), www.balfourproject.org/french-support-for-the-zionist-cause/, accessed 26 August 2019.

23 CAB/24/282/19, *Halifax Memorandum*, *op. cit.* at 6, para. 29.

24 *Id.* at 3–4, paras. 14–15; 5–6, paras. 26–30; 9, para. 46. MacKenzie argued, among other things, that an additional weakness in the British legal position arose from Britain's issuance of the Balfour Declaration, thus undermining the validity of the argument that Britain was not free to act in Palestine without detriment to French interests, thereby questioning the basis for reading McMahon's 24 October 1915 letter as excluding Palestine based on the "general reservation" in favor of French interests. The original file, FO 371/23,219, shows Beckett did not exactly "endorse" MacKenzie's memorandum, but instead took issue with various portions of the draft memo and asked MacKenzie to revise it accordingly.

25 FO 371/23,219, Letter from Baggally to Downie (19 January 1939).

26 Kedourie, *op. cit.* at 272, quoting undated minute written by H.F. Downie of the Colonial Office.

27 E 891/6/31, Baggallay minute (30 January 1939) enclosing memorandum by Baggallay, *The Juridical Basis of the Arab Claim to Palestine: Views of the Lord Chancellor* (30 January 1939), *reprinted in* Priestland, *op. cit.* Vol. IV at 201–09.

28 *Id.*

29 *Id.* The Lord Chancellor reiterated these and other arguments in support of the British position at a 24 February 1939 meeting of the British and Arab delegations regarding the McMahon-Hussein correspondence. *See* n.52 and accompanying text, *supra*.

30 Anonymous, *The McMahon-Hussein Correspondence of 1915–16*, 16 Bulletin of International News no. 5 at 6–13 (11 March 1939), quoting Vickery's Letter to the Editor of *The Times*, 21 February 1939.

31 Cmd. 6019, *Palestine: Statement of Policy* (May 1939, hereafter "*MacDonald White Paper*").

32 *Id.* at 5, para. 7.

33 *See* FO 371/10,820, W. Childs, *Decisions Regarding Publication of the McMahon-Hussein Correspondence* at 7 (1930) (the Eastern Department of the Foreign Office had opposed publication because doing so "would make known the embarrassing references to the Caliphate and raise a storm in India and the Mohammedan world").

34 The *Daily Mail* articles were written by J.M.N. Jeffries, a former war correspondent who went to Palestine in 1922 to report on its developing political and economic affairs. Jeffries wrote a series of articles highly critical of British policy, accusing the government of bad faith by issuing the Balfour Declaration in contravention of the earlier promise of Palestine to Hussein. Jeffries discussed his articles and further elucidated his views in his book *Palestine: The Reality* (Longmans, Green & Co. 1939). Jeffries' articles were republished recently in W. Matthew, *The Palestine Deception, 1915–1923: The McMahon-Hussein Correspondence, the Balfour Declaration, and the Jewish National Home* (Institute for Palestine Studies, 2014). A rival journalist, Philip Graves, criticized Jeffries' articles a short time after they were written. According to Graves, the articles formed part of the "sensational Press of this country." Graves also scolded Jeffries for mischaracterizing McMahon's 24 October 1915 letter to Hussein as a "covenant" by mistranslating the Arabic word "*mawathik*" (from McMahon's original English of "assurances"). P. Graves, *Palestine, the Land of Three Faiths* at 49, 51 (Doran, 1923).

35 Cmd. 5479, Peel Commission Report, *op. cit.* at 18–19, para. 5; *see also* CO 733/344/22, Cabinet Paper (Secret) 149 (37), *Desire of Royal Commission on Palestine to Quote Extracts from the McMahon-Hussein Correspondence in their Report* (27 May 1937) and Cabinet 23(37) (Secret), *Extract from Conclusions of a Meeting Held on Wednesday, 2 June 1937* (authorizing the Peel Commission to publish relevant excerpts from the McMahon-Hussein correspondence).

36 G. Antonious, *The Arab Awakening: The Story of the Arab National Movement*, Appendix A at 413–27 (Allegro, 1939).

37 Porath, *op. cit.* at 46 ("Not only did the McMahon-Husayn correspondence by itself not constitute a treaty, but the correspondence was never completed and left both sides in their original positions. At most we are dealing with a promise or moral obligation on the part of Britain, but between this and a treaty there is a considerable gap."); *see also* Graves, *op. cit.* at 50 ("there was no 'agreement' with Hussein of Mecca in the sense of a Treaty, and there were no negotiations then or subsequently on the basis of any draft instrument.").

38 Vienna Convention on the Law of Treaties, *op. cit.*, art. 31 [emphasis added].

39 *Id.*, art. 32.

40 Oppenheim and Lauterpacht, *op. cit.* at 952, 954.

41 J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed.) at 325 (Oxford Univ. Press, 1963).

42 Cmd. 5974, *op. cit.* at 31, 38. While serving as the Chief Justice of Palestine, McDonnell had urged High Commissioner John Chancellor to fire the "ardent partisan of Zionism," the Jewish Attorney General of Palestine, Norman Bentwich, "in view of the importance of maintaining the reputation of the British Government for strict impartiality in the administration of justice." CO733/175/3, Despatch (Secret) from High Commissioner for Palestine to Secretary of State for the Colonies at 2–3 (20 September 1929).

43 *Rhine Chlorides*, 144 ILR 259, at 298, para. 74 (2004), quoting the award in *Georges Pinson (France) v. United Mexican States*, Franco-Mexican Claims Commission, as translated in Annual Digest of Public International Law Cases 1927–28 para. 50 at 426 (19 October 1928), cited in R. Gardiner, *Treaty Interpretation* (2d ed.) 174 (Oxford Univ. Press, 2015).

44 S. Huneidi, *Was Balfour Policy Reversible? The Colonial Office and Palestine, 1921–23*, 27 Journal of Palestine Studies 23, 34 (1998) (quoting note from Shuckburgh to Herbert Samuel).

45 Cmd. 5479, Peel Commission Report, *op. cit.* at 20, para. 9.

46 In a pre-hearing memorandum submitted to the Peel Commission, the Jewish Agency for Palestine largely adopted the British legal interpretation of the McMahon-Hussein correspondence. The memorandum focused mainly on Feisal's conciliatory statements prior to 1920, especially his January 1919 written agreement with Weizmann and his March 1919 letter to Frankfurter. *See Jewish Agency Memorandum*, *op. cit.* at 61–76.

47 Letter from Balfour to Lord Rothschild (2 November 1917), https://israeled.org/wp-content/uploads/2015/06/1917-11-November-2-The-Balfour-Declaration-PICS-RECENT.pdf, accessed 26 August 2019.

48 Cmd. 5479, Peel Commission Report, *op. cit.* at 20, para. 10.

49 The Sykes-Picot Agreement is reproduced in Moore, *op. cit.* at 25–28.

50 https://en.wikipedia.org/wiki/Sykes%E2%80%93Picot_Agreement#/media/File:MPK1-426_Sykes_Picot_Agreement_Map_signed_8_May_1916.jpg, accessed 27 September 2019.

51 *Id.* at 25–26.

52 Cmd. 5479, Peel Commission Report, *op. cit.* at 21, para. 11.

53 The Sherif, according to Ormsby-Gore, viewed the Sykes-Picot Agreement as "a fundamental divergence from the promises

held out to him by us in the letters of Sir Henry McMahon before he began his revolt." But Ormsby-Gore added, "I am quite satisfied that neither he [Sherif Hussein] nor Sherif Faisal are seriously upset by the Zionist movement, nor have they desire to include Cisjordan Palestine in their dominions." Priestland, *op. cit.* Vol. I at 133, W. Ormsby-Gore, *Report on the Existing Political Situation in Palestine and Contiguous Areas by the Political Officer in Charge of the Zionist Commission*, Report No. 147,225 (22 August 1918).

54 Cmd. 5974, *op. cit.* at 43, para. 14.

55 Friedman, *op. cit.* at 84–85.

56 Moore, *op. cit.* at 25.

57 The Palestinian Arab side argued precisely the opposite; namely, that Britain felt free to disregard French interests in Palestine "by insisting on provision being made in the Sykes-Picot Agreement for internationalisation of Palestine." *Report of a Committee*, *op. cit.* at 42, para. 12.

58 "Palestine proved to be a stumbling block. Sykes wanted it for Britain … *while Picot was determined to get it for France*." Fromkin, *op. cit.* at 192 [emphasis added].

59 In fact, as Fromkin notes, France continued to covet Palestine, and proposed a secret deal with Russia less than three months after signing the Sykes-Picot Agreement, under which Russia pledged "to support in negotiations with the British government the designs of the [French] Republic on Palestine." *Id.* at 197 and n.17, quoting C. Andrew and A. Kanya-Forstner, *France Overseas: The Great War and the Climax of French Imperial Expansion* at 101 (Thames & Hudson, 1981).

60 Fromkin notes the obvious omission of Jews/Zionists from the group to be consulted about the future of Palestine, and that Captain William Reginald Hall, head of intelligence at the Admiralty, brought this to Sykes' attention, telling him the Jews "had a strong material, and a very strong political interest" in the future of Palestine. Fromkin, *op. cit.* at 196, citing R. Adelson, *Mark Sykes: Portrait of an Amateur* at 196–97 (Cape, 1975).

61 *The Times*, 28 May 1917 at 5.

62 Library of Congress, Prints and Photographs Division, http://hdl.loc.gov/loc.pnp/ggbain.23518, accessed 7 September 2019.

63 *See generally* D. Lewis, *The Origins of Christian Zionism: Lord Shaftesbury And Evangelical Support For A Jewish Homeland* (Cambridge Univ. Press, 2010).

64 *See* M. Seller, *Isaac Leeser's Views on the Restoration of a Jewish Palestine*, American Jewish Historical Quarterly 58(1) at 119 (1968) ("In England, George Eliot's novel *Daniel Deronda* gave a sympathetic presentation of the idea of a Jewish return to Palestine. The English Reverend A. G. H. Hollingsworth considered the restoration of the Jews to Palestine not only as an act of humanity and justice to the Jewish people but also as a political and economic necessity for the British Empire. The Jewish state in Palestine would safeguard the route to Asia Minor and India. Many Christians in England and elsewhere considered the restoration of the Jews to Palestine a necessary precondition for the return of Jesus").

65 Memorandum prepared by the General Staff of the War Office, *The Strategic Importance of Syria to the British Empire* (9 December 1918), *reproduced in* Toye, *op. cit.* Vol. II at 151.

66 C. Weizmann, *Trial and Error: The Autobiography of Chaim Weizmann* at 200–08 (Harper & Bros. 1949).

67 Paper No. CP60, Memorandum by Secretary of State for the Colonies, Jan. 1923, enclosing extract of Minute by Ormsby-Gore dated 24 December 1922 and Memorandum (Secret) entitled "History of Negotiations Leading up the Balfour Declaration of 2 November 1917"), *reproduced in* Priestland, *op. cit.* Vol. II at 325–28; *see also* Cmd. 5479, Peel Commission Report, *op. cit.* at 23, para. 18 ("At the time of the Balfour Declaration the German Government was doing all it could to win the Zionist Movement over to its side …").

68 Cmd. 5479, Peel Commission Report, *op. cit.* at 23, para. 15; Peel Secret Testimony at 516–17, para. 8786 (Lloyd George *in camera* testimony, 16 April 1937).

69 Cabinet Paper (Secret) C.P. 60(23), *Palestine and the Balfour Declaration* (Jan. 1923) at 3, *reproduced in* Priestland, *op. cit.* Vol. II at 327.

70 War Cabinet, *The Zionist Movement* (Secret), Paper G.164 (17 October 1917), Appendix One, Item 9 at 8 (written statement from L.L. Cohen, Chairman, Jewish Board of Guardians), reproduced in Priestland, *op. cit.* Vol. I at 56–57.

71 *Id.* at 53–54 Appendix One, Item 7 at 5 (written statement from Sir Philip Magnus, M.P.).

72 *Id.* at 52; *see also* C.P. 60(23), *op. cit.* at 1–4 (Vol. II at 325–28).

73 Cmd. 5479, Peel Commission Report, *op. cit.* at 22, para. 14.

74 War Cabinet 261, Minutes of Meeting of the War Cabinet (31 October 1917), *reproduced in* Priestland, *op. cit.* Vol. I at 67–68.

75 *Id.* at 68.

76 Letter from Balfour to Lord Rothschild (2 November 1917), http://gpophotoeng.gov.il/fotoweb/Grid.fwx?search=balfour%20declaration#Preview7, accessed 16 September 2019.

77 *Id.*

78 General Jan Smuts, 17 January 1930, quoted in *Jewish Agency Memorandum*, *op. cit.* at 11, para. 10, citing New Judea, January 1930 at 72.

79 Cmd. 5479, Peel Commission Report, *op. cit.* at 24, para. 19.

80 Porath, *op. cit.* at 35.

81 For a legalistic argument that the Balfour Declaration promised *all* of Palestine to the Jewish people, *see* L. Gribetz, *The Case for the Jews: An Interpretation of their Rights Under the Balfour Declaration and the Mandate for Palestine* at 44–46

(Bloch Publishing Co., 1930).

82 C.P. 4379, Report to the Cabinet from the High Commissioner (Secret) at 430 (Dec. 1922), *reproduced in* Priestland, Vol. I, *op. cit.* at 67–68; *see also* Lord Curzon, *The Future of Palestine*, Memorandum for the War Cabinet (Secret), War Cabinet Paper G. 164 (17 October 1917), *reproduced in* Priestland *op. cit.* Vol. I at 45–47 (discussing various possible interpretations of the term "National Home").

83 Cmd. 5479, Peel Commission Report, *op. cit.* at 24, para. 20.

84 *See* War Cabinet G.164, *op. cit.* Appendix One, Item 5 at 4 (written statement of Dr. [Chaim] Weizmann, President of the English Zionist Federation, responding to draft of Balfour Declaration: "Instead of 'establishment' would it not be more desirable to use the word 're-establishment'? By this small alteration the historical connection with the ancient tradition would be indicated and the whole matter put in its true light."), *reproduced in* Priestland, *op. cit.* Vol. I at 52.

85 C. Weizmann, *op. cit.* at 208.

86 *See generally* I. Friedman, *The Response to the Balfour Declaration*, Jewish Social Studies 35(2), 105–24 (1973).

87 Frankfurter's notes of meeting with Balfour, 24 June 1919, http://aldeilis.net/english/meeting-justice-brandeis-mr-frankfurter-balfour-paris-1919/, accessed 26 August 2019.

88 Cmd. 5479, Peel Commission Report, *op. cit.* at 22, para. 14.

89 Israel Ministry of Foreign Affairs, *The Balfour Declaration: 100 Years of International Recognition of the Jewish People's Right to Self-Determination in their Historic Homeland, the Land of Israel* (29 October 2017), https://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/The-Balfour-Declaration.aspx, accessed 26 August 2019.

90 Memorandum prepared by Lt. Col. W.H. Gribbon, General Staff, War Office (12 June 1918), *reproduced in* Priestland, *op. cit.* Vol. I at 200–01.

91 *Id.* at paras. 3, 7(c).

92 Kedourie, *op. cit.* at 65, quoting D. Ben-Gurion, *Letters to Paula* at 169, 200 (Univ. of Pittsburgh Press, 1972).

93 Report of American Section of Inter-Allied Commission of Mandates in Turkey (29 August 1929), https://ecf.org.il/media_items/951, accessed 26 August 2019. Many years later Charles Crane, one of the two Commissioners, sent a handwritten letter to former British High Commissioner John Chancellor, inviting Chancellor and his wife to visit the Cranes in Palm Springs, California (Crane even enclosed a picture post card). Crane then launched into an attack on the Jews, saying among other things, "I do not like the idea of attributing everything that goes wrong in the Jewish world to Hitler. The minute they are caught in one of their tricks they immediately cry Hitler!! Hitler!!" Chancellor Papers, *op. cit.*, Box 20/MF15, Letter from Crane to Chancellor (11 February 1934).

94 Covenant of the League of Nations, art. 20, http://iilj.org/wp-content/uploads/2016/08/The-Covenant-of-the-League-of-Nations.pdf, accessed 25 August 2019.

95 According to a League of Nations pamphlet published in 1927, the Mandate system was "an attempt to apply to the territories which were at the disposal of the Allied Powers a new device ensuring that the government of the backward peoples concerned shall not be the cause of the evils which have resulted in the past." League of Nations Information Section (League of Nations Secretariat, Geneva), *The Mandate System* at 5–6 (Feb. 1927).

96 *See, e.g.* Letter from Jamal Husseini, General Secretary, Executive Committee, Palestine Arab Congress to the President of the Council, League of Nations, 12 April 1925 (arguing the League of Nations "should have asked Great Britain to abolish the Balfour Declaration which conflicts with the principles of its Covenant in accordance with article 20.")

97 A. Abdul Hadi, *op. cit.* at 20.

98 San Remo Resolution (25 April 1920), https://ecf.org.il/media_items/299, accessed 26 August 2019 [emphasis added].

99 *See* H. Grief, *The Legal Foundation and Borders of Israel Under International Law* at 18–44 (Mazo Pub. 2008); *but see* P. Terry, *Britain in Palestine (1917–1948) – Occupation, the Palestine Mandate, and International Law*, University of Bologna Law Review 2(2) at 202–03 (2018) ("there can be no doubt that the [Balfour] Declaration did not have any status in international law.").

00 Treaty of Sevres (10 August 1920), http://sam.baskent.edu.tr/belge/Sevres_ENG.pdf, accessed 25 August 2019 [emphasis added].

01 *Id.*

02 *See generally* J. McTague, *The British Military Administration in Palestine 1917–1920*, Journal of Palestine Studies, 7(3), 55–76 (1978).

03 The Mandate for Palestine originally encompassed both Transjordan (the modern-day Hashemite Kingdom of Jordan) and Cisjordan (the modern day State of Israel and the West Bank). In 1923 Britain, keeping McMahon's pledge to Sherif Hussein, separated Transjordan from the Palestine Mandate and administered the territory separately until it gained independence in 1946. One historian has argued the Mandate should not be viewed as having legally taken effect until peace with Turkey was finalized on 6 August 1924, calling into question the legality of certain local ordinances adopted in Palestine between December 1917 and 1924. S. Huneidi, *A Broken Trust: Herbert Samuel, Zionism and the Palestinians* at 21–22 (I.B. Tauris, 2001).

04 *See* Treaty of Peace with Turkey, signed at Lausanne (24 July 1923), http://sam.baskent.edu.tr/belge/Lausanne_ENG.pdf, accessed 25 August 2019.

05 Cmd. 1785, *op. cit.* at 2 [emphasis added].

06 *See* L. Oppenheim, *op. cit.* at 217–18; W. Mallison and S. Mallison, *The Palestine Problem: International Law and World*

Order at 71 (Longmans, 1986) ("The [Balfour] Declaration is thereby established as international law through the recognized customary law-making processes of the implicit agreement of states expressed by toleration, acquiescence and silence."); K. Loevy, *op. cit.* at 310 ("the Palestine Mandate legalised" the Balfour Declaration); Huneidi (1998), *op. cit.* at 37–38 ("When the Mandate came into force … the Balfour Declaration, which had been a political document, acquired a legal status."); *but see* G. Watson, *The Balfour Declaration in International Law*, Journal of Levantine Studies 8(1), 101–20 at 107 (2018) ("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").

07 Permanent Mandates Commission, *Minutes of the Fourteenth Session held at Geneva* (26 Oct.–13 November 1928).

08 Cmd. 1785, *op. cit.* at 2.

09 Cmd. 1785, *op. cit.* at 2–12.

10 As noted in the Introduction, no steps were taken to appoint such a commission until the Lofgren Commission was formed in 1930.

11 Letter from Palestine Arab Delegation to Lloyd George (5 January 1922), *reproduced in* Priestland, *op. cit.* Vol. I at 87–93.

12 Covenant of the League of Nations, *op. cit.*, Art. 22.

13 *Id.*

14 Huneidi (2001), *op. cit.* at 24–25.

15 The most famous mandate-related case involved a dispute between Greece and Britain regarding whether certain public works concessions the Ottomans had granted to a Greek businessman survived the War and the onset of the Mandate. Although a Jewish businessman (Pinchas Rutenberg) who later received some of the same concessions from the British was the real party in interest in the case, the litigation is beyond the scope of this study, as it did not involve a dispute between the Arabs and Jews of Palestine. *See The Mavrommatis Palestine Concessions*, Permanent International Court of Justice, Series A, No. 2 (30 August 1924).

16 Public Notice, para. 3, reprinted as Appendix I to Memorandum no. 31, Palestine Royal Commission, *Memoranda Prepared by Government of Palestine*, Colonial No. 133 at 151 (1937).

17 *Id.*, *Lehrer v. Postmaster General*, High Court No. 88, Supreme Court of Palestine Sitting as High Court of Justice (1928).

18 Colonial No. 133, *op. cit.* Memorandum No. 33 at 158–59; *Husseini v. Government of Palestine*, High Court No. 55 (1925).

19 Peel Public Testimony, *op. cit.* at 307, paras. 4807, 4810.

20 *Id.*; *see also* Palestine Commission on the Disturbances of August, 1929, Evidence Heard by the Commission in Open Sittings and a Selection from the Exhibits Put in During those Sittings, Colonial Paper No. 48 (1930, hereafter "Shaw Transcript and Exhibits") at 349, paras. 8909–30 (Stoker cross-examination of Luke regarding the impact on Arab sentiment of High Commissioner Samuel's compromise and the court's ruling).

21 District Governor, Jerusalem-Jaffa District v. Suleiman Murra, 1926 A.C. 321. For various discussions of the case *see* N. Bentwich, *Judicial Interpretation of the Mandate for Palestine*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, 1(1) at 212, 216–18 (1929); L. Stein, *The Palestine White Paper of 1930* at 12–13 (Jewish Agency for Palestine, Nov. 1930); D. Schorr, *Water Law in British-Ruled Palestine*, Water History 6, 247–63 (2014). For further detailed background on the 1925 Urtas-Jerusalem water diversion controversy *see* V. Lemire, *The Awakening of Palestinian Hydropolitical Consciousness: The Artas Jerusalem Water Conflict of 1925*, Jerusalem Quarterly 48, 31–53 (2011).

2

THE WAILING WALL

Conflicting legal claims

Introduction

The Western or Wailing Wall (*Kotel Ha'Maaravi* in Hebrew) was perhaps the most contested religious site in the world during the 1920s, and became ground zero for the Arab–Jewish conflict.[1] Jews revere the Wall as their holiest and most sacred place, the only surviving remnant of their ancient Temple, the place where Jews believe the *Shekhinah* or divine spirit continues to be felt most palpably.[2]

Muslims also regard the Wall as a holy place, known to them by the Arabic term *al-Buraq*, named for the Prophet Mohammed's steed who the Angel Gabriel tethered along the Wall at the end of Mohammed's celestial journey from Mecca to Jerusalem.[3] Prior to the 19th century, however, there was little or no evidence the Muslims viewed the Wall or the area in front of the wall with any particular reverence.[4] In any event, even today the Wall remains the "only Holy Place in Jerusalem in which both Muslims and Jews have a direct concern," and thus "is at all times a potential element of friction" between the two communities.[5]

The Wall formed a portion of the western exterior of the ancient Jewish Temples built atop Mount Moriah in Jerusalem in the area Jews refer to as the Temple Mount, or *Har Ha'Bayit*, and that Muslims refer to as the *Haram al-Sharif*. King Solomon built the original Temple on that site nearly three thousand years ago. The Babylonians destroyed the original Temple in 587 B.C, and thereafter the Jews began praying at the ruins of the Temple. The Jews rebuilt the Temple about 70 years later, after which it was destroyed again, this time by the Macedonians in 170 B.C. Once again, the Jews would visit the ruins to pray and mourn. The Second Temple was reconstructed during the reign of King Herod of Judea, and was destroyed for the last time in 70 A.D. during the Roman conquest of Jerusalem. Again, the Jews would visit the ruins and pray, originally at the large stone atop Mount Moriah where Abraham was said to have nearly sacrificed his son Isaac.[6]

The wall under Muslim rule

The Muslim Arabs took possession of the *Haram*, including the Wall, by conquest in 638 A.D. Muslim Arabs and later Muslim Turks held the Wall continuously until 1967, other than during the British Mandate and a brief time during the Crusader period (late 11th until late 12th century). The Muslims built the Mosque of Omar (Dome of the Rock) and the *al-Aqsa* Mosque (the third holiest shrine in Islam, after Mecca and Medina) in the 7th century on the site of the former Jewish Temples on Mount Moriah. The Mosque of Omar completely enclosed the stone

where the Jews had been accustomed to pray and lament the loss of the Temples. In 1193 Saladin's son, King Afdal, declared the area in front of the Wall a *Waqf*, deeming it a religious or charitable area under Muslim *Sharia* Law.[7]

Over time the Jews moved their prayers and wailings from the large stone atop Mount Moriah to the only surviving remnant of the Herodian exterior wall, an area more than 100 meters long and 20 meters high. The area accessible to the Jews and which became known as the "Wailing Wall" was about 30 meters long, with an area of paving stones or rough pavement in front of the wall about 4 meters wide. By the 19th century the pavement was sandwiched between the Wall on one side and an area of small, impoverished stone houses on the other side. Those small homes comprised the so-called Moghrabi, or Moroccan Quarter, which Abu Midian dedicated in 1320 to the Moroccan pilgrims as a separate *Wakf*.[8] Access to the Wall was from a narrow lane from the north.[9]

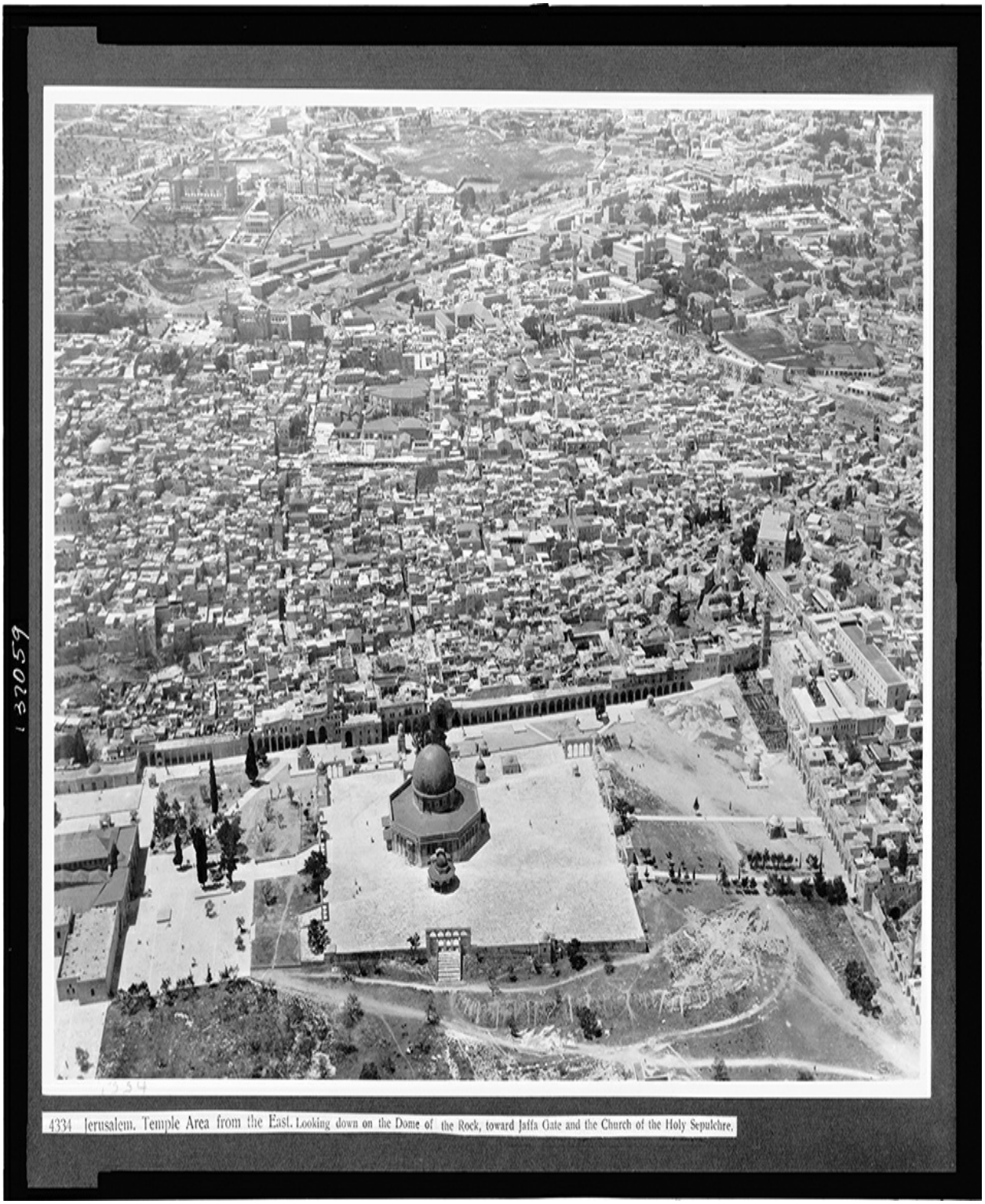


FIGURE 2.1 Aerial view of the Old City of Jerusalem, 1931 (Library of Congress, Prints and Photographs Division).[10]

Figure 2.2 shows a closer view of the Moghrabi Quarter and the Wall.

FIGURE 2.2 Aerial view of the Moghrabi Quarter and Wailing Wall

(Courtesy of Buki Boaz Israeli photograph collection, from the Exhibition *The Mount – Viewing Temple Mount – Haram al-Sharif 1839–2019*, The Tower of David Museum, Jerusalem, Shimon Lev, Curator).[11]

Figure 2.3 from the early 20th century shows both the Moghrabi Quarter and the Wall.[12]

FIGURE 2.3 View of the Moghrabi Quarter and Wailing Wall

(Matson Photograph Collection, Library of Congress).

Written evidence of Jewish prayer at the Wall dates back to the 10th century.[13] Jewish prayer at the Wall continued thereafter more or less without interruption.[14]

During Ottoman times the authorities occasionally took steps to regulate Jewish activity at the Wall. In 1727, in the earliest known example of the Muslims resorting to the law and legal

process in their conflict with the Jews, the Moghrabis sued the Jews, complaining they prayed too loudly and littered the area in front of the Wall. The *Qadi* (Islamic Judge) ordered the Jews to desist from praying at the Wall, because they lacked a permit authorizing them to do so. Over time, however, the Jews were allowed to continue praying at the Wall on condition they did so without disturbing the Moghrabi residents, and only if they made no claims of ownership of the Wall.[15]

In 1840, during the period of the Egyptian Pasha's occupation of Palestine, the Jews applied for permission to pave the passageway in front of the Wall. The authorities responded with a decree rejecting the Jewish application:

> [W]hereas it has come to light from a copy of the minutes of the *Majles Shura* [Representative Council] of Jerusalem that the area which the Jews have applied to pave is contiguous with the wall of the *Haram Al-Sharif* and the tethering place of *al-Buraq* and is contained in the *Wakf* of Abu Midian (of holy memory); and whereas there is no precedent for the Jews carrying out any such repairs in that area in the past; and whereas it has been established that it would be inadmissible under the *Shar'ia* Law (for them to do so); therefore the Jews must not be enabled to carry out their paving, and they must be cautioned against raising their voices and displaying their books (or utterances) and informed that all that may be permitted them is to pay visits as of old.[16]

In 1911 the Turkish authorities issued a decree prohibiting the Jews from bringing certain items such as "chairs, screens, and similar articles, or any innovation be made which may indicate ownership."[17]

The Ottoman authorities, however, occasionally issued legal rulings *permitting* Jewish prayer at the Wall. For example, in August 1889 the Sultan issued a decree appointing a new Chief Rabbi of Jerusalem. The decree said,

> there shall be in no way any interference with the synagogues and with their places of devotional visits and pilgrimage situated in the places (or: localities) within the jurisdiction of (lit.: appertaining to, or: dependent on) his Chief Rabbinate and with their ceremonies or the practices of their ritual[18]

Similar rulings were issued in 1893 and 1909.[19] On other occasions the Ottoman authorities turned a blind eye to their own edicts, allowing the Jews to bring chairs and benches to the Wall in exchange for small payments.[20]

Early disputes during British rule

Immediately following the British conquest of Jerusalem near the end of World War I, General Edmund Allenby issued a proclamation declaring Britain's intention to maintain and protect all the Holy Places "according to the *existing* customs and beliefs of those to whose faiths they are sacred."[21] This was the first official endorsement of the concept of maintaining the *Status Quo* at the Holy Places, eventually codified in Article 13 of the Mandate. As we shall see, the parties all viewed the *Status Quo* as having the force of law.

As noted, the Muslims had obtained ownership of the Wall by conquest in the 7th century. While the Allied Powers in the Treaty of Versailles had rejected the notion of acquisition of territory by conquest, preferring self-determination under the tutelage of the mandate system, they did not retroactively dissolve claims of ownership based on previous conquests, including the Muslim ownership of the *Haram* and the Wall. Thus, from the moment the British arrived in Palestine, they accepted as a matter of law that the Muslim *Wakf* already "owned" the Wailing Wall and the pavement in front of the Wall.[22]

FIGURE 2.4 View from the south showing the Wall and narrow pavement area in front of the Wall. The Moghrabi Quarter lies immediately to the west of the pavement

(Matson Photograph Collection, Library of Congress).[23]

The Shaw Commission later reaffirmed this view, describing the Wall as "Legally … the absolute property of the Muslim community."[24] The former Attorney General of Palestine, Norman Bentwich, noted the Muslims "had nine points of the law in their favor by reason of

their ownership and possession of the pavement."[25] Notwithstanding the acknowledged Muslim ownership of the Wall, Allenby's proclamation also formalized the notion that Jewish prayer practices at the Wall could continue, so long as those practices had been permitted under Ottoman rule.

Jewish prayer at the site was, therefore, conducted solely at the pleasure of and subject to the rules and regulations of the Muslim owners. Nevertheless, the Jews had also acquired with the passage of time a loosely defined right of access to the Wall. The Mandate itself, as we have seen, incorporated in Article 13 the requirement that Britain maintain and protect the Muslim right of ownership and the Jewish right of access as the *Status Quo* at the Holy Places. As the Shaw Commission would later note, "the Jews, through the practice of centuries, have established a right of access to the Wall for the purposes of their devotions."[26]

As of the beginning of the Mandate, therefore, the respective rights and claims of the Jews and Muslims regarding the Wall remained open to debate, raising many questions. Did the Jews, for example, have the right to pray at the Wall whenever they wanted, day or night? Had the Jews acquired some form of legal or equitable interest, albeit less than ownership, perhaps an easement, or a prescriptive right, or a usufruct or something similar, granting them more than just the simple right of visitation or access accorded to ordinary tourists? Were the Jews allowed to bring chairs or place benches on the pavement in front of the Wall? Could the Jews bring Torahs, prayer books and prayer stands/tables, oil lamps, wash basins, and/or other appurtenances of prayer with them? Could the Jews place a screen along the pavement to separate male from female worshipers? Could the Jews blow the *Shofar* at the Wall on *Yom Kippur* (their holiest day, known as the Day of Atonement)? Could the Jews undermine the Muslim claim of ownership by conquest through a strategy of slow but steady ownership by encroachment?

And did the Muslims, for example, have the right to make repairs to the Wall; to erect structures at the top of the Wall; to increase the height of a wall forming part of a structure above the Wall; to convert certain houses near one end of the Wall into a *Zawiyah* (religious meeting place or hospice); to construct a door at one end of the pavement, thereby converting the pavement into a thoroughfare enabling the Moghrabi residents to drive donkeys and other animals along the pavement during Jewish prayers; to engage in the noisy and boisterous *Zikr* ceremony within close earshot of Jewish worshipers at the Wall; or for the *Muezzin* to broadcast the call for prayer from a rooftop adjacent to the Wall, thereby disturbing the solemnity of Jewish worship?

Each of these questions became flashpoints for legal conflict and controversy at the Wall during the 1920s, with the Jews pushing for as many rights as possible, and the Muslims resisting at every turn for fear the Jews intended to encroach, slowly but surely, on Muslim rights until gaining *de facto* control and ultimately *de jure* ownership of the Wall, and even rebuilding their ancient Temple on the site of *Haram al-Sharif*.

From the British perspective, their obligation under the Mandate to preserve and protect the *Status Quo* meant no more and no less than following the exact practices prevailing at the Wall during Ottoman times. The British viewed this as meaning "the Jewish community have a right of access to the pavement for the purposes of their devotions, but may bring to the Wall only those appurtenances of worship which were permitted under the Turkish regime."[27]

Indeed, the photographs[28] on the following pages show both the presence and absence of chairs and benches at the Wall during the pre-World War I years.

The British viewed the *Status Quo* as having the force of law, and did not hesitate to enforce it. For example, in 1919 the Administrative Council of Jerusalem issued a decree banning the bringing of chairs, benches "and the like" to the Wall area. The Jews nevertheless brought benches to the Wall during Passover 1922 and on *Yom Kippur* 1923, sparking controversy.[29]

The Jews and Muslims also viewed the *Status Quo* as a legal concept which they could use to gain leverage against each other. Thus, for example, in 1920 the Jews objected when the *Waqf* began repairs to the upper layers of the Wall. The British military authorities permitted the repairs to proceed after the Muslims had pointed to previous instances where they had done the same thing. This time, however, the British required the Muslims to perform the repairs under the supervision of the Department of Antiquities, and prohibited any repair work on Fridays and Saturdays.[30]

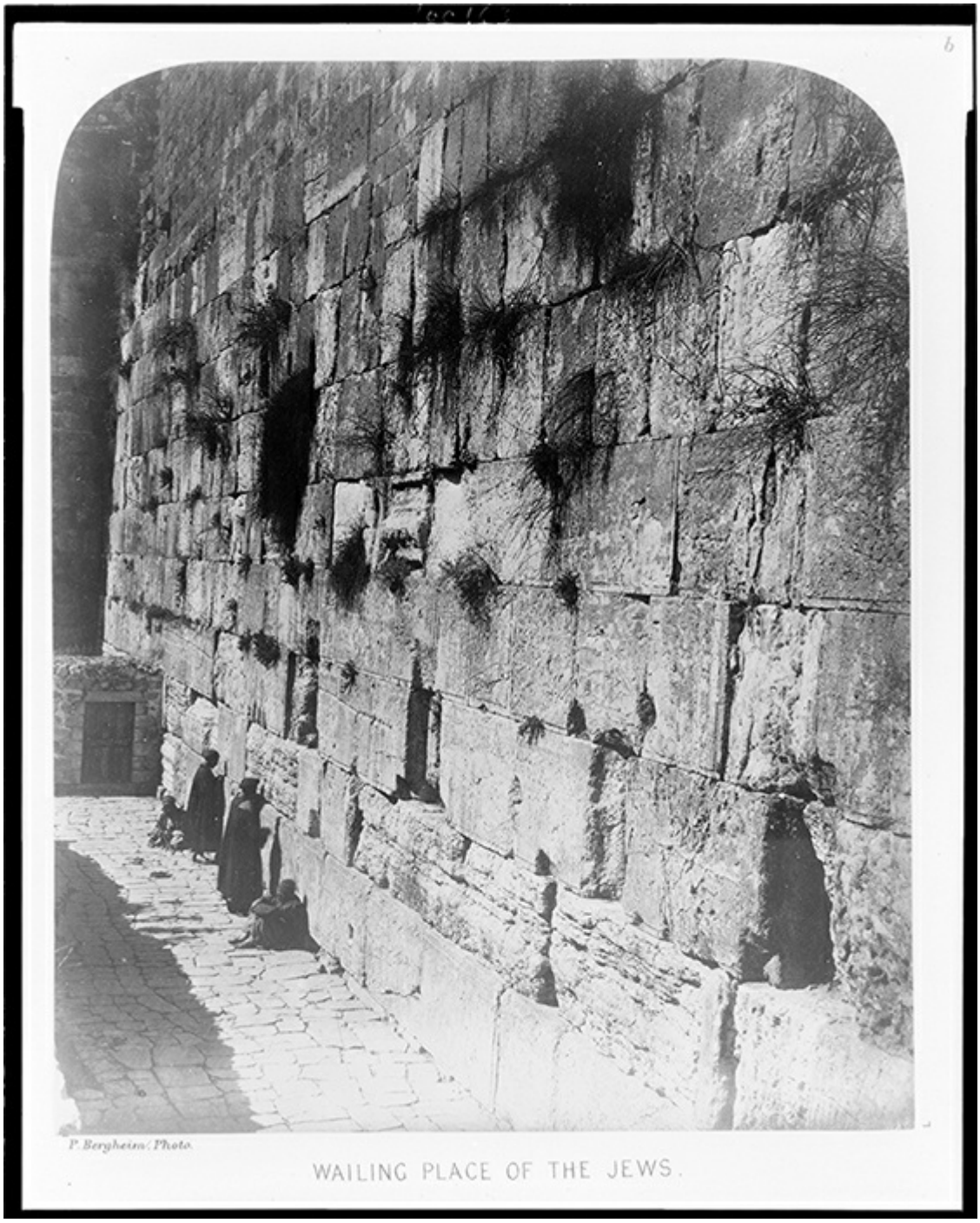


FIGURE 2.5 Wailing Wall, 1865

(Library of Congress, Prints and Photographs Division).

Following the Passover 1922 incident, a British official noted in a monthly report on the political situation in Palestine:

> [I]n Arab and Jewish circles much excitement has been caused by the question as to whether or not benches are to be allowed for the accommodation of Jews wailing before the [Wall]. … In order to guard against the establishment of any

rights by the Jews in this area, seats or benches were officially forbidden during the Turkish regime. But it would appear that this prohibition has not been observed, for since the [British] military occupation, and apparently before it, benches had in fact been introduced by means of monetary arrangements made with the neighbouring Moslems. The general Moslem awakening … has, as one of its symptoms, the assumption of a rigid attitude on this question of benches. It has been necessary … to forbid benches. The question is important, because it is one of these that are apt to raise passions to a dangerous height.[31]

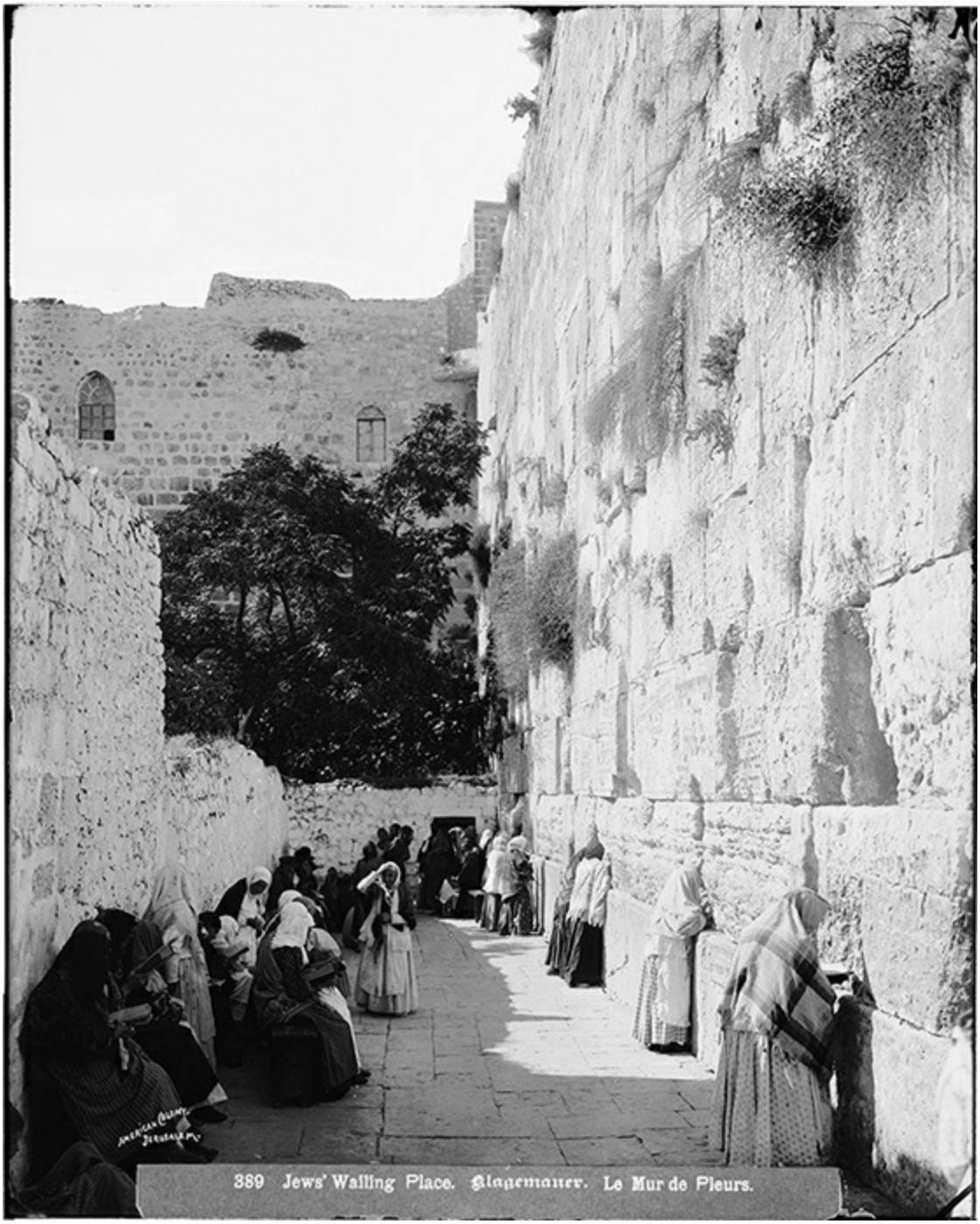


FIGURE 2.6 Wailing Wall, late 19th/early 20th century

(Matson Photograph Collection, Library of Congress).

Following the Passover 1922 events a proposal was made for a judicial inquiry into the relative rights of the Muslims and Jews at the Wall. The Mandatory Government needed guidance and a set of legal rules to keep the peace, especially as the international commission required by Article 14 of the Mandate to determine the parties' rights had not yet been established (and

would not be established until 1930). But no judicial inquiry was launched.[32]

In July 1924 the British Government issued the Holy Places Order-in-Council, divesting all Palestine courts of jurisdiction over "[a]ny cause or matter in connection with the Holy Places or religious buildings or sites in Palestine, or the rights or claims relating to the different religious communities in Palestine." This Order left both Arabs and Jews without the ability to seek injunctive or other forms of legal relief in the local courts of Palestine to prevent each other from engaging in alleged violations of the *Status Quo* or any other provisions of the Mandate applicable to the Holy Places. Divesting the local courts of jurisdiction meant the parties would have to seek relief directly from the Palestine Government, the British Government, and/or the League of Nations.[33]

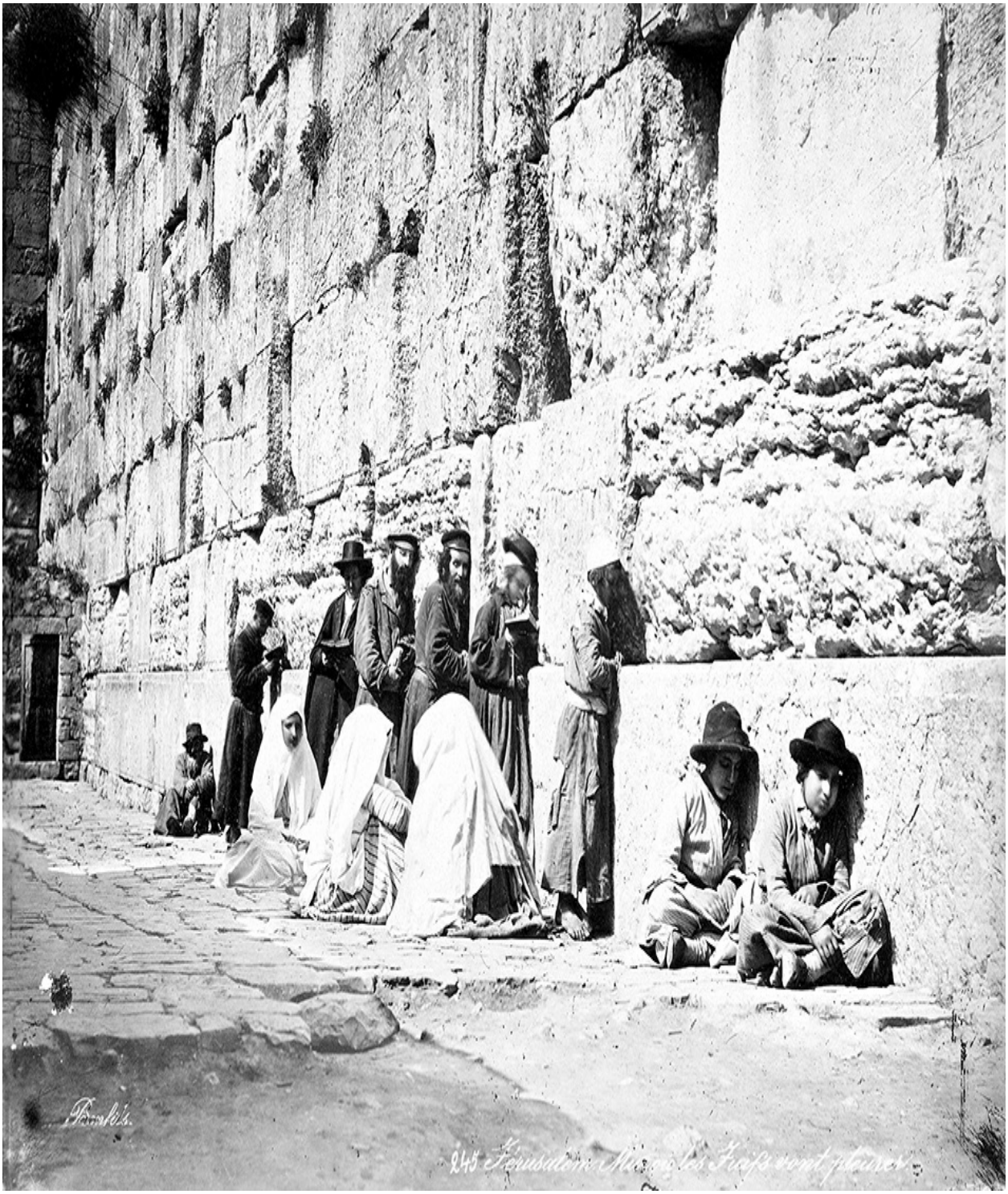


FIGURE 2.7 Wailing Wall, 1870s

(Felix Bonfils).

Another incident occurred at the Wall on *Yom Kippur* 1925, when British authorities removed benches and chairs the Jews had brought to the Wall. The Jews invoked the jurisdiction of the

League of Nations, filing a petition protesting:

> [The] incident which recently occurred in Jerusalem on the Jewish Day of Atonement, when the police were sent by the district authorities to remove seats and benches placed at the Kothel Maaravi (the so-called Wailing Wall) for the use of aged and infirm worshippers during the continuous services held there, in accordance with immemorial custom, throughout the Past. … [The Zionist Executive] feel bound to place on record the painful impression caused by this deplorable incident throughout the Jewish world. They earnestly hope that, through the good offices of the mandatory Power and the League of Nations, means may be found of putting an end, by common consent, to a state of affairs which it is impossible to regard without serious concern.[34]

The Permanent Mandates Commission (PMC) of the League of Nations, the body vested with overseeing the performance of the Mandatory rulers, considered but refused to take action on the Jewish petition, noting the matter should be resolved "by agreement" between Muslims and Jews.[35]

During the discussion of the Jewish Petition at the PMC meeting the following year, Commissioner Yamanaka of Japan had the following exchange with the Chief Secretary to the Mandatory Government, Lt. Colonel George Stewart Symes. Symes described the issue in essentially legal terms:

> [T]he Jews were accustomed to go to the western Temple wall to bewail the fallen grandeur of Israel. The site, however, which they occupied for the purpose belonged to a Moslem Waqf, and, while the Jews were allowed to go there, *they were not legally allowed to do anything which would give the impression that the site in question was their own property*. All religious communities did their utmost to prevent each other from acquiring any *legal right* in the matter of property which they considered to belong to themselves. This being so, the Moslems who owned the site in question had raised objections to the bringing of stools by the Jews to the site, for (they said) after stools would come benches, the benches would then be fixed, *and before long the Jews would have established a legal right to the site*. However much sympathy the Administration might feel for the Jews in question, its mandatory duty was to respect the *status quo* and therefore when stools were brought by the Jews on to the site in question the police had to remove them, *for the Jews were not legally within their rights*. If the police had not taken away the stools a regrettable incident would have occurred similar to past incidents. The question could only be settled by an agreement between Moslems and Jews and the government would do its utmost to promote such an agreement.[36]

In discussing the events of 1922, 1923 and 1925 a British official later wrote:

> It may seem a matter of reason and humanity that aged worshippers should be permitted to have seating accommodation, especially on the Day of Atonement, when they fast for twenty-four hours, but the other point of view is stated by Sir Ronald Storrs in a memorandum written in 1925: "The Moslem objection to the introduction of benches … is based partly upon the fact that the pavement in front of the Wall is actually the only approach to one or more of the Moghrabi houses, and that it is in danger of being blocked if benches or anything of a permanent nature were allowed to obstruct the fairway: but still more upon the theory, unfortunately verified by universal experience in Jerusalem, that any concession or abrogation from existing rights tends to become the thin end of a wedge before which rights are apt to disintegrate. Chairs, they state, would become wooden benches, wooden benches stone benches, stone benches fixed stone benches … so that the Wakf would one day find houses belonging to others erected against their wishes upon their own property."[37]

In the meantime, the Moslem Supreme Council seized upon Jewish-created postcards and other artwork showing Jewish symbols, such as the Star of David depicted over the Dome of the Rock, as further evidence the Jews were plotting to take the entire *Haram* for themselves.[38] The files of the Palestine Government by that time "were full of petitions" from both Arabs and Jews complaining about alleged violations of the *Status Quo* at the Wall.[39]

In 1927 a Jerusalem-based British Official, Administrative Officer Lionel George Archer Cust, prepared a lengthy memorandum attempting to define the *Status Quo* applicable to all Holy Places in Jerusalem and elsewhere for all religions.[40] Regarding the Wailing Wall, Cust

described the *Status Quo* as follows:

> The Jewish custom of praying [at the Wall] is of considerable antiquity … and has now become an established right. This right to pray is, however, accompanied by the claim of the actual ownership of the Wall. The Moslems resist this on the ground that the Wall is an integral part of the enclosure Wall of the *Haram* al Sharif, and that the space in front of it is a public way, and part of the premises of the Abu Midian Waqf. For this reason, the Moslems have always protested against the placing of benches or chairs in front of the Wall by the Jews as causing an obstruction in this public way and implying possessory rights. Though benches have certainly from time to time been introduced, there is a resolution taken by the Administrative Council and confirmed by the *Mutasarrif* under the old Regime that chairs or tents or curtains (to divide the women from the men) are not to be allowed. This is still enforced, but portable camp-stools or boxes or tins with cushions are permitted for the convenience of worshippers.[41]

The *Yom Kippur* 1928 incident

Yom Kippur began the evening of 23 September 1928. Shortly before sunset, the British Deputy District Commissioner for Jerusalem, Edward Keith-Roach, accompanied by a British police official, Constable Douglas Duff, visited the *Haram* area to obtain a view of the Wall. According to Keith-Roach's official report, prepared two days later, Keith-Roach observed the Jews had made "various innovations … which violate the *Status Quo* and infringe the legal rights of the owners of the pavement, the Abu Midian Wakf."[42] The innovations included five petrol vapor lamps (instead of the customary two), a number of mats placed on the ground at the southern end of the Wall, a large "tabernacle" (instead of the customary small stand to hold the Torah), and a screen to divide men and women.[43]

Keith-Roach reported that before he left the *Haram* area the *Mutawalli* of the Abu Midian *Wakf* approached him and complained about the Jewish innovations.[44] Keith-Roach and Duff went to the Wall and spoke to the Jewish Beadle, telling him the screen had to be removed by early the next morning, but that the other items could remain until the end of *Yom Kippur*. Keith-Roach warned the Beadle that if the screen were not removed by early morning then Duff would do so.[45]

The next morning, however, the screen was still at the Wall. Duff waited until 9.20 for the Beadle to remove it, but the Beadle was reluctant to do so during *Yom Kippur*. Duff then asked the worshipers to remove the screen, but they refused due to the holiness of the day. Duff then ordered the police under his command to remove the screen. According to Duff's report, as the police were removing the screen "a certain amount of opposition was shown particularly by the women and one Rabbi who clung on to the screen. As he [the Rabbi] refused to release it, he was carried bodily with the screen outside."[46] Another officer reported

> there was a good deal of excitement among the men and women present as the screen had to be pulled through the crowd, none of the people agreeing to take it away. Some women hung on to the end of the screen and would not release it.[47]

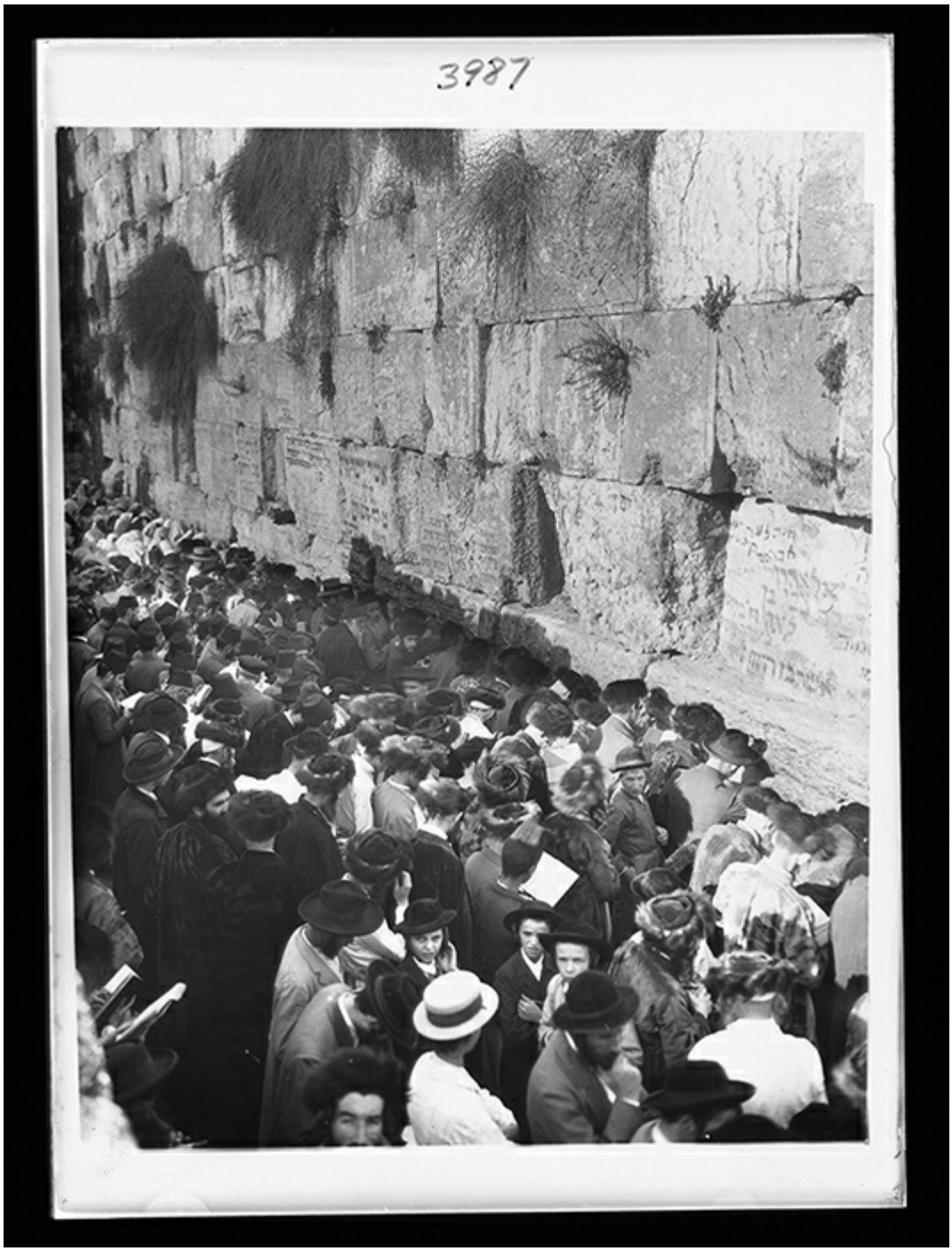


Figure 2.8 Typical crowd at the Wailing Wall for *Yom Kippur*

(Matson Photograph Collection, Library of Congress).[48]

Sir Harry Luke, at that time the Chief Secretary of the Palestine Government and, in the absence of High Commissioner Sir John Chancellor, the Officer in Charge of Administering the Government of Palestine (the Acting High Commissioner) seemed almost bemused by the incident, confiding the following to his private diary for that same day, 24 September 1928:

> Row at Wailing Wall owing to the Beadle (whose name it transpires is Noah Gladstone) introducing a screen which on protests from Moslems had to be forcibly removed on Day of Atonement by Police, causing a scuffle. The Rabbi clung so persistently to the screen that he was also removed adhering to it. Great excitement among Jews. Even Jewish female lunatics discussing it in the asylum. K-R [Keith-Roach] told me "nothing more would be heard of it!"[49]

Meanwhile, Luke casually recorded his activities for the next two days in a single entry for September 25–26. After a quick reference to "Meetings with Jewish deputations over Wailing Wall incident, Drafting of Communique, Writing Despatch, etc.," Luke turned his attention to other matters: "Tennis tournament, Police sports & dance, & much work at office. A heavy time generally."[50]

Luke and Keith-Roach could not have been more mistaken about the magnitude of the *Yom Kippur* incident. Luke had no idea how controversial the incident would prove to the Jewish world, nor had he any idea the incident would set in motion a chain of events culminating less than a year later in the worst violence to occur in the first decade of the Mandate.

The incident provoked an immediate protest from Jewish leaders in Jerusalem.[51] The *Jewish Daily Bulletin* ran a front page story in its 26 September 1928 edition, which began as follows:

> Palestine Jewry felt highly indignant today as the news spread throughout the country that in the midst of the *Yom Kippur* prayers before the Western Wall of the Temple, commonly known as the Wailing Wall, the British police of Jerusalem appeared at the Wall and interfered with the services. Several persons were hurt, including an American Jewish woman, when the worshippers withstood the attempt of Police Inspector Duff, on duty at the Wailing Wall, to remove the screen put up for the services so as to separate the men and women worshippers in accordance with Jewish custom. The congregation assembled before the Wall, a thousand strong, protested against the unexplainable order and clung tenaciously to the screen, as it was forcibly removed. The screen was torn. The interference caused great excitement and the news spread rapidly throughout the Holy City.[52]

Jewish reaction was intense elsewhere too, including as far away as South Africa, where the local Zionist Federation sent a cable to the British Parliament, saying they were "gravely concerned" over the "deplorable disturbance of Jewish worship on most sacred day of year at Wailing Wall Jerusalem involving violation of Jewish religious sentiment throughout the world."[53]

As Luke mentioned in his diary entry, the Palestine Government issued a communique on 26 September 1928 formally setting forth its version of the *Yom Kippur* events, noting

> the importation of the screen and its attachment to the pavement constituted an infraction of the *status quo*, which the Government were unable to permit. At the same time the Government deeply deplore the shock that was caused to large numbers of religious people on a day so holy to Jews. … Government consider that the removal of the screen was necessary, but regret all the circumstances attending that removal.[54]

Jewish and Arab legal reactions to the 1928 incident

Within a week following the *Yom Kippur* incident, both parties turned once again to the law and the legal process for redress, following their well-established custom and practice. The Muslims garnered more than 1,300 signatures on five separate petitions to the Government, protesting the alleged Jewish efforts to claim possession of the Wall and asking the Government to remove all Jewish items from the pavement in front of the Wall.[55]

On 8 October 1928 the Grand Mufti of Jerusalem, Haj Amin al-Husseini, met with Luke, still serving as the Officer Administering the Government of Palestine. The Mufti gave Luke a memorandum accusing the Jews of harboring "unlimited greedy aspirations," and noting the Muslims

> believe that the Jews' aim is to take possession of the Mosque of *al-Aksa* gradually on the pretence that it is the Temple, by starting with the Western Wall of that place, which is an inseparable part of the Mosque of *al-Aksa*.[56]

The Zionist Organization began assessing its legal options shortly after the *Yom Kippur* incident. An internal memorandum prepared for Leonard Stein, then serving as the organization's Political Secretary, did not offer much hope. The memorandum noted the "evidence seems to show that … ownership of the Wall is Moslem …[t]he pavement or alley appears to be the property of the Wakf."[57] Focusing on the legal obstacles presented by the *Status Quo*, the internal memorandum concluded:

> [The British Government previously stated] in unequivocal terms that the non-enforcement of the letter of the law re benches, etc. does not constitute any precedent. It would appear that the legal question involved is one which concerns the establishment of a custom. After what lapse of time does a custom carry with it legal sanction? Would innovations of another character, e.g. the screen, be permitted even if the custom of placing chairs beneath the Wall were eventually recognized. Legally, perhaps, each case would have to be subjected to a judicial ruling through the League of Nations, each question being decided on its individual merits. Submission to the League is apparently the only course which might obtain the necessary finality on this point, while maintenance of the status quo in all other respects remains the only policy adhered to.[58]

The internal memorandum sheds light on the Zionist Organization's awareness that the Jewish legal case for the Wall depended more on achieving a favorable interpretation of the meaning of the *Status Quo*, rather than attempting to establish any proprietary rights to the Wall or the pavement. As the memorandum predicted, the League of Nations eventually did render a formal judicial ruling two years later, as we shall see in Chapter 4.

In the meantime, the Zionist Organization filed a petition in mid-October 1928 with the League of Nations formally protesting the Mandatory Government's handling of the *Yom Kippur* incident.[59] The Petition began by decrying the *Yom Kippur* screen removal as "a deplorable incident which recently occurred in Jerusalem on the Jewish Day of Atonement, which has caused the most painful impression throughout the Jewish world." The Petition then recited the facts from the Jewish perspective, differing in several respects from those stated in Keith-Roach's report. For example, the Petition indicated the police had ignored a request from the worshipers to allow the screen to remain until the end of the day, and the identical screen had been used in the same spot ten days earlier during *Rosh Hashana* prayers at the Wall, without complaint from the Muslims.

The Petition further recounted the events of *Yom Kippur* 1925, noting this was "not the first occasion upon which the Palestine Government has found it necessary to make aggressive use of the Police." The Petition then argued the Wall was sacred only to the Jews and no other religious community, and the Muslims would even drive their donkeys past the Wall and "desecrate it in the most offensive manner." The Petition demanded the Jews be allowed to pray at the Wall without interference as "an essential condition of civilized government in Palestine."

The Petition reiterated prior Jewish public statements that the Jews harbored no designs on the *Haram al-Sharif*, stating the Jews

> wish emphatically to repudiate as false and libelous the rumours which have been circulated that it is the intention of the Jewish people to menace the inviolability of the Moslem Holy Place which encloses the Mosque of Aqsa and the Mosque of Omar.[60]

The Petition concluded by requesting the League of Nations order the Mandatory Government to "take all necessary steps to ensure that an arrangement eliminating the present obstacles to free

exercise of worship at the Holy Place shall be effected in the very near future."[61]

The legal maneuvering continued further. A second Jewish petition was filed on 14 October 1928. On 7 November 1928, following a 1 November meeting of the General Moslem Conference in Jerusalem, both the Supreme Moslem Council and an organization calling itself the "General Moslem Conference for the Defence of *Buraq*" each sent telegrams to the League, the latter of which was laced with legal language:

> *Buraq* so-called Wailing Wall is Moslem sanctuary sanctified by text of Koran and Moslem uncontested *Wakf* inalienable property and that all Jewish claims are supported by no right whatever except that previously they were allowed as followers of all creeds to visit *Buraq* with no right of worship preachings or speeches … new Jewish claim to worship and prayer rites to which they never had rights *is only made to gain prescription rights which Moslems can never tolerate as actually infringing their rights alienating their property by actual possession of one of their Shrines.* Moslems determined defend their absolute rights in this their Holy Place with no matter what consequences this may entail.[62]

This marked the beginning of the so-called "*Buraq* Campaign," which the Mufti launched as a means of galvanizing Muslim sentiment around the Wailing Wall dispute and furthering the Arab political position. The 1 November General Muslim Conference also approved a series of resolutions, accusing the Jews of deliberately encroaching at the Wall to provoke a dispute with the Muslims and eventually seize control of all Muslim Holy Places. The Muslims requested the repeal of the 1924 Expropriation of Land Ordinance, or alternatively an amendment to the Ordinance exempting the Muslim Holy Places from the reach of the law. The Muslims further requested the sacking of the Jewish Attorney General of Palestine, Norman Bentwich, whom the Muslims regarded as "a serious menace to their most important interests."[63]

Still another Muslim petition took the form of a lengthy letter dated 11 December 1928 to the Secretary General of the League of Nations, restating and expanding the Muslim legal argument that the Jews were trying to oust the Muslims from the Wall and the pavement, and eventually take ownership and control of the entire *Haram* where they would rebuild their Temple. Accusing the Jews of trying to create the conditions for "a veritable usucaption title," the Petition urged the Council of the League

> to consider the questions bound up with this religious dispute and to insist on the principal of the inviolability of property rights. Unless the law related to landed property in Palestine is strictly observed, Jerusalem, the Holy City of Moslems, Jews and Christians, may become a grave of international conflict and a threat to world peace.[64]

The Permanent Mandates Commission found no basis at its meetings the following July for granting any of the Jewish or Muslim petitions, reiterating instead its recommendation from two years earlier that the parties try to settle their differences.[65]

British legal reaction (I): the 1928 white paper

On 19 November 1928 the British Government issued a White Paper addressing the *Yom Kippur* incident and announcing its policy regarding the Wall. The White Paper repeated the common formulation that although the Wall and the pavement in front of the Wall were legally

> the absolute property of the Muslim community … the Jewish community have established an undoubted right of access to the pavement for the purposes of their devotions … but may bring to the Wall only those appurtenances of worship which were *permitted* under the Turkish regime.[66]

The White Paper also exonerated Keith-Roach and Duff for their actions in removing the screen,

noting they were faced with the burden of having to make an "immediate" choice between complying with the Mandatory Government's obligations under Article 13 of the Mandate and enforcing the *Status Quo*, or allowing the Jews to violate the *Status Quo* by placing a screen along the pavement. The British officers, therefore, acted appropriately in removing the screen. The White Paper also promised that "[i]n future, steps will be taken to ensure that a Jewish officer is present at the Wall on all such occasions."[67]

The White Paper went on to criticize the Jews for provoking the Muslims by making "innovations" to their practices on *Yom Kippur* without the prior agreement of the Muslims and the Mandatory Government. The White Paper chided the Jewish authorities, using the language of modern-day negligence law, for not being

> more alive to the possibility that the Muslim authorities would complain against any departure from the *status quo* on the Jewish Day of Atonement, since such a complaint was, in fact, made on the same day in 1925, and, after the police had intervened, it had been made clear to those concerned that the Palestine Government would regard it as their duty to take similar action in the event of any recurrence.[68]

Addressing the Jewish request in the October Petition for "an arrangement eliminating the present obstacles to free exercise of worship at the Holy Place," the White Paper affirmed the British Government's "duty and intention" to maintain the *Status Quo* as it pertained to pre-existing Jewish prayer practices as the Wall, but equally affirmed "[i]t would be inconsistent with their duty under the Mandate were they to endeavor to compel the Moslem owners of the pavement to accord any further privileges or rights to the Jewish community."[69]

Finally, the White Paper urged the Muslim and Jewish sides to try to work out a compromise, and offered British help in brokering a negotiated settlement, especially as the issue had evolved from purely religious to a "political and racial question."[70]

But no compromise materialized. High Commissioner Chancellor noted in a 15 December 1928 dispatch to the Colonial Secretary, Leo Amery, that it had now become incumbent upon the Jews "to prove Turkish authorization" regarding the appurtenances they had been allowed under the law to bring to the Wall during Ottoman times.[71] "It is not disputed," continued Chancellor,

> that on occasion benches and other appurtenances were brought to the Wall, but the Moslem position is likely to be … that these things were not done as of right but in consequence of private financial transactions between the Jews and the Mutawali of the Abu Madian Wakf.[72]

The Muslims received the White Paper favorably, but their reaction quickly turned to disappointment with the British for not enforcing it. On 27 December 1928, the Mufti wrote to the Deputy District Commissioner for Jerusalem, urging the Government to enforce the White Paper "as early as possible" so that "the *status quo* in force during the Turkish rule should be observed."[73]

As succeeding months went by, the Muslims grew increasingly frustrated with the British for failing to enforce the White Paper. The British Government, however, faced with enforcing the White Paper and angering the Jews, or not enforcing it and angering the Muslims, and with no possibility of brokering a settlement between the two sides, turned to its own lawyers for advice.

British legal reaction (II): the law officers of the crown

By late 1928, and even prior to the issuance of the White Paper, compromise seemed as far away

as ever, as both sides continued pressing their claims and asserting their rights to the Wall. The Muslims responded to the *Yom Kippur* incident by taking various measures to reassert their ownership of the Wall and the surrounding area, further exacerbating tensions with the Jews. For example, the Muslims stepped up the pace of masonry construction of a four-foot high privacy wall for a building in a section of the *Haram* at the north end of the Wall. The building, which had been under construction prior to the *Yom Kippur* incident, was meant to house officials of the nearby Muslim religious court. One side of the building rested atop the Wall, directly above the Moghrabi *Wakf* garden lying to the north of the pavement in front of the Wall. The inhabitants of the building would be able to use the top of the Wall as a sort of balcony. The new four-foot high wall was built to afford privacy to the women who might be sitting or walking along the balcony.[74]

The Muslims also commenced work to convert several houses at the southern end of the Wall into a *Zawiyah*, or small prayer shrine.[75] In addition, the Muslims began work on opening a new doorway at the southern end of the Wall pavement, enabling access from the *Haram* to the *Zawiyah*, and through the *Zawiyah* to the Wall, thereby converting the pavement area from a cul-de-sac (with only one way in and out, on the north side) into a thoroughfare along which the Muslims would be able to drive their donkeys and mules.[76] The area near the new door and the stairway from the new door to the pavement are shown in Figures 2.9 and 2.10.[77]

The Muslims also stationed a *Muezzin* on a rooftop adjacent to the Wall, where he was issuing the prayer call in a manner disruptive of Jewish worship.

The Jews protested all this activity as violations of the *Status Quo*.[78] On 18 October 1928 the Palestine Zionist Executive wrote to Luke, who was still acting as the Officer Administering the Government, complaining about the Muslim construction activity, arguing it "constitute[d] a radical alteration of the *Status Quo*." The Jews claimed the entire Wall constituted a Holy Site, and thus it made no difference that the construction activity was occurring atop the northern end of the Wall, directly above the Moghrabi garden. The letter also alleged the construction implicated the Antiquities Ordinance of 1920,[79] meaning it would be illegal if it had commenced without permission from the Director of Antiquities.[80]

Figure 2.9 Wailing Wall, area of New Door

(Colonial Office files).

Figure 2.10 New Door to Wailing Wall

(Colonial Office files).

Luke sent a dispatch to the Colonial Office the following week, notifying them of the complaint from the Zionist Executive and describing the Muslim construction work at the top of the Wall. Luke noted the Mandatory Government possessed uncertain legal powers to regulate the construction activity. The Antiquities Ordinance of 1920 had prohibited the alteration, reconstruction or restoration of any antiquity without the permission of the Director of Antiquities. On the other hand, Article 13 of the Mandate provided "nothing in this Mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed."

Luke reminded the Colonial Office it would be impossible to submit this question to the Palestine Courts, because the 1924 Holy Places Order-in-Council had divested the local courts of jurisdiction over matters involving the Holy Places. Luke felt he did not have clear authority to order a halt to the Muslim construction activity, but in light of the complaint received from the Zionist Executive he asked the Colonial Office for advice and instructions.[81]

Luke's dispatch arrived at the Colonial Office on 5 November 1928, two weeks before the issuance of the White Paper. J.D. Hall, the first official to make a file entry (7 November 1928) lamented that Luke's dispatch "is not perhaps as helpful as we might reasonably have expected."[82] Hall therefore recommended the British Government seek legal advice:

> The whole matter is, however, full of pitfalls and I submit that it would be most unwise for H.M.G. to reach any decision in the matter, whether for action or inaction, *without taking the highest legal advice open to them, and I would suggest that a case should be prepared for immediate submission to the Law Officers.* Mr. Luke's despatch does not cover the ground very fully and in the preparation of the proposed case for the Law Officers it would probably be found necessary to obtain further information from him on questions of fact.[83]

Hall concluded by suggesting Luke be instructed to seek an agreement from the Mufti to halt the construction work pending a final decision by the British Government. Hall's superior, Assistant Colonial Secretary O.G.R. Williams, minuted his agreement with this approach, indicating "we must be fortified with the L.O.'s [Law Officers] opinion."[84]

News of the Muslim construction activity soon reached the British House of Commons. On 12 November 1928 Joseph Monatague Kenworthy of the Liberal Party had the following exchange with the Colonial Secretary, Leo Amery:

> Lieut.-Commander KENWORTHY asked the Secretary of State for the Colonies if he is aware that the Moslems in Jerusalem are erecting masonry constructions on top of the Wailing Wall; why this is being permitted by His Majesty's Government in Palestine, especially in view of the action taken by the authorities in Jerusalem to enforce the removal of temporary screens placed by Jewish devotees against the wall as infringing the *status quo*; and if he will give instructions that the *status quo* is to be preserved and that this new construction on this ancient wall should be forbidden?
>
> Mr. AMERY: The matter to which the hon. and gallant Member refers is engaging my close consideration, and *I propose to take the highest legal advice open to me before coming to any definite decision.*
>
> Lieut.-Commander KENWORTHY: Has the right hon. Gentleman in the meantime taken any steps to inform the Administration of Palestine of the very deep feelings that have been aroused by the alleged action of the police in this case, and by the attitude of His Majesty's Government to the Moslems in allowing this building?
>
> Mr. AMERY: The Administration of Palestine is very well aware of the state of feeling in Palestine, and the question whether this building is a violation of the *status quo* is the very question on which I wish to make quite sure before I come to a decision.[85]

The next day, T.I.K. Lloyd of the Colonial Office[86] minuted a discussion with Grattan Bushe, Assistant Legal Adviser to the Colonial Office, regarding whether to seek advice from the Law

Officers. Lloyd noted he and Bushe agreed they needed more facts: "We feel that it is most desirable that we should have further info. before approaching the L.O. [Law Officers] particularly any info there may be available as to past practice under the Turkish regime in matters such as in dispute."[87] The Colonial Office therefore requested Luke provide references to or copies of prior Turkish rulings regarding the respective rights of Muslims and Jews at the Wailing Wall.

Luke responded on 30 November 1928, sending another dispatch to the Colonial Office but admitting he had little to offer. He complained

> the material at the disposal of the Government is meagre; and, were it not for the fact that you asked me to submit a memorandum urgently, I should have desired to cause further research to be made into the historical circumstances surrounding Jewish claims, Jewish practice, Muslim claims and Muslim practice before being confident that I had placed before you all the considerations for so important a reference to the Law Officers.[88]

Luke then made an interesting observation:

> The more I study the whole question the more I am impelled to the conclusion that it becomes increasingly difficult among the contending claims to define the nature of the *status quo* and the extent of the areas of the Wall and the Waqf property to which it may be deemed to apply. Indeed the question will probably be found impossible of solution until the claims have been determined, defined and regulated by the Commission contemplated in Article 14 of the Mandate. I think, for example, that it is not beyond the bounds of possibility that the Moslems might seek to establish before such a tribunal that the orders of the Ottoman authorities with regard to public prayers and appurtenances were apparently disobeyed in consequence of a financial bargain, or a series of financial bargains, between the Jews and the Mughrabis. If they were to do so, they would be in a position to challenge any argument to the effect that Moslems had shown forebearance and had therefore allowed the Jews to establish a right. Any argument on these lines would, I presume, be ultimately determined only be a competent Judicial Tribunal.[89]

Luke's letter also enclosed a memorandum from Norman Bentwich, the Attorney General of Palestine, describing the facts and the statutory texts as a supplement to Luke's memo.[90] Bentwich quoted approvingly from a memo Ronald Storrs (then the District Commissioner of Jerusalem) had written in 1925, noting the Jews "may be said to have established an absolute and acknowledged right of free access to the Wall for purposes of devotion at any hour of the day or night throughout the year." Nevertheless, Storrs continued, "the Jewish right is no more than a right of way and of station, and involves no title, express or implied, of ownership either of the surface of the Wall or the pavement in front of it."

Bentwich then noted the issue of Muslim repairs to the Wall had arisen twice so far under British rule. The first, in 1920, involved Muslim repair work on the upper strata of the Wall. The Jews protested, claiming the work would interfere with worshipers below and would degrade the archeological value of the Wall. The Military authorities at the time ruled the Muslims could repair the upper courses of the Wall, on condition that no work be done on Fridays and Saturdays, and that while any work was performed care should be taken not to disturb the Jewish worshipers below. The work was not continued during the Military administration. After civilian rule commenced in July 1920, the Department of Antiquities oversaw the project.

The second, in 1927, involved the Moroccans removing weeds from the lower portion of the north end of the Wall, adjoining a small garden belonging to the Moghrabi Wakf. After the Jews complained, the Deputy District Commissioner ruled any alterations to the lower strata of the Wall required the prior approval of the Government, but by that time the issue was moot because the weeds had already been cleared.

Lloyd read Luke's dispatch and the enclosed memorandum from Bentwich. Lloyd, clearly

frustrated, minuted

> [t]he absence of information on this point has, I have found, the effect of making it more difficult to frame a reference to the Law Officers; in the result any reference has, in part, to put to the Law Officers questions of policy and hypothetical questions rather than questions of law and of fact.

With these limitations in mind, Lloyd submitted a draft referral to the Law Officers for review by his superiors in the Colonial Office. Shuckburgh read Lloyd's draft and concurred in the recommendation to seek advice from the Law Officers:

> [It is] not easy to frame precise legal points upon which legal opinion can suitably be asked or given. The whole question is so mixed up with political and other considerations that it is difficult to state a case in such a way as to present a clear legal issue, or indeed to feel confident that such an issue arises at all … Nevertheless, I hardly see what else we can do … If the Secretary of State has not fulfilled his promise [to Kenworthy] to seek high legal advice, he will have to give his reason for changing his mind; and I do not quite see what reasons he could well give. There seems no alternative but to let the reference to the Law Officers go forward.[91]

Meanwhile, Luke cabled Shuckburgh on 30 November 1928, focusing on the Muslims' new practice of stationing a *Muezzin* on a roof adjacent to the pavement in front of the Wall and issuing the prayer call from that location, interfering with Jewish prayer services at the Wall.[92] The next day Luke sent another telegram advising he had met with the Mufti to ask for the *Muezzin* to be withdrawn from the rooftop. The Mufti, according to Luke, said he would do so *only* if the Jews "cease to bring down to the Wall appurtenances which … he claims to be illegal." Luke said it was "useless to pursue the matter further pending … decision of H.M. Government following upon the advice of Law Officers."[93]

The Parliamentary inquiry from Kenworthy to Amery, coupled with the British Authorities' increasing frustration with both the Muslims and Jews "constantly appealing to the Government of Palestine" about violations of the *Status Quo*, prompted Colonial Secretary Amery in early January 1929 to seek a formal legal opinion from the Law Officers of the Crown, Attorney General Sir Thomas Inskip and Solicitor General Sir Boyd Merriman.[94]

Amery's request to the Law Officers sought legal advice on five topics: first, whether the Wall should be deemed a purely Muslim shrine under Article 13 of the Mandate; second, whether the Palestine Antiquities Ordinance conflicted with Article 13; third, whether the Muslim constructions at the top of the Wall violated Jewish rights under Article 13, even though the construction did not impede Jewish prayer at the Wall, and whether the creation of the *Zawiyah* violated Jewish Article 13 rights by impeding Jewish worship at the Wall and/or making access to the Wall more difficult; fourth, if either of the two parts of question three were answered in the affirmative, what remedial steps should the Palestine Government take; and fifth, the Colonial Secretary made an open-ended request to the Law Officers for "any advice generally upon the whole matter which you may feel able to offer."

While the request for advice noted "the matter is not one governed entirely by legal considerations," it also made clear the Government's future actions regarding the Wall would be guided heavily by the Law Officers' answers to the above questions.[95]

The Law Officers issued their formal Opinion on 16 February 1929.[96] The Opinion expressed five conclusions, in response to each of the issues Amery had raised for their consideration:

First, the Law Officers concluded the Wall was *not* a "purely Moslem Sacred Shrine" within the meaning of Article 13 of the Mandate. "The long-established Jewish practice of praying at the Wall and the sanctity due to the history of the lowest stratum of the fabric prevent the Wall

from being exclusively sacred to Moslems."

Second, the Law Officers found the Antiquities Ordinance inconsistent with Article 13.

Third, the Law Officers found that whether the Muslim construction activity at the top of the Wall did or did not violate Jewish rights under Article 13 would depend on the nature of the construction and whether it was of such a character as to be offensive to Jewish religious sentiment and to intrude upon the traditional rights of Jews to pray. Nevertheless, the Law Officers concluded the construction activity did not violate Article 13. However, the Law Officers opined that the creation of the *Zawiyah* violated Article 13 by impeding Jewish worship at the Wall and/or making access to the Wall more difficult.

Fourth, as to remedial measures, the Law Officers found the Palestine Government would be justified using the police to enforce the *Status Quo*. The Law Officers also recommended consideration be given to amending the 1924 Order-in-Council to restore the jurisdiction of the Palestine courts to hear and adjudicate disputes regarding the Holy Places and disputes regarding the implementation of Article 13 of the Mandate.

Finally, the Law Officers recommended the government take steps to appoint the special commission contemplated by Article 14 of the Mandate to determine the respective rights of the Muslims and Jews to the Wall.

Lloyd read the Law Officers' formal Opinion the same day it was issued, and wrote a minute laced with skepticism. He criticized the Opinion as

> [N]ot very helpful but we scarcely thought that they could be. In effect they offer two suggestions. The first is that the Holy Places O. in. C. [Order-in-Council] … might be amended 'in such a way as to restore the jurisdiction of the Courts to the extent which is required.' The second, and this the L.O. [Law Officers] strongly urge, is that 'every possible step should be taken without further delay to secure the appointment of the Special Commission' prescribed by Art. 14 of the Mandate. I am very doubtful of the wisdom of adopting either suggestion. An amendment of the O. in C. so as to give Palestine Courts jurisdiction in disputes concerning the Wailing Wall and its environs would, I think, be likely to revive a controversy which seems to be subsiding. Both parties – i.e. Jews and Moslems – *would be prone to indulge in litigation on every conceivable point* and their unreasonable demands or intolerant refusals would be likely to provoke public disturbances … I can only suggest that … in so far as the L.O. opinion gives advice as to the action to be taken in dealing with contingencies that may arise it will no doubt be followed, and invite an expression of [the High Commissioner's] views on the two suggestions made by the L.O. and discussed earlier in this minute. It is perhaps unnecessary to enter into details but I would at least say in the despatch that neither suggestion seems to be free from difficulty.[97]

Several days later, Bushe minuted that even if the 1924 Order-in-Council were to be amended, the local courts would still not have jurisdiction to hear cases involving alleged violations of any of the provisions of the Mandate, including Article 13, because

> the Mandate is not, as such, law in Palestine at all. If the Govt was to prevent the erection of a structure, or to pull one down, *vi et armis*, I do not see what answer they would have in law.[98]

Over the next few weeks other officials at the Colonial Office weighed in with their own comments on the Law Officers' report. Williams wrote a minute endorsing an amendment to the 1924 Order-in-Council to restore Holy Places jurisdiction to the Palestine Courts. Williams argued it would be better to "remove controversy [regarding the Holy Places] as far as possible from the executive to the judicial sphere."[99]

A final minute, written by Shuckburgh on 2 May 1929, best summed up the Colonial Office's lack of optimism that the Law Officers' Opinion would help calm the situation in Palestine:

> The Law Officers report is not particularly helpful; but then we hardly expected it would, or could be. The only solution of this vexed question lies in a friendly settlement between Jew and Arab on the spot …[100]

Chancellor met with the Mufti on 6 May 1929 regarding the Law Officers' Opinion, which had not yet been delivered. Chancellor, however, signaled to the Mufti the report would be favorable to the Muslims, because the Jews had failed to submit any written proof showing which, if any, appurtenances they had customarily brought to the Wall during Ottoman rule. Following a lengthy and highly technical discussion of the meaning of the *Status Quo* as it related to the Wall and pavement, Chancellor asked the Mufti whether he would be willing, purely as a humanitarian gesture, to consider allowing the Jews to bring chairs. The Mufti refused, saying the Jews would interpret "as a right anything which the Muslims might do now solely as a courtesy."[101]

On 8 May 1929 the Colonial Office transmitted the Law Officers' Opinion to High Commissioner Chancellor.[102]

Meanwhile, on 9 May 1929, before they were aware of the Law Officers' Opinion, the Jews filed yet another Petition, this time with the Chief Secretary of the Palestine Government (Luke), alleging several ongoing and new Muslim violations of the *Status Quo*. The Jewish Petition complained about the construction of the *Zawiyah* in a location where the Muslims previously had no place of prayer (described in the Petition as "an additional Mosque at the right of the Wailing Wall") and the opening of a new doorway on the south side of the wall.

Regarding the *Zawiyah*, the Petition further alleged the only purpose for creating the *Zawiyah* was to interfere with Jewish prayer at the Wall by conducting "disturbing and competitive services" so close by. "It is obviously difficult to imagine," the Petition said, "that a new [Muslim] religious need has arisen now after hundreds of years."

The Jewish Petitioners also accused the Mandatory authorities of applying a double-standard when enforcing the *Status Quo*, applying it to "every little thing done by the Jews," while "ever willing to facilitate the grant of any demand by licenses, repairs, plans, etc. when it concerns Moslem authorities." The Petition expressed hope the Government would "succeed in finding a radical solution in the matter of the Wailing Wall, a solution which should be based upon that attitude of strict justice, equal to both parties …"[103]

On 27 May 1929, Harry Sacher, a British-born, Jerusalem-based lawyer and member of the Palestine Zionist Executive, still unaware of the Law Officers' Opinion (which was not communicated to the Muslims and Jews until mid-June), sent a lengthy and highly legalistic letter to Chancellor, arguing Jewish rights at the Wailing Wall were more extensive than the *Status Quo* concept contained in Articles 13 and 14 of the Mandate.[104]

Sacher argued Articles 13 through16 of the Mandate needed to be read together, with equal weight accorded to each provision, to understand the full scope of Jewish rights at the Wall. Thus, Sacher argued, Articles 13 through 16 collectively stood for the proposition that the Jews were granted not just the legal right of *free access* to the Wall, but also the more far-reaching legal right of *free exercise of worship*. The text of Articles 15 and 16 of the Mandate, Sacher argued, further conferred upon the Jews the right to full and free exercise of worship, constrained not by the limitations of the *Status Quo* as the British had defined it, but instead *solely* by considerations relating to the maintenance of public order and good government.

Those legal rights, according to Sacher, represented merely the baseline of Jewish legal rights to the Wall under the Mandate. Because Article 14 contemplated the appointment of a Special Commission to determine the parties' rights *and* claims to the religious sites, the drafters of the Mandate must have intended the word "claims" to encompass more than the mere concept of

existing rights, meaning *additional* rights "beyond recognized and established law or practice."[105] Thus, Sacher argued, the Mandate provided far more protection for the Jews at the Wall than the November 1928 White Paper's limited notion that the Jews were merely entitled to the same rights they enjoyed under Turkish rule, and *nothing* more.[106]

Sacher also questioned the validity of certain Turkish precedents as the basis for defining the *Status Quo*, especially the 1911 ruling. Sacher argued that from 1871 onward the Jews had conducted daily afternoon and evening services at the Wall, including pitching a small tent at the Wall during *Rosh Hashana* and *Yom Kippur*. Sacher argued the local, Jerusalem-based Turkish authorities had no jurisdiction to issue the 1911 ruling, as it could only lawfully have been promulgated from Constantinople. Moreover, Sacher argued, the Jews had appealed the 1911 ruling to Constantinople, and that appeal was still pending when World War I began.[107]

In any event, Sacher's arguments failed to persuade Chancellor, who advised the Colonial Secretary on 14 June that Sacher's argument was "untenable."[108] Chancellor continued:

> The obligation to see that the free exercise of all forms of worship are ensured to all cannot be held to include freedom to exercise all forms of worship at all times and in all places. It is perhaps sufficient to observe that the freedom of the Jews to arrange forms of worship and ceremonial in their own synagogues cannot reasonably be held to extend to what they may do in a place which is admittedly the property of members of another faith and is claimed to be sacred by members of that faith.[109]

Chancellor told the Colonial office he had concluded that although the Ottoman authorities had not specifically allowed the Jews to bring any particular appurtenances to the Wall,

> [T]here is probably a more consistent history of Ottoman refusal to permit chairs and benches than of their refusal to permit the objects referred to in [Sacher's] memorandum, i.e., scroll of the Law, Ark, box of prayer books, wash-basin and lamps. But in respect of these articles, too, it would appear that the attitude of the Turks was at best one of tolerance or forbearance, not of authorization.[110]

Chancellor said there was "no prospect" of the Jews and Muslims reaching agreement regarding their respective rights to the Wall and pavement area. Therefore, he submitted a series of proposals for the Colonial Secretary's consideration for defining the *Status Quo*, as "I consider it incumbent upon me to put forward for your consideration proposals for the solution of this vexed question."[111] Chancellor's proposals included a ban on Muslim repair work on the portion of the Wall immediately facing the pavement without approval from the Mandatory Government, and permitting the Jews to bring certain customary appurtenances but not benches, stools, or screens without permission from the Muslim authorities.[112] He described the Wailing Wall issue as

> probably one of the most puzzling questions that have come before the Government of Palestine for decision, since it involves not so much ascertainable points of law as considerations of religion and politics, and above all, the precise extent to which unauthorized or tolerated practice may be held to have acquired in the course of years the sanctity of prescription.[113]

Meanwhile, on 11 June 1929, Luke sent a letter to the Supreme Moslem Council formally notifying them of the Law Officers' Opinion and granting permission to continue the conversion of the houses adjacent to the southern end of the Wall into a *Zawiyah*, and to complete the construction work at the top of the Wall. The letter specifically referenced the Law Officers' Opinion, including the cautionary language regarding the legality of the *Zawiyah*:

> In the Law Officers' opinion the Jews are entitled to conduct their worship without any greater disturbance than has occurred in the past, *or may be inevitable by reasons of changes in the habits of the population of Jerusalem or otherwise.*

> If the erection of the proposed *Zawiyah* results *in the observance of Moslem rites in the presence of Jewish worshippers*, or in an incursion by Moslems into the place where the Jews pray during the customary times of Jewish worship so as to cause genuine annoyance or disturbance, this would be regarded as an interference with existing rights.[114]

Luke sent a mostly identical letter to the Palestine Zionist Executive two days later, notifying them of the Government's decision to permit the resumption of the Muslim constructions at and adjacent to the Wall.[115] The Zionist Executive responded on 4 July 1929, complaining the Muslims were violating the Jews' existing rights in two ways: first, the *Muezzin* had recently begun issuing the call to prayer from the immediate vicinity of the Wall, something which had not been done prior to the *Yom Kippur* 1928 incident; and second, the Moghrabis had started performing a Muslim rite involving the beating of drums and singing (known as the *Zikr* ceremony) in a small garden in the Moghrabi area on the other side of the pavement facing the Wall.[116] *The Times* described the ceremony as

> usually conducted by a *Rufai* or singing Dervish, to the accompaniment of a drum and cymbals. He improvises pious canticles in a high pitched voice, standing in the middle of a circle of devotees who chant deep-throated responses and bow profoundly with a rhythmic movement which increases in rapidity as the ceremony proceeds.[117]

The letter complained both activities disrupted and interfered with Jewish prayer activity at the Wall.

On Friday night, 5 July 1929, a Mandatory Government official visited the Wall to check the veracity of the Zionist claim, and reported hearing "a din of drumming and singing which can only be described as deafening."[118] The Moghrabi Sheikh intervened at the request of Luke and the Mufti to halt the singing and drumming.[119] Mandatory Officials believed the entire incident had been "a calculated move to bring pressure to bear on the Government to enforce the recommendations of the [1928] White Paper, and as a response to the Jewish propaganda regarding the Wailing Wall."[120]

In mid-July the Muslims resumed their construction projects. On 20 July, Jerusalem Chief Rabbi Abraham Isaac Kook telephoned Cust, the author of the 1927 *Status Quo* Memorandum, now serving as the Acting Deputy District Commissioner for Jerusalem, to complain. Cust sent a letter marked "Urgent" to Rabbi Kook the next day, informing him:

> [A]fter … the opinion of the Law Officers of the Crown on the legal issues involved had been received, the Government decided that there was no objection to the reconstruction of this wall on condition that it is rebuilt to its former height. It was also decided that there was no objection to the new proposed opening made in the wall, provided that there shall be no incursion by this way into the pavement during the customary hours of Jewish worship and no other act calculated to cause annoyance or disturbance to Jewish worshippers at prayer.[121]

Unsatisfied with Cust's letter, the Jews once again resorted to the petition process to air their grievances. The Petition, dated 4 August 1929 and sent to the Colonial Secretary in London, alleged three violations of the *Status Quo*: first, the new door on the south side of the Wall had caused the pavement in front of the Wall to be converted from a place of intimate prayer into "a highway, open to every passer by"; second, converting the *Zawiyah* "openly alters the feature of the Wall and may be a continuous source of antagonism and a nest for intrigue and dispute"; and third, Rabbi Kook rejected any attempt to restrict Jewish prayer at the Wall to certain fixed hours (a concern which turned out to be the result of a misunderstanding, as the British had not purported to restrict the hours of Jewish access to the Wall). The Petition concluded with a request for the British Government to take "immediate and effective intervention … to find a

solution which is in conformity with the holiness of the place and the honour of the [British] nation."[122]

Permanent Mandates Commission and the 1928 petitions

Meanwhile, several months following the issuance of the November 1928 White Paper and the Law Officers' Opinion, the original October 1928 Jewish Petition submitted to the League of Nations following the *Yom Kippur* incident was ready for consideration by the Permanent Mandates Commission (PMC). High Commissioner Chancellor traveled from Jerusalem to Geneva to represent the Mandatory Government.[123]

The PMC's Chairman, the Marquis Theodoli of Italy, noted at the beginning of the discussion the *Yom Kippur* 1928 incident "had acquired extraordinary prominence throughout the world."[124] But before the discussion could proceed further, Chancellor informed the Commissioners he had just received a telegram from the National Council of the Jews in Palestine (*Va'ad Leumi*) asking the PMC to defer considering the Jewish Petition, "pending submission of additional material."

Chancellor noted the Muslims were satisfied with the November 1928 White Paper and had insisted it be enforced. Chancellor explained to the PMC he had told the Muslims he could not enforce the White Paper without authorization from the Colonial Secretary, who at that time was awaiting the Law Officers' Opinion. The Jews, on the other hand, regarded the *Status Quo* as defined in the White Paper as their "minimum" claim to the Wall and the pavement.[125]

Chancellor repeatedly referred during the PMC meeting to the *Status Quo* as a legal concept, and used the term "illegal" to describe violations of the *Status Quo*. Chancellor informed the PMC the Muslims had raised the height of the wall along the Mufti's residence overlooking the Wall to screen the women inside the house from public view. Chancellor said the British authorities did not regard that as an infringement of the *Status Quo*. Chancellor also reported the Muslims had commenced other building activity adjacent to the Wall during early 1929, drawing protests from the Jews. The Mufti insisted the Muslims had the right to engage in such construction activity but agreed to a temporary halt as a "personal favour" to Chancellor,[126] who subsequently permitted the construction to resume based on the Law Officers' Opinion.

Chancellor explained to the PMC how the Muslims were "exceedingly suspicious of the motives of the Jews in respect of their rights at the Wailing Wall." Chancellor noted the Mufti's concern that if the Muslims allowed the Jews *any* rights at the Wall beyond those existing during Ottoman times, then the Jews would soon capture the *Haram* and build a synagogue overlooking the Wall. Chancellor characterized the Mufti's position as "absurd," but as helpful in appreciating the Muslims' "uncompromising attitude." Chancellor noted the Mufti was not even willing to allow individual elderly and infirm Jews to bring their own chairs to the Wall to have a place to sit while praying.[127]

Chancellor also noted the Muslims and Jews could not agree on a definition of the *Status Quo* at the Wall. Chancellor told the PMC he had asked both the Muslims and Jews to provide documentary evidence supporting their positions as to what the Jews had or had not been allowed to do at the Wall under Turkish rule. The Muslims supplied copies of the various orders prohibiting the Jews from bringing benches, but the Jews had as yet (6 July 1929) produced no documents other than three photographs from 1910 and 1911 showing the presence of benches at the Wall during Turkish rule, both on religious holidays and ordinary days.[128] The Jews'

inability to find additional documentary proof of their practices at the Wall during Ottoman times motivated their request to the PMC to defer consideration of their 1928 petition.

Following is one of the three photographs the Jews submitted to Chancellor, showing the Wailing Wall in 1910. The photo ended up in a file (along with several other contemporaneous photos of the Wall) at the Colonial Office.[129]

Figure 2.11 Wailing Wall, 1910

(Colonial Office files).

Chancellor said the Mufti had rejected the authenticity of those photos, alleging the caption itself was not sufficient proof of the date the photo had been taken. Moreover, this particular photo, even if actually taken in 1910, pre-dated the 1911 Ottoman ruling banning chairs and benches.

Chancellor said the Jews had produced no other documentary proof that chairs or benches had been in use during Ottoman times.

Chancellor's personal photo album contains the photograph of the Wall shown in Figure 2.12, taken in 1929.[130] The photo does not appear to show any chairs or benches along the pavement.

The PMC discussion concluded with Chairman Theodoli congratulating Chancellor on the way he had handled the situation. The Chairman said his own "experience in the East had proved to him how easily religious passions might trouble relations with Eastern races."[131]

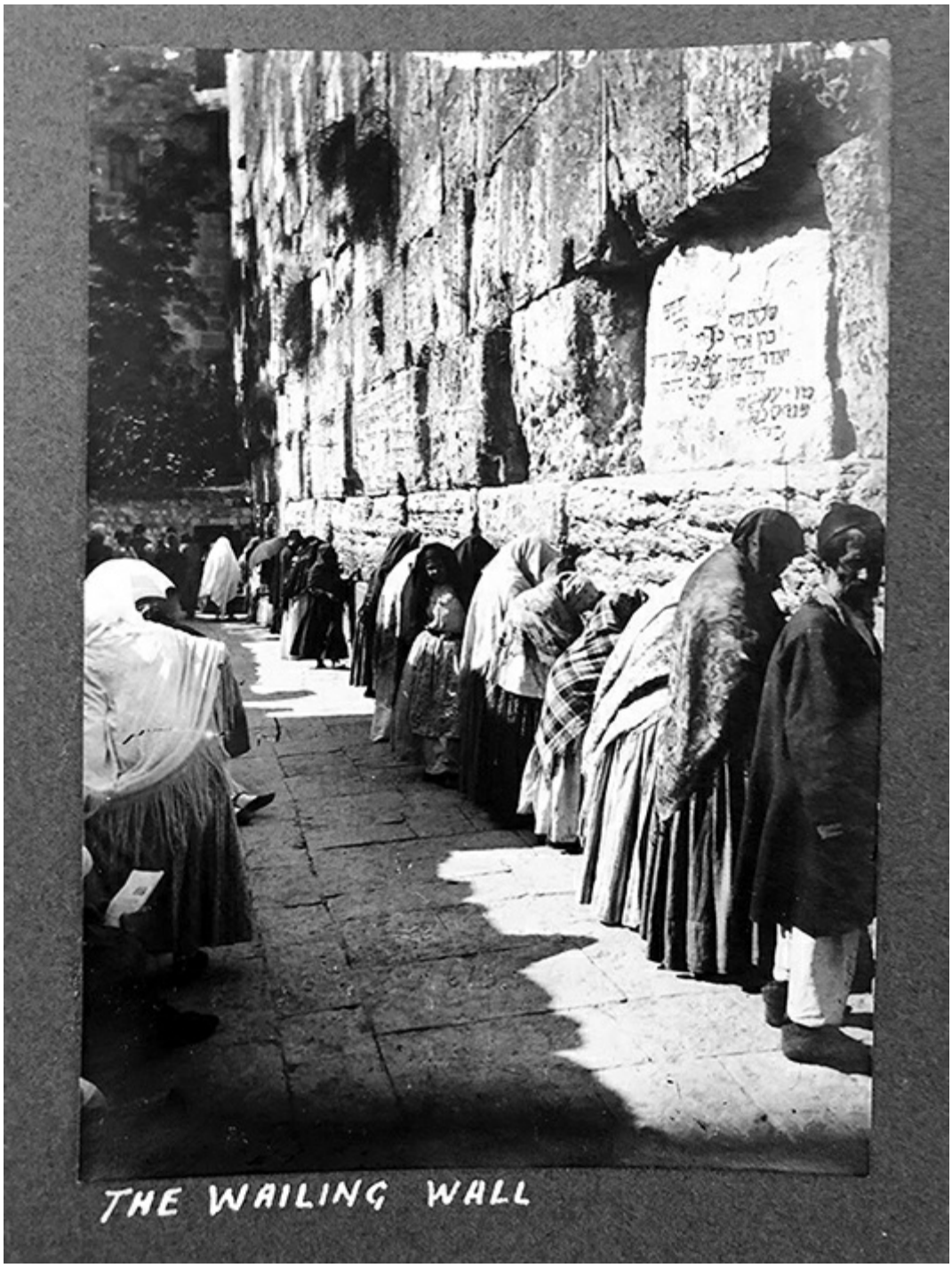


Figure 2.12 Wailing Wall, 1929

(Chancellor Papers, Oxford, Bodleian Libraries).

At another PMC meeting several days later, however, Commissioner D.F.W. Van Rees of the Netherlands[132] raised the issue of Britain's legal interpretation of Article 13 of the Mandate. He disagreed with the British Government's interpretation of Article 13 as requiring it "not to make any departure from the rule followed by the Ottoman Government." Instead, Van Rees argued,

the better interpretation of Article 13 would have permitted the Jews to make temporary use of a screen and some chairs on another's property, because it was "scarcely admissible to infer … that an attempt was being made on the part of the Jews to infringe any right whatever."[133]

Van Rees further reasoned that under Article 13, the "existing rights" of the Muslims regarding the Wall and the pavement were limited to the right of property *ownership*. Thus, the Ottoman restrictions on Jewish practices at the Wall did nothing to *add* to the ownership rights of the Muslims, as those rights were already absolute and undisputed. By the same token, removing those same restrictions on the Jews would not have *decreased* or had any other impact on the Muslim right of ownership: those rights would be the *same* regardless of any restrictions on the Jews. That the Ottomans chose not to remove the restrictions did not necessarily tie the hands of their successors, the British.

Indeed, as Van Rees argued, the British had ample authority under Article 13 to rescind the "administrative prohibition" on the Jews without in any way adversely impacting the Muslims' undisputed ownership rights. Van Rees concluded the British Government may have acted wisely from a political point of view, but its legal interpretation of Article 13 was "open to doubt."[134]

The PMC ultimately notified the World Zionist Organization in March 1929 it had considered the October 1928 petition and hoped the British Government would be able to broker a settlement of the Wailing Wall dispute between the Muslims and Jews.[135]

Sixteenth Zionist Congress

As the month of August 1929 began, the Sixteenth Zionist Congress was already underway in Zurich, where the delegates voted to form the Jewish Agency, to be comprised of half Zionist and half non-Zionist members, thereby uniting most of world Jewry under Weizmann's leadership.[136] The Congress also passed the following Resolution regarding the Wall:

> The Congress recalls with sorrow the incidents at the Holy Place of the Wailing Wall where, on the Day of Atonement [1928], the most sacred day of the Jewish year, Jews, in the midst of solemn worship, were subjected to the indignity of forcible interference on the part of the police. This was an act of sacrilege revolting to the religious sensibilities of all men. The Congress repudiates as false the widespread insinuations of hostile propagandists with respect to these incidents. It solemnly affirms that the protests evoked throughout the Jewish world were the expression of our conviction that at the *Kotel Maaravi*, a place of prayer hallowed by an unbroken tradition of many centuries, it is the unalterable right of Jews to perform undisturbed the offices of their religious life under conditions consonant with the free exercise of worship, as expressly guaranteed by the Mandate.[137]

Reaction among Palestinian Arabs to this Resolution and other actions taken at the Zionist Congress was highly negative. The Arabs viewed the resolutions as provocative, lending support to their suspicions the Zionists intended to oust the Muslims from the *Haram al-Sharif* and rebuild the Jewish Temple.[138]

Luke would later describe during his secret testimony before the Shaw Commission how the Palestinian Arabs reacted to the events in Zurich:

> Arabs thought Zionism was on the downward grade, but those fears were revived very acutely when they saw that at Zurich this August Dr. Weizmann pulled off his coup and united the Zionists and non-Zionists into what they regarded no doubt rightly as the whole of Jewry as far as Palestine is concerned … when Dr. Weizmann effected this amalgamation between Zionist and non-Zionist Jews then from their point of view they were up against a very formidable proposition

indeed.[139]

Chancellor described the impact of Zurich on the Arabs in even starker terms:

> And when at Zurich last July the Zionist and non-Zionist Jews embraced one another & agreed to join forces to establish the National Home, the Arabs realized that they now had all the Jews in the world against them, & that now was the moment to make a desperate bid to get rid of the Jews out of the country for ever.[140]

August 1929 riots

Increased tensions

By the time the Zionist Congress adjourned on 11 August 1929, tensions in Palestine regarding the Wailing Wall had grown to a fever pitch, fueled by the anger and resentment that had been building on both sides since the *Yom Kippur* 1928 incident. Both the Arab and Jewish press had been agitating on behalf of their constituencies for months. Both sides had flooded the High Commissioner's office with Petitions complaining about each other. Both sides had formed organizations for "the defense" of the Wall.

As discussed above, Chancellor left Palestine on 19 June to attend the PMC meeting in Geneva, after which he continued on to England for home leave. Chancellor would not return to Palestine until 29 August, leaving Luke once again in charge as the Officer Administering the Government of Palestine. Luke noted in his diary for 19 June, "High Comm'r leaves. I am sworn in as oag [Officer Administering the Government]."[141]

The members of the Palestine Zionist Executive had also left the country in mid-July to attend the Zionist Congress in Zurich, leaving a lower-ranking official, Isaiah Braude in charge, with assistance from Sacher's law partner Solomon Horowitz and a Tel Aviv banker, Sigried Hoofien.

On 20 July, the Arabs resumed the building operations near the Wall. That same day a group of Jews formed a "Pro-Western Wall Committee" under the leadership of Dr. Joseph Klausner of the Hebrew University, who was a supporter of the Zionist Revisionist Party.[142] On 29 July, Braude and Horowitz met with Luke and asked him to issue a communique regarding the Muslim construction activity at the Wall and the new door to the pavement, noting the Hebrew press had grown increasingly provocative and that a government communique might serve to calm the waters.[143]

That same day Braude sent a telegram to his superiors in the Palestine Zionist Executive in Zurich. Braude warned public agitation was growing and something "absolutely" needed to be said "immediately" to calm the situation.[144] But before hearing back from Zurich, Braude went ahead and issued a Communique on 31 July (after showing a draft to Luke's deputy, Mills). The Communique, however, did little to calm the situation.

On 1 August, the Zionist Executive cabled Braude, instructing him that "agitation should be dampened," as the Executive saw no prospect of reversing the Government's policy regarding the Wall in light of the Law Officers' Opinion. Braude gave interviews to the Hebrew press that same day, but to little effect. One paper in particular, *Doar Hayom* (Daily Mail), run by the Zionist Revisionist Leader Zev Jabotinsky, was particularly outspoken in opposition to the White Paper. Hoofien knew Jabotinksy, and on 5 August sent him the following telegram:

> *Doar Hayom* ignores all action of [Zionist] Congress relating to Kotel [Wall] and calls for revolt and insubordination.

> Although the public is not influenced thereby yet there is excitement among the youths which might lead to accidents without being of any practical utility. I ask that you cable them to change your attitude. Otherwise responsibility is on them and on yourself.[145]

Jabotinsky responded that he would direct the paper to lower the temperature of its reporting, but a few days later the provocative tone resumed.[146]

During the first full week of August there were minor violent flare-ups at the Wall, including separate Muslim attacks on two Jews. On 8 August Pinhas Rutenberg, the Managing Director of the Palestine Electric Corporation, met with Luke and warned him Jewish agitation was increasing over the Wall, so much so that he had heard a group of Jews from outside Jerusalem might come to the Wall on 15 August for *Tisha b'Av* observances to commemorate the destruction of the ancient Temples. As we will see in Chapter 3, Luke and Rutenberg had different recollections of this meeting when they were examined about it under oath before the Shaw Commission a few weeks later.[147]

The Arab press also ran articles in late July and early August agitating about the activities at the Zionist Congress and supposed Jewish attempts to pressure the British Government to reverse the White Paper. On 12 August the Society for the Defense of the Aqsa Mosque and Muslim Holy Places sent a telegram to Chancellor (who was by then on home leave in London) once again urging immediate enforcement of the White Paper. The organization also issued a statement to the Arabic press accusing the Jews of violating the *Status Quo* and calling upon "all Muslims to hurry to participate in the defense of the Holy *Burak* and the Mosque of *Aksa*."[148]

Tisha b'Av at the wall

The week beginning Sunday, 11 August 1929 contained two important religious days. The Jewish fast day of *Tisha b'Av*, commemorating the destruction of the ancient Temples, was Thursday, 15 August. The prophet Mohamed's birthday was to be celebrated on the Muslim Sabbath, Friday, 16 August. The High Commissioner, Sir John Chancellor, remained in Britain on home leave. The Chief Secretary, Sir Harry Luke, continued acting in Chancellor's place as the Officer Administering the Government. The Palestine Government posted additional police in the vicinity of the Wall and gave instructions that no demonstrations would be permitted.[149]

Cust also negotiated with the Muslims for a cessation of their building projects during those religious Holidays. On 12 August, Klausner's Pro-Western Wall Committee issued an appeal to Jews around the world to take action to prevent the forfeiting of the Wall.[150] When the *Tisha b'Av* Holiday began after sundown on 14 August, Cust visited the Wall and reported all was quiet and peaceful.

Meanwhile, on that same evening of Wednesday, 14 August, approximately 6,000 Jews gathered in Tel Aviv, largely from two organizations, the *Haganah* (Jewish Defense organization) and the *B'rith Trumpeldor*, or *Betar*, a revisionist Zionist organization. The Jews passed resolutions complaining about the infringement of Jewish rights at the Wailing Wall. While neither group at any point in time that evening or thereafter during August engaged in militant or even aggressive activity,[151] the resolutions were strongly worded, urging all communal and political measures be taken until reaching "the redemption of the Wall." Some in the crowd chanted "the Wall is Ours" and, evidencing the raw nerves still exposed after the prior *Yom Kippur* screen incident, "shame to Keith-Roach."[152]

The next day, Thursday 15 August, Cust received a late morning call from an official at the *Va'ad Leumi* advising that a number of young Jews had arrived in Jerusalem and were gathering at the Lemel School, intending to march in procession to the Government offices and hand a copy of the prior evening's Tel Aviv resolutions to Luke, and then to proceed to the Wall. By early afternoon the Mandatory officials decided to allow the procession to the Wall, but fearful of an adverse Muslim reaction, they imposed three conditions: first, that there be no demonstrations, speeches, or singing either at the Wall or on the way to or from the Wall; second, that they not march in military formation; and third, that no flags be raised or unfurled at the Wall.[153]

Hoofien relayed the conditions to the youth leaders, who accepted the first two but rejected the ban on flag-raising. Hoofien recalled advising the relevant police official, Major Saunders, as the procession began that the youth had rejected the flag-raising condition and had gone ahead anyway. Saunders recalled later that he did not know the flag-raising ban had been rejected until he read a report on the incident four days later.[154]

Before the procession began, the British authorities alerted the Mufti and asked him to notify the Moghrabi community, to avoid surprise, rumor, and overreaction. The Jewish youth procession, which began with approximately 300 people and grew as it progressed from the Lemel School, went directly to the Wall, arriving at around 3.30 in the afternoon of 15 August.[155] Three of the youth leaders went directly from the Wall to the government offices to deliver a copy of the Tel Aviv resolutions from the prior evening. The remainder of the crowd stayed at the Wall, where the Zionist blue and white flag was raised. One of the young Jewish leaders gave a brief speech and read the Tel Aviv resolutions, a two minute silence was observed, and the Hatikvah, the unofficial Jewish "national anthem" was sung.

The Jews behaved largely in an orderly manner, and there were no clashes with the Muslims either before, during or after the procession to the Wall that day, even though the Jewish youth had ignored *all* the government's conditions, including those they previously had agreed to obey.[156]

Despite the British efforts to communicate with the Mufti and downplay the situation, that same evening The Protection of the Mosque of *al-Aksa* Association sent identical telegrams to two newspapers denouncing the Jews' "severe demonstration" at the Wall. "Resentment is great and general," said the telegrams. "Do what should be done of protest and disapproval."[157]

Luke made the following handwritten entry in his diary for 15 August: "Jewish feast of *Tisha Be'Av*. An extremist J. political demonstration at the Wailing Wall." Luke continued the handwritten entry under the date 16 August at the bottom of the page, where he wrote "causing on [sic] a Moslem counter-demonstration."[158]

When one turns to the next page of Luke's diary, what immediately strikes the reader is that the entries (except for the handwritten dates on the left margin) were typewritten on separate pieces of paper and glued to the pages of Luke's diary book, continuing for a total of eight pages. This is the first and only instance of typewritten, pasted-in entries for Luke's diary during 1928 and 1929. Given Luke's position during the August 1929 violence as the highest-ranking British official in Palestine, he may have been motivated to create a paper trial in his diary that cast his actions in the best possible light. Or he may have been too overwhelmed with his responsibilities and not had time to make daily handwritten entries, and waited until he had time to reconstruct the events. But unlike Luke's breezy 24 September 1928 entry, the typewritten entries between

16 August and 25 August 1929 focus solely on the disturbances and contain no frivolity.

Muslim counter-demonstration

The next morning, Friday, 16 August, word reached Cust that the Muslims planned a counter-demonstration for later that day. Cust relayed the information to Luke, who phoned the Mufti and asked him to meet immediately. Luke asked the Mufti to use his influence to stop the Muslim demonstration. The Mufti doubted he could do so, but said he would try to restrict the demonstrators to *Wakf* property. By the time the Mufti reached the *Haram* area, the demonstrators were already on their way to the Wall. Approximately 2,000 Muslims arrived at the Wall by early afternoon. One of the sheikhs from the *al-Aksa* Mosque made an "inflammatory" speech. Some "riff-raff" from among the Muslim demonstrators attacked the Jewish Beadle, tore up the prayer books, obliterated the little slips of paper the Jewish worshipers had secreted into cracks in the Wall, and destroyed a Torah stand.[159]

Matters worsened considerably, however, as the Muslim demonstrators emerged from the Old City onto Jaffa Road. They murdered the first Jew they saw, and then:

> One mob stopped a car containing a Jew – an English barrister resident in Jerusalem, who was distinguished for his friendship with the Moslems and was devoting his life to bring together the two branches of the Semitic race – and cut him and two companions to pieces.[160]

The Hebrew Press reacted with anger. Luke's first typewritten diary entry, dated 16 August, said simply "in connexion with Wailing Wall disturbances caused armored car company to stand by for emergencies."[161]

Luke later testified in a secret, *in camera* session before the Shaw Commission about the decision to permit the Muslim 16 August counter-demonstration at the Wall. His stark assessment bears repeating:

> Luke: Palestine is a purely artificial conception. There has never been until 1920 a political unit of Palestine. Palestine, Syria and Transjordan are from every point of view except the political one at the moment one country and what happens in Palestine has a very close effect and produces very close and immediate reactions of course in Syria and Transjordan … [H]ad we tried to prevent the Moslem demonstration at the Wall on the 16th by force, and had the police been overpowered as they might easily have been, and in my opinion, almost certainly would have been, where should we have been then?
>
> Chairman: Can you envisage, don't answer if you feel it is not right to do so, can you envisage what might have taken place?
>
> Luke: I think in that case it is not difficult to envisage what would have taken place had our police, the Jerusalem police, been overpowered. The Arabs would have spread right through Jerusalem; they would have killed every Jew they could have got hold of; quite possibly on their doing that they would have attacked British Jews and then possibly British non-Jews and that would have been followed by risings in every town in the country. *That is what would have happened and the Government would have been wiped out.*[162]

The uneasy week

On Saturday, 17 August a Jewish youth, Avraham Mizrachi, was stabbed after trying to retrieve an errant football which had strayed onto the tomato patch of a nearby Arab home near the Bukharan Quarter. Several Jews and Arabs were injured in the ensuing clashes.

The next day, the Palestinian lawyer Auni Bey Abdul Hadi wrote to Luke complaining the

Mandatory Government should not have allowed the Jews to hold "a big demonstration" at the Wall on *Tisha b'Av*. The letter accused the Jews of causing the Bukhara violence by "trespass on the cultivation of the Arabs."[163]

Tensions reached a fever pitch over the next few days, with multiple incidents of Arabs and Jews attacking each other, but in small numbers. On 18 August, the Executive Committee of the Palestine Arab Congress wrote to Luke, complaining the Government had allowed the "big demonstration" by the Jews at the Wall three days earlier and demanding such demonstrations be banned in the future.[164]

Mizrachi succumbed to his wounds on Tuesday, 20 August. The British authorities requested the Jews conduct the burial that same night, under cover of darkness. The Jews refused. The next morning the Jews held a large funeral procession for Mizrachi through the streets of Jerusalem. The British authorities wanted the mourners to walk on the back streets, but the Jews insisted on walking along at least one main road, and it was agreed they could walk along the Jaffa Road for part of the procession. When the British tried to divert the procession off the Jaffa Road, some of the Jews refused and tried to push through the police cordon. Violence erupted between the police and the Jews, leaving two dozen wounded.[165]

The next day, Wednesday, 21 August, the Palestine Zionist Executive issued a statement calling upon the Jewish community, especially youth, to "refrain from independent actions and demonstrations which are likely only to render more difficult the efforts of the Zionist organization to obtain an effective and satisfactory solution of the whole problem."[166] Press agitation continued both in the Hebrew and Arabic papers throughout the week.

The following day, Thursday, 22 August, Luke met with several Jewish leaders, who expressed concern about the possibility of violence the next day, when the Muslims would normally come to the *Haram* for Friday prayers. Luke assured the Jewish leaders he had asked the Muslim clergy to make peaceful sermons, and had ordered more police to Jerusalem from other parts of the country. The Jewish leaders asked Luke if the police would disarm any Muslims coming to Jerusalem the next day with heavy sticks or clubs. Luke said he was reluctant to do so, for fear of provoking the Muslims even further.[167]

That same evening (Thursday, 22 August), Luke convened a meeting at his home, inviting six representatives of the Arab and Jewish organizations, three from each side, to try to reach agreement on either joint or separate public statements urging calm. Jamal Husseini, Subhi Bey Khadra and Auni Bey Abdul Hadi represented the Arab side, with Isaiah Braude, Yitzhak Ben-Zvi, and Yitzhak Levy representing the Jewish side.[168] Both separate and draft joint statements were prepared, but the talks ultimately collapsed after the parties could not agree on the language. Luke's typewritten diary entry for 22 August described what occurred at his house that evening:

> After a good deal of negotiations was able to bring about the Moslem-Jewish meeting in my house … They arrived at 4 p.m. and I gave them tea and then proposed to leave them to their discussions, but they insisted on my remaining for the first part. I remained till 5 and then had to go to the office … when I came back … [t]he Arabs said they would not agree to publication of a joint formula. They continued to talk until 9:30 p.m. without achieving a definite result. I then suggested, as I was very anxious for an announcement to be made not later than the following morning (23 August) so as to ensure a quiet Friday on the part of the Moslems, that a short communique might be issued merely to the effect that three representative Moslems and three representative Jews had met at my house to discuss the situation. The Jews agreed to this suggestion but the Arabs did not. The Arabs suggested, however, that the discussion should be resumed on the following Monday, the 26th. This was agreed to by all concerned.[169]

But the follow-up meeting never occurred, due to the intervening events occurring over that fateful weekend.

The next day, Friday, 23 August, the British police observed many Arab villagers arriving in Jerusalem for Friday prayers, armed with sticks and heavy clubs. Major Alan Saunders, the Acting Commandant of Police, cancelled an order issued by a lower-ranking officer to disarm the Arabs, fearing doing so would provoke violence, which the British were not sufficiently staffed to suppress.[170] Saunders went to the Mufti and asked for an explanation. The Mufti said the villagers were carrying the weapons in self-defense and had no aggressive intentions.

The sermons at the *Haram* that morning were more or less calm, but some in the crowd urged their brethren to ignore the calls for restraint, and others in the crowd may have been too far away to hear the attempts to calm them.[171] At around noon reports of shots fired from the *Haram* reached the British authorities. Soon after, the Arabs began rioting inside and outside the Old City. By the time the Arabs reached the Orthodox Jewish neighborhood of Mea Shearim, the riot "took the form of a ferocious attack by Arabs on Jews."[172]

That afternoon, a British police official issued arms to 18 Jewish special constables and ex-soldiers in Jerusalem and staves to another 60 Jews to help the Jews defend themselves. The next morning the Palestine Zionist Executive asked Luke to arm an additional 500 Jewish youths and to enroll them as special constables. Luke consulted with the Group Royal Air Force Captain, who told Luke that once his reinforcements arrived, the British armed forces would be able to afford "an adequate measure of protection" to the Jews living in outlying areas near Jerusalem.

Luke also conferred with his civilian advisers, and ultimately decided not to allow the young Jews to be armed, for fear of provoking the Arabs and making the situation even worse. Following a complaint from the Mufti that the Arabs were in an excited state and worried about armed Jews, Luke ordered all 41 remaining Jewish special constables to be *dis*armed.[173] Luke later testified before the Shaw Commission that this was "the most painful and difficult decision I have ever had to take."[174]

Hebron

By the morning of 24 August Jerusalem had calmed down somewhat, but events took a terrible turn in Hebron, south of Jerusalem, where Arabs "made a most ferocious attack on the Jewish ghetto and on isolated Jewish houses, killing 60 Jews, including many women and children."[175] The Shaw Commission described the violence in Hebron as "savage," accompanied by wanton destruction and looting. The British Police Superintendent in Hebron, Raymond Cafferata, later recounted the following horrific scene, in which he entered a Jewish house and saw

> [A]n Arab in the act of cutting off a child's head with a sword. He had already hit him and was having another cut but on seeing me he tried to aim the stroke at me but missed; he was practically on the muzzle of my rifle. I shot him low in the groin. Behind him was a Jewish woman smothered in blood with a man I recognized as a police constable, named Issa Sherif … He was standing over the woman with a dagger in his hand. He saw me and bolted into a room close by and tried to shut me out, shouting (in Arabic) "Your Honour, I am a Policeman …" I got into the room and shot him.[176]

The British press and the Shaw Commission praised Cafferata's "great heroism" in preventing an even worse massacre. Unfortunately, reinforcements did not arrive until many hours later.[177] In fact, the British police "were, for all intents and purposes, helpless" throughout the entirety of the rioting around the country.[178] The Shaw Commission reported there were only 1,500 officers in

all of Palestine, the vast majority of whom were local Arabs, and only 175 of whom were British.[179]

Over the next few days spasmodic violence spread throughout the country, including to Haifa (where both sides attacked each other, with the Jews killing an Imam and six other Muslims). On 29 August the worst violence in the north of the country occurred, when 45 Jews were killed or wounded in Tzfat.[180]

The situation largely subsided by 30 August. A total of 133 Jews and 87 Arabs had been killed. The wounded numbered 339 Jews and 181 Arabs.

Several weeks later Chancellor visited Hebron and recorded what he had seen in a letter to his son:

> I have just come back from Hebron, where I went to inspect the houses where the Jews were murdered. The horror of it is beyond words. In one of the houses I visited not less than twenty-five Jews men & women were murdered in cold blood … I do not think history records many worse horrors in the past few hundred years.[181]

Proclamations and new instructions

On 29 August Chancellor returned "in haste" to Palestine.[182] That same day the *Va'ad Leumi* issued a communique to the entire Jewish community of Palestine, urging calm and restraint, and warning any act of revenge or reprisal against the Arabs would be regarded "as an act of treason."[183] That same day Weizmann wrote to Lord Passfield demanding that Luke and Cust be fired.[184]

Two days later, Chancellor issued the Proclamation shown in Figure 2.13.

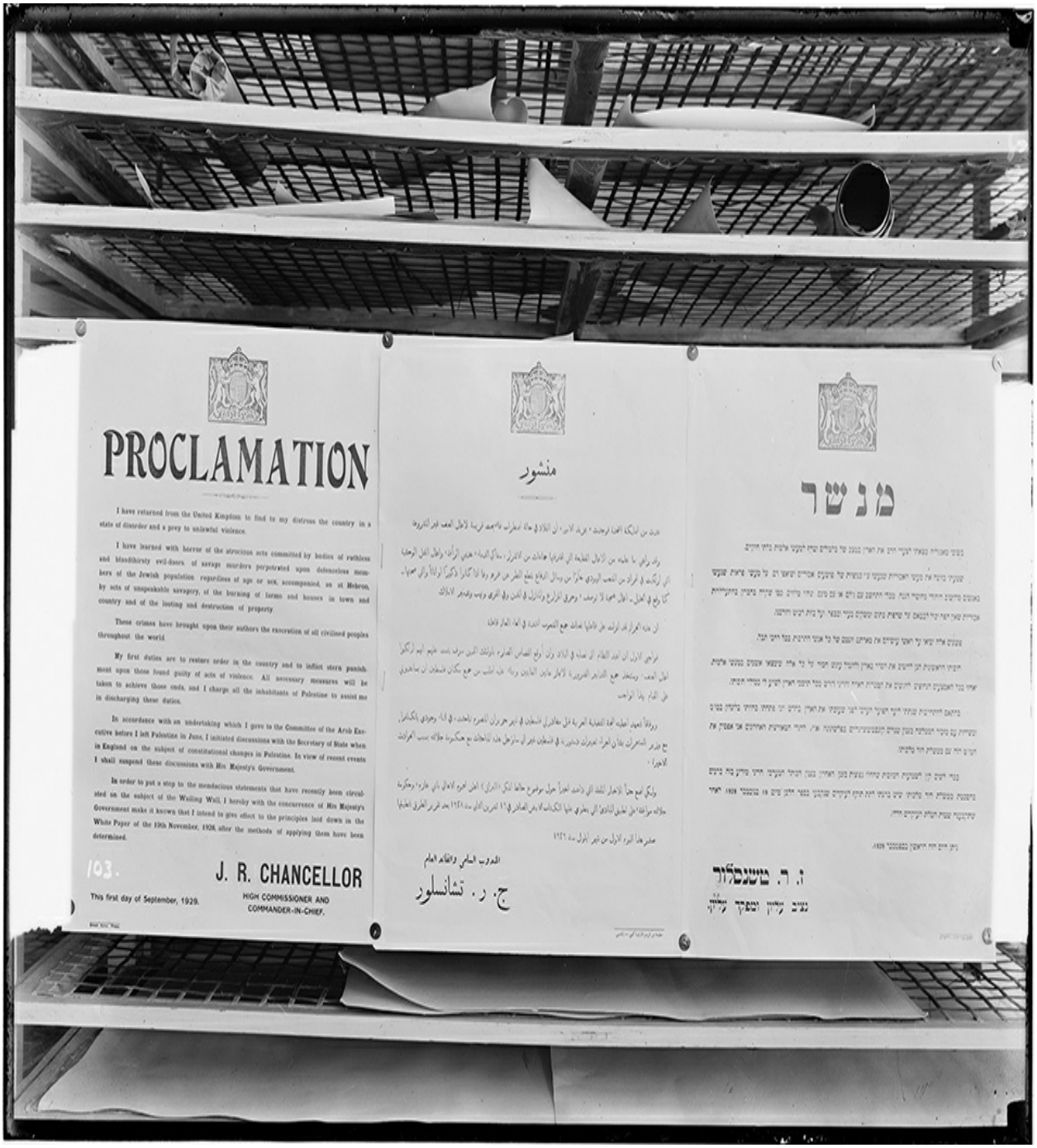


Figure 2.13 Chancellor Proclamation, 1 September 1929

(Matson Photograph Collection, Library of Congress).[185]

The Proclamation is interesting in a number of respects. On one hand, it seemed to presume guilt on the Arab side. On the other hand, it gave in to the longstanding Muslim demand to enforce the November 1928 White Paper. Nevertheless, the Muslims reacted very negatively to the Proclamation, resorting again to legal arguments in a letter from 16 prominent Christian and Muslim Arab lawyers (including Auni Bey) to the High Commissioner.

The letter began by noting the Arab lawyers' "great regret and astonishment" at the Proclamation. They attacked the Proclamation as "premature" and not in accord "with the Spirit of Justice and Equity … [f]or Justice knows no rank and Equity requires no pompous titles."[186] The letter then listed a number of Arab accusations against the Jews that the Proclamation had failed to mention. The letter went on to address the legal aspect of the recent situation and the Arab lawyers' desire for adjudication:

> You should at least have remembered that hundreds of Zionists have held an *illegal demonstration* on the 15th August, 1929, at the Holy *Burak* and in Moslem suburbs, bearing Zionist colours, cursing the Moslems' prophet, religion and faith and that your Excellency could since a month have put a stop to the provocative policy followed by the Zionists in their efforts to undermine the principles, stipulated in the White Paper of the 19th November, 1928 and to realise the Zionist aspirations which aim at the expropriation of the Holy *Burak* and the blessed Mosque of Aqsa. … But whether your Proclamation be correct or incorrect, facts remain unchanged and *it will be given to our voices to reach impartial ears one day*, the world will then realise that your Excellency's Proclamation which you hurried to publish and in which you insulted the Arab nation will be considered neither an equitable judgment nor a means by which spirits are appeased and agitation quelled.[187]

The Society for the Protection of the Mosque of *Aksa* and the Moslem Holy Places also wrote to the High Commissioner on 5 September, complaining the Proclamation was one-sided and ignored Jewish acts of provocation and violence.[188] Like the letter from the Arab lawyers, this letter also invoked the law and legal process for vindication, demanding "an impartial inquiry be made by outsiders whose sense of justice is not curbed by Zionist influence."[189]

The Jews had already made the same demand one day earlier that "a faithful and independent commission of enquiry be appointed by His Majesty's Government to investigate the recent events, their causes and those responsible for them."[190]

Meanwhile, the parties turned once again to the petition process to air their grievances against each other. The Arabs, for example, submitted various petitions to the League of Nations in early September 1929 blaming the Jews for the violence.[191] The Arab lawyers defending those charged with riot-related crimes also "arrange[d] a plan to waste as much time as possible in court," including frequently walking out of court in protest, leaving their clients without counsel.[192]

On 1 October 1929 the Palestine Government issued a set of "Instructions regarding Use of Wailing Wall" to the Palestine Police, providing the Jews would have access to the Wailing Wall "for the purposes of prayer and devotion at all times."[193] The Instructions were intended to be temporary and without prejudice to the ultimate rights and claims of either the Muslims or the Jews regarding the Wall and the pavement. The Instructions allowed the Jews to bring a portable stand containing ritual lamps, a portable washbasin and a portable water container. On the Sabbath and Holidays the Jews would also be allowed to place a stand at the northern end of the Wall for prayer books, two tables, one for the Ark containing the Torah, and another upon which to lay the Torah for reading. On *Rosh Hashana* and *Yom Kippur*, each Jewish worshiper would be permitted to bring a prayer mat, to be placed close enough to the Wall to avoid obstructing passage along the pavement.

The Instructions prohibited the Jews from bringing benches, stools, chairs, or screens to the Wall at any time. The Instructions required the Muslims to keep the new door at the southern end of the Wall locked during the Jewish Sabbath and Holy Days. Finally, the Instructions banned the driving of animals along the pavement in front of the Wall during the mornings of the Sabbath and Holy Days. On *Yom Kippur* animals could only be driven along the pavement

between dawn and 7.00am.[194]

Not surprisingly, neither side was happy with the Instructions. Although not mentioned specifically in the Instructions, the British later prohibited the Jews from sounding the *Shofar* at the Wall on *Yom Kippur* after receiving a complaint from the Supreme Moslem Council regarding the use of the *Shofar* at the Wall on the second day of *Rosh Hashana*. According to the complaint a Jew

> sounded yesterday at the *Buraq* a bugle-horn which they usually sound during their prayers at synagogues … While Jews were prohibited under all circumstances from raising their voices in the *Buraq*, how dare they use and sound a bugle-horn.[195]

The *Shofar* ban obviously upset the Jews, who sent a formal letter of protest to the High Commissioner on 13 October 1929, one day prior to the arrival of the Shaw Commission in Palestine.[196]

The Muslims also objected to the Instructions.[197] At least one Muslim organization rejected the legal validity of the Instructions, asserting the Jews enjoyed, as a favor granted by the Muslims that could be withdrawn at any time, merely the right to pay a "simple visit and devoid of any ceremony, article or voice." The letter warned the Muslims would use "all lawful means" to enforce this policy.[198] The Muslims also declared a one-day general strike in Palestine, Transjordan, and Syria to protest the Instructions.[199]

On 1 October 1929 Chancellor met with the Mufti, who complained the British were biased in favor of the Jews. The Mufti then added:

> [O]ne of the reasons which led the Arabs to turn towards Great Britain was her traditions of justice. But owing to the intrigues of the Jews those traditions were not being applied to Palestine. The Arabs had not forgotten that 2000 years ago the Jews had succeeded, by practicing their intrigues on the Roman Governor and officials in Palestine, in bringing to trial and condemnation no less a person than the Lord Jesus.[200]

Chancellor received two more telegrams in early October from the Muslim Community, raising additional objections to the legality of the Instructions. On 7 October Chancellor wrote to his son:

> The Jewish New Year celebrations at the Wailing Wall 4th-6th October have gone off peacefully thanks to police and military precautions & to my provisional regulations – although the Regulations are disliked by both Arabs and Jews who are protesting against them. I have had one long telegram on the subject from a Moslem body which threatens to rouse Indian Moslems against them; but now that they have worked for the New Year, I hope they will serve for the Day of Atonement.[201]

On 14 October 2014 and again on 17 October, Chancellor met with representatives of the Muslim community, including Auni Bey. At both meetings the Muslim representatives lodged a variety of complaints, including that the Instructions were illegal and violated the *Status Quo* to the extent they allowed the Jews to bring *any* appurtenances with them to the Wall. The Moslems also alleged the Jews were bribing witnesses who would be testifying before the Shaw Commission, once the hearings commenced later in October.[202] Chancellor grew increasingly frustrated with the constant pressures of dealing with the Muslim and Jewish sides, confiding in a 24 October 1929 letter to his son, "I am so tired and disgusted with this country & everything connected with it that I only want to leave it as soon as can do so without failing in my duty."[203]

The British Government itself also harbored reservations about the legality of the new Instructions. Bushe minuted on 20 September 1929 (several days before the Instructions were

made public) that they would "have no legal force." If "someone does place carpets … or what not on the pavement, what offense will he be charged with? It is not a criminal offense to disobey the HC [High Commissioner]!"[204]

Proposals to settle the dispute

The bitter legal dispute between the Muslims and Jews regarding the Wall stands as one of the defining aspects of the first decade of British rule in Palestine. But much like any legal dispute, there were occasional efforts to try to reach a settlement. As early as 1918 the Jews began making overtures about buying the Wall and the pavement in front of the Wall (in other words, buying the *Abu Midian Wakf* property). In the spring of 1918 Chaim Weizmann approached the British military government, which then floated the idea with the Muslim community. The Military Governor, Sir Ronald Storrs, reported the Muslims were offended at the notion of selling *Wakf* property to the Jews. Storrs advised "it would be a grave error of policy for the Military Government to raise the question at all."[205]

In August 1918 Clayton reported he had tried, while insisting the British were neutral in the manner, to explain to the Muslims they might be able to secure "a large sum of money for a property which is to-day of little value." The Muslims, however, opposed any such initiative, fearing it would be the first step toward Jewish encroachment on the *Haram* itself. Indeed, a society known as the *Jamiart El Islamyeh* had been formed to urge the Palestinian Arabs not to consider selling the Wall or any other real property to the Jews.[206]

In October 1918 Clayton sent another report to London, noting how an unauthorized Jewish attempt to buy the Wall had disrupted Clayton's ongoing, quiet efforts to persuade the Arabs to consider selling the Wall:

> Up to quite recently signs were not wanting that the Moslem Dignitaries and notables were beginning to be impressed with the arguments explained to them at great length in favour of the scheme [for the Jews to buy the Wall]. The hopelessness … of obtaining the funds to put into effect … the restoration of the *Haram es Sharif*, the possibility of replenishing the Wakf coffers and so promoting Moslem education of a liberal scale, the comparative unimportance and squalor of the buildings and their [Moroccan] inhabitants in the precinct, the lurking fear that they might have one day to yield for nothing (as a City improvement scheme or otherwise) that for which they would now receive a very large sum of money – these and a variety of other considerations appeared to be modifying a 'non possumus' attitude into one of critical apprehension and fear of the effect on the local and general Islamic world. From the moment, however, that an attempt was apparently made by a Jerusalem Jew (doubtless without the knowledge of the Zionist Commission) to get into direct pecuniary contact with the Moslems concerned something approaching a panic set in, and from that day things have gone from bad to worse in so far as concerns the Zionist hopes in this respect.[207]

There had been other Jewish attempts to buy the Wall beginning as early as 1871, but none were successful.[208] For example, a Jewish effort was launched in 1926 to buy properties in front of the Wall as a first step toward acquiring the entire Moghrabi *Waqf* area and eventually the Wall itself.[209] By late 1926 the Jews were able to buy one nearby property, and by late 1928 had raised enough money to make an offer to lease or purchase the area near the Wall, but High Commissioner Chancellor asked the Jews to hold off to avoid provoking violence.[210]

In early October 1928 Frederick Kisch, a Jerusalem-based Zionist official proposed, in a confidential letter to the Zionist Executive in London, that the Muslims be compelled to sell the pavement and the Moghrabi *Wakf* to the Jews "in exchange for another suitable area in the Old City, with the inevitable addition of a cash payment for the benefit of the *Wakf* authorities."[211] None of these initiatives were pursued, even as new initiatives were brewing in Egypt and

Palestine.

On 26 August 1929 Adrian Holman, a Second Secretary at the British Embassy in Paris, wrote to the Foreign Office about a visit he received earlier that day from a prominent Egyptian Jew, the Baron Felix de Menasce, the President of the Israelite Community in Alexandria. Holman reported that Menasce

> [E]xplained to me at some length that the frequent cases of rioting at the Wailing Wall were due to the fact that the buildings surrounding the Wall were in the hands of the Moslems and had always been looked upon by the British Government as bearing a religious character. It had consequently always proved impossible for the Jews to buy the buildings in question and thus prevent troubles in the future. He maintained that the buildings were purely civil as opposed to religious and that the present moment might be an opportune one for the British Government to reconsider the possibility of arranging for the Jewish community to buy the buildings for demolition or other purposes. He was sure that if this were done, the Jewish community throughout the world would easily be able to find the necessary sum of money.[212]

G.W. Rendell of the Foreign Office responded to Holman on 7 September, noting the Muslims viewed the Wall as a religious site and would not be willing to sell the nearby buildings to the Jews. Rendell poured more cold water on the idea, adding,

> [t]he Colonial Office are, I think, familiar with the advantages and difficulties of a solution on the lines of the Baron de Menasce's proposal, and seeing how overworked they are at the moment with a variety of Middle Eastern crises, I am not adding to their correspondence by passing the suggestion on to them.[213]

On 29 August 1929, less than one week after the Hebron massacres and the same day High Commissioner Chancellor finally returned to Palestine from his home leave, two separate and unique proposals, one Arab and one Jewish (presumably unknown to each other), were made to the British Government to settle ownership of the Wall and/or the surrounding area.

The Jewish proposal was from Pinchas Rutenberg, Managing Director of the Palestine Electric Corporation, in a letter to Lord Reading (a Jew and Chairman of the Palestine Electric Corporation), urging the British government to expropriate the entire area in front of the Wailing Wall to create "a suitable and dignified Jewish praying place."[214]

This was not the first time expropriation had been floated,[215] but never at such a high level. Rutenberg was the preeminent Jewish businessman in Palestine and the future Chair of the *Va'ad Leumi*. Lord Reading took matters to the very highest level of the British Government, forwarding Rutenberg's letter to Prime Minister Ramsay MacDonald the next day, with a cover letter of endorsement:

> I would therefore earnestly represent that the necessary measures should be adopted as soon as practicable to make a complete end of this cause of dispute by expropriating the more extended area, as suggested by Mr. Rutenberg in his letter to me. I understand that this could be accomplished without interfering with any part of Moslem "Holy Ground."[216]

Interestingly, when Rutenberg testified *in camera* before the Shaw Commission three months later, he did not mention the concept of expropriation or his letter to Lord Reading. Rutenberg instead urged the Mandatory Government to broker a financial solution, saying it was "essential to bring the two parties together, *and then the Jews will pay and the question will be settled*."[217]

In any event, nothing came of Rutenberg's expropriation proposal. The Colonial Office reacted negatively, noting

> the present time is not opportune for considering the question of compulsory expropriation … Quite apart from the legal aspect, such action would be intensely resented by the Moslems and we have taken the line hitherto that expropriation is out of the question.[218]

In addition, the High Commissioner (John Chancellor) had already told the PMC the first conclusion he came to after arriving in Palestine as High Commissioner in November 1928 and studying the Wailing Wall issue was that "there must not … be any attempt to expropriate, in favour of the Jews, the area of the pavement in front of the Wall."[219]

However, at that same PMC meeting (6 July 1929), Chancellor disclosed he personally had asked the Mufti to consider selling the Moghrabi dwellings ("mean hovels," as he described them) to the Jews, assuming the Jews would pay to relocate the Moghrabi inhabitants to superior accommodations elsewhere. Chancellor explained the Jews would be able "to make there a courtyard surrounded by a loggia where they could say their prayers in peace and in dignified surroundings." Weizmann embraced the idea and had £70,000 at the ready, but the Mufti rejected the plan, even after Chancellor suggested the Mufti consider an indirect sale, whereby he would transfer the property to the Mandatory Government as middleman, which would complete the sale to the Jews, thereby allowing the Mufti to avoid looking as if he had agreed to a sale to the Jews.[220]

In an amazing coincidence of history, only three days after Menasce's meeting with Holman, and on the *same* day (29 August 1929) Rutenberg had sent his letter to Lord Reading, another prominent Egyptian, Prince Mohamed Ali Pasha, quietly but very dramatically entered the stage. Ali Pasha was the uncle and Regent to Farouk, the future King of Egypt. Those who knew Ali Pasha regarded him as "a very liberal-minded man,"[221] with a "courtly bearing."[222]

On that fateful day of 29 August 1929, Ali Pasha, while on a visit to Istanbul, hand-delivered to the British Ambassador to Turkey a letter addressed to High Commissioner Chancellor in Jerusalem. The letter contained a stunning proposal from Ali Pasha for settling the Muslim-Jewish dispute over the Wailing Wall:

> Having heard about the troubles going on in Palestine between Jews and Mohametans, and having a certain knowledge of the Arab and Mohametan aspirations, I thought I might be of service outlining a proposal by which this quarrel might perhaps be ended peacefully.
>
> The Mohametans and Arabs having been masters in Palestine for over one thousand years, they are fighting for their honour and do not want to lose anything which they have acquired as a possession. They fear that either through administrative channels or by force they will be compelled ultimately to relinquish rights they have held for so long.
>
> Every one knows that in every country in law after the lapse of a certain period proprietary rights are established. In this case the rights of the Mohametans go back one thousand years.
>
> My proposal for a solution is that, instead of fighting or dealing unjustly by one party or the other, it would be infinitely better to come to an understanding. The Mohametans may be willing to accept a sum of money which would help them to do good for the community and *as the Jews are rich, if this thing is so much desired by them, there seems no reason why they should not pay for it.* If this could be done, it would avoid coercion and possibly injustice to one or other of the parties.
>
> Certainly I am sure the Mohametans and Arabs will not accept a small sum such as £10,000 or even £20,000 for a matter in which their honour is so far involved. In Zurich the Zionists have collected £240,000 for Palestine. *Let them give £100,000 and I feel sure this would settle the difference*.[223]

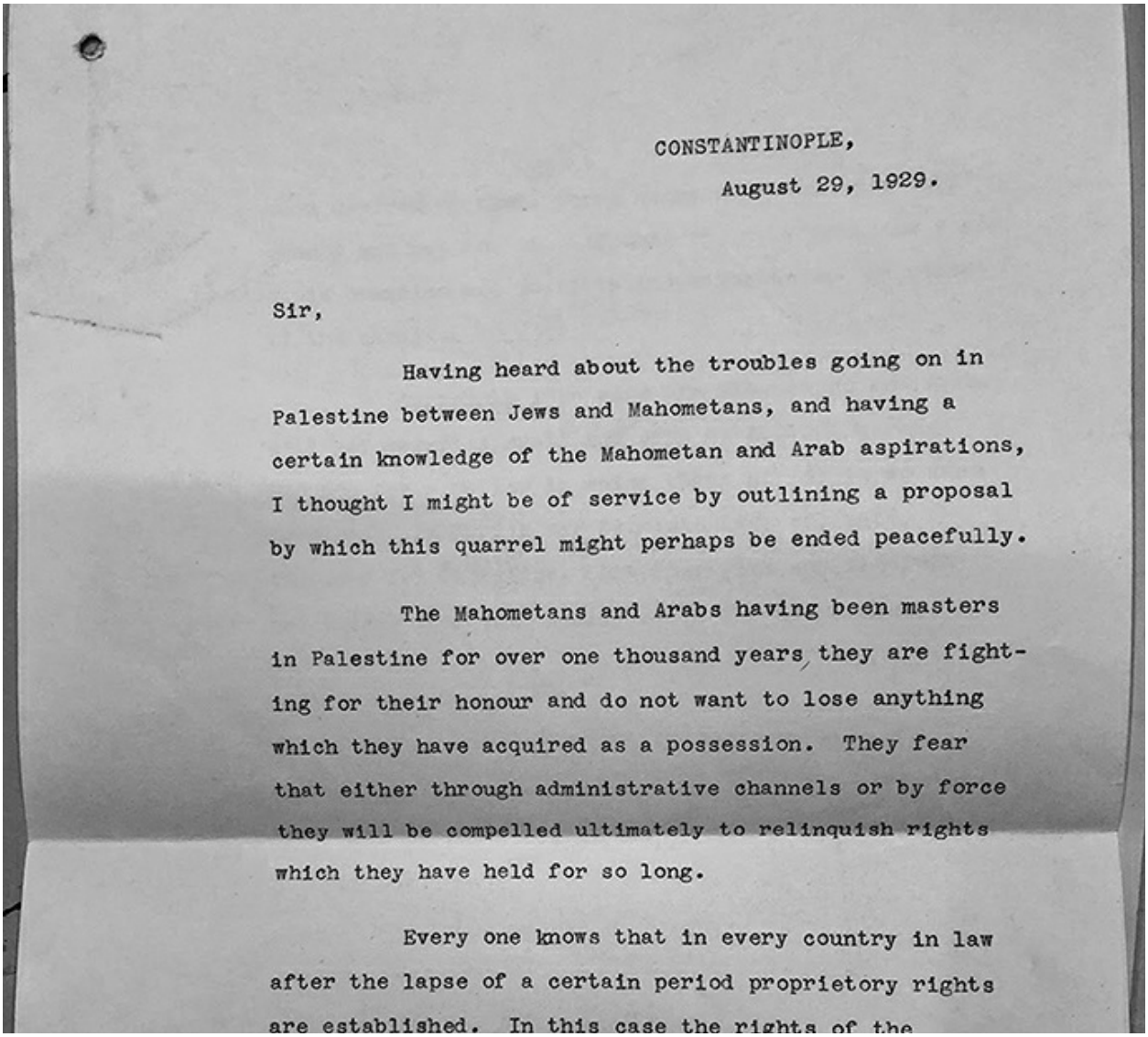
While the Jews had previously made attempts to *buy* the Wall, this letter appears to be the first and only record of an Arab proposal to *sell* the Wall to the Jews. Although the letter does not specifically mention "selling" the Wall, that is precisely what Ali Pasha meant. Ali Pasha hand-delivered the letter to the British Ambassador in Constantinople, Sir George Clerk, telling him he wanted to "submit a suggestion which would, he thought, provide a solution to the question of

the Wailing Wall in Jerusalem."[224]

Ambassador Clerk never forwarded Ali Pasha's letter to Jerusalem. Instead, he sent it directly to Foreign Secretary Arthur Henderson in London, along with a cover letter adding his own observation that

> the idea of the Jews buying the Wall has long been considered and rejected, and recent events seem scarcely favorable to the idea of the Muslims accepting even as fancy a price as £100,000, supposing the Jews were prepared to offer that sum.[225]

The Foreign Office kept Clerk's original cover letter in its files together with a copy of Ali Pasha's letter, recording the latter in its official index for 1929 as "Suggested sale of wall to Jews by Moslems: proposal of Prince Mohamed Ali Pasha."[226] The Foreign Office sent the original of Ali Pasha's letter to the Colonial Office. No record was found of any further action, nor is there any evidence in Chancellor's files or his diary proving or even hinting he ever learned of the letter's existence. The original Ali Pasha letter, containing the only Arab offer ever to sell the Wall to the Jews, remained buried in the Colonial Office files for the next 90 years.[227]



CONSTANTINOPLE,
August 29, 1929.

Sir,

Having heard about the troubles going on in Palestine between Jews and Mahometans, and having a certain knowledge of the Mahometan and Arab aspirations, I thought I might be of service by outlining a proposal by which this quarrel might perhaps be ended peacefully.

The Mahometans and Arabs having been masters in Palestine for over one thousand years, they are fighting for their honour and do not want to lose anything which they have acquired as a possession. They fear that either through administrative channels or by force they will be compelled ultimately to relinquish rights which they have held for so long.

Every one knows that in every country in law after the lapse of a certain period proprietory rights are established. In this case the rights of the

Mahometans go back one thousand years.

My proposal for a solution is that, instead of fighting or dealing unjustly by one party or the other, it would be infinitely better to come to an understanding. The Mahometans may be willing to accept a sum of money which would help them to do good for the community and as the Jews are rich, if this thing is so much...

His Excellency,
Lieut-Colonel Sir John R. Chancellor, G.C.M.G., G.C.V.O., D.S.O.,
High Commissioner for Palestine,
J E R U S A L E M.

much desired by them, there seems no reason why they should not pay for it. If this could be done, it would avoid coercion and possibly injustice to one or other of the parties.

Certainly I am sure the Mahometans and Arabs will not accept a small sum such as £10,000 or even £20,000 for a matter in which their honour is so far involved. In Zurich the Zionists have collected £240,000 for Palestine. Let them give say £100,000 and I feel sure this would settle the difference.

I am,

Sir,

Your obedient Servant,

Mohamed Ali.

Figure 2.14 Mohamed Ali Pasha's letter[228]

Ali Pasha's letter is extraordinary. No one in the Muslim world had previously offered to sell the Wailing Wall (or broker a sale) to the Jews. Surely Ali Pasha never spoke a word of it to anyone in the Muslim world, as he lived peacefully for nearly three more decades. Nor is there any evidence he had any authority from the Muslim authorities in Jerusalem to make the offer. But his letter nevertheless represents an extraordinary and courageous step for a highly prominent Arab and potential future King of Egypt to have taken so soon after the August 1929 violence.

One lingering question remains: is it possible Ali Pasha discussed his idea with Menasce? Two very prominent Egyptians, one Muslim and one Jewish, within three days of each other separately approached the British Embassies in Istanbul and Paris to float the idea of the Jews buying the Wailing Wall and nearby dwellings. Perhaps they had coordinated their efforts and stage-managed them as carefully as possible to avoid detection. Or perhaps neither had any idea of the other's activity, and their visits to the British Embassies in Paris (Monday) and Istanbul (Thursday) of the same week were purely coincidental. We will leave that mystery for others to solve.

Notes

1 Lofgren Commission Report, *op. cit.* at 10–11; for a discussion of the "inescapable" relevance of the Wailing Wall disputes of the 1920s to today's Arab–Israeli conflict, *see* M.E. Lundsten, *Wall Politics: Zionist and Palestinian Strategies in Jerusalem, 1928*, Journal of Palestine Studies 8(1) at 3 (1978).

2 C. Adler, *Memorandum on the Western Wall Prepared for the Special Commission of the League of Nations on the Wailing Wall on behalf of the Jewish Agency for Palestine* (hereafter "Adler Memorandum") at 4–5 (June 1930) ("[T]he belief that God's presence adhered to the Temple and the site upon which it was built has been continuous in the minds and in the prayers and in the literature of the Jewish people throughout these three thousand years."); Letter from Prof. Joseph Klausner, Hebrew University of Jerusalem, to Pinchas Rutenberg with enclosed memorandum entitled "Relevant historical information indicating the historical affinity of the Jewish race and the Western Wall" (19 August 1929), *reproduced in* Priestland, *op. cit.*, Vol. II at 678–86.

3 *See, e.g.* Letter to *The Times* from Amin al Husseini, Grand Mufti of Jerusalem and President of the Supreme Moslem Council in Palestine, 27 August 1929 ("[t]he *Burak*, called by Europeans the 'Wailing Wall' and by Jews 'Kotel Moravi,' is a part of the western wall of the Mosque of Omar, which is held by Moslems as a very sacred shrine sanctified by the text of the Koran."); *see also* Shaw Transcript and Exhibits, *op. cit.*, Vol. I at 322, para. 8276 (Muslims believe "the Prophet on his horse entered into the *Haram* area on the west by a gateway, a portion of the arch of which is still visible, the gateway however being built up, and got inside under the arch, and there tethered the steed. That place is now at a considerably

higher level than the pavement of the Wailing Wall, but a lower level than the pavement of the *Haram* area. He took his steed in and tethered it against the inside wall of what was then a sort of entrance way into the *Haram*, but is now a room or Mosque, and visitors are shown a ring, not supposed to be the original ring, but a ring of some age, marking the spot where the original ring was by which the steed was tethered."). For a fascinating discussion of the debate between Muslim and Jewish scholars regarding whether Mohammed tethered his horse along the Western (Wailing) Wall or elsewhere, perhaps along the less religiously important eastern wall, *see* H. Cohen, *Year Zero of the Arab Israeli Conflict: 1929* (Wayne State Univ. Press, 2015) at 60–63; *see also* Lofgren Commission Transcript at 410–11, 990 (Muslim authorities disagree among themselves regarding precise location where Mohammed's steed was tethered); *but see id.* at 718–20 (Muslim jurist testifies Muslims unanimously believe Mohammed's steed was tethered at the Western Wall).

4 CO 733/179/4, *Memorandum on the Wailing Wall*, Enclosure I to Confidential Despatch to the Secretary of State [for the Colonies] at para. 4 (17 January 1930); see also Porath, *op. cit.* at 260 ("the pavement in front of the Wall – was not considered a holy place by the Muslims, and the residents of the Maghrebi quarter even used to throw their garbage there").

5 Shaw Commission Report, *op. cit.* at 28.

6 Lofgren Commission Report, *op. cit.* at 10–11.

7 *Id.* at 11–12.

8 *Id.* One commentator has noted the creation of the two *Wakfs*, one encompassing the Wall and the other the pavement and area in front of the Wall, meant "[t]he religious contest over the Wall was virtually predictable." P. Mattar, *The Role of the Mufti of Jerusalem in the Political Struggle over the Western Wall, 1928–29*, Middle East Studies 19(1) at 104, 105 (1983).

9 Lofgren Commission Report, *op. cit.* at 8.

10 Library of Congress, Prints and Photographs Collection, http://hdl.loc.gov/loc.pnp/cph.3c37059, accessed 10 September 2019.

11 The author is grateful to Buki Boaz, Dr. Shimon Lev, and the Tower of David Museum, Jerusalem for permission to reproduce the photograph.

12 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.15160, accessed 4 September 2019.

13 Lofgren Commission Report, *op. cit.* at 11–12, discussing writings of Ben Meir, Rabbi Samuel ben Paltiel, Solomon ben Judah, and Benjamin of Tudela; *see also* R. Storrs, Memorandum on the Wailing Wall (hereafter "Storrs Memo") at para. 2 (1925), *reproduced in* Priestland, *op. cit.*, Vol. II at 657–59.

14 Lofgren Commission Report, *op. cit.* at 11–12.

15 H. Cohen (2015), *op. cit.* at 70, citing A. Cohen, E. Simon-Pikali and O. Salameh, *Yehudim be Veit haMishpat haMuslemi Hevrah, Kalkalah, veIrgun Kehilati be Yerushalayim haOthomanit, be Me'ah ha Tesha'-Esreh* ("Jews in the Moslem Courts: Community, Economy and Organization in Ottoman Jerusalem in the 19th Century") at 116–18; see also N. Bentwich, *England in Palestine* at 172 (Kegan Paul, 1932).

16 Lofgren Commission Report, *op. cit.* at 67, appendix VI.

17 *Id.* at 70, appendix VIII. The Decree was rescinded in January 1912. Lofgren Commission Transcript, *op. cit.* at 312–14.

18 Lofgren Commission Report, *op. cit.* at 67–69, appendix VII.

19 *Id.* at 13.

20 *See infra* at nn. 31 and 72 and accompanying text; *see also* Ch.3 *infra* at n.118 and accompanying text.

21 Allenby Proclamation (11. Dec. 1917) [emphasis added], static.timesofisrael.com/www/uploads/2017/12/Proclamation-Reuters-Telegram-Liddell-Hart-Centre-for-Military-Archives-King%E2%80%99s-College-London-300x480.jpg, accessed 27 August 2019.

22 Storrs Memo, *op. cit.* at para. 5.

23 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.07439, accessed 4 September 2019.

24 Shaw Commission Report, *op. cit.* at 27.

25 Bentwich (1932), *op. cit.* at 177.

26 Shaw Commission Report, *op. cit.* at 28.

27 Cmd. 3229, *The Western or Wailing Wall at Jerusalem*, Memorandum by the Secretary of State for the Colonies at 3–4 (19 November 1928).

28 Figure 2.5: Library of Congress, Prints and Photographs Division, http://hdl.loc.gov/loc.pnp/cph.3c00163, accessed 10 September 2019; Figure 2.6: Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.06651, accessed 4 September 2019; Figure 2.7: Félix Bonfils – Getty Villa, Public Domain, https://commons.wikimedia.org/w/index.php?curid=15165000, accessed 11 September 2019. However, other early photographs of the Wailing Wall show Jewish worshippers sitting on chairs and/or benches along the pavement. *See, e.g.* D. Elmendorf, *A Camera Crusade Through the Holy Land*, Plate LXXXIII (C. Scribner's Sons, 1912).

29 Storrs Memo, *op. cit.* at para. 10.

30 Cust, *op. cit.*

31 *Report on the Political Situation in Palestine during the Month of May 1922, reproduced in* Priestland, *op. cit.*, Vol. II at 106, para. 3; *see also* M. Samuel, *What Happened in Palestine: The Events of August 1929, Their Background and Their Significance* (Stratford, 1929) at 39 ("A screen of this kind was used during the Turkish regime … "); T. Segev, *One Palestine, Complete: Jews and Arabs Under the British Mandate* (Henry Holt & Co., 1999) at 298 ("Officially, the Jews were subject to a whole series of prohibitions; in practice, a wink and a bribe eased relations with the Waqf, and on special

days, especially the High Holy days, the Jews were allowed to blow the ram's horn, or *shofar*, at the wall and set up an ark and benches. Annie Landau told Colonel Kisch [of the Palestine Zionist Executive] that, to the best of her memory, the Jews had from time to time put up a screen to separate the men from the women.").

32 Bentwich (1932), *op. cit.* at 173. Bentwich notes the British Government proposed to create the Article 14 Commission in 1923, to be comprised of five Christians, three Muslims and three Jews, but the Latin Catholic powers (France, Spain and Italy) feared their claims to various Holy Places would not be adequately safeguarded and therefore blocked the formation of the Commission. *Id.* at 174.

33 *Palestine (Holy Places) Order-in-Council* (25 July 1924), https://ecf.org.il/media_items/1469, accessed 27 August 2019.

34 Letter from Zionist Organization to High Commissioner for Palestine, para. 9 (3 May 1929), reprinted in League of Nations, Permanent Mandates Commission, Ninth Session, 25th Meeting (23 June 1926) (Annex VI), C.405.M.144. 1926. VI. (C.P.M./9th Session/P.V.), www.un.org/unispal/document/mandate-for-palestine-league-of-nations-9th-session-minutes-of-the-permanent-mandates-commission/, accessed 27 August 2019.

35 League of Nations, Permanent Mandates Commission, Ninth Session, 24th Meeting (23 June 1926), C.405.M.144. 1926. VI. (C.P.M./9th Session/P.V.), www.un.org/unispal/document/mandate-for-palestine-league-of-nations-9th-session-minutes-of-the-permanent-mandates-commission/, accessed 27 August 2019; *see also* Cmd. 3229, *op. cit.* at 4.

36 *Id.* [Emphasis added.].

37 Storrs Memo, *op. cit.*, para. 10.

38 Porath, *op. cit.* at 262–63;

39 Bentwich (1932), *op. cit.* at 173.

40 Cust, *op. cit.*

41 *Id.* at 569–71.

42 CO 733/160/16, E. Keith-Roach, Deputy District Commissioner, Jerusalem, Report (Confidential) No. 15,853/28 to Chief Secretary at 1–2, para.2 (25 September 1928).

43 Even the precise physical nature of the screen continues to provoke debate. Norman Bentwich, the Attorney General of Palestine at the time, described the screen as a "canvas screen [that had been] fixed to the pavement with an iron bolt." Bentwich (1932), *op. cit.* at 175. The pro-Palestinian American Professor Mary Ellen Lundsten describes the screen as "a large screen … attached to the pavement," citing references to official British documents, including the 1928 White Paper. Lundsten, *op. cit.* at 13 and n.31. The Israeli journalist Tom Segev, on the other hand, describes the screen as "an ordinary collapsible screen, of the type that people sometimes use in their bedrooms," citing Duff's later written recollection. Segev, *op. cit.* at 295. Another near-contemporary account described the screen as "portable and no bigger than an ordinary-sized screen used in houses." Sidebotham, *op. cit.* at 166 (1930).

44 CO 733/160/16, Keith-Roach, *op. cit.* at 2, para. 3.

45 *Id.* at 2, paras. 4–5. A Jewish witness later submitted a transcript of his recollection of the conversation between Keith-Roach, Duff and the Beadle, challenging Roach's claim that the Beadle had promised to remove the screen. Keith-Roach disputed the witness' version of the conversation. CO 733/163/4, Statement of Arthur Raus (3 January 1929); CO 733/163/4, Letter from E. Keith-Roach to Chief Secretary (12 March 1929). Another Jewish witness, Dr. Wolfganag von Weisel, testified regarding a 21 August 1929 article he had published in *The New Palestine*, in which he attributed the 1928 screen incident to a dispute between the Ashkenazi and Sephardi Beadles. According to von Weisel, the Sephardi Beadle held a grudge against the Ashkenazi Beadle for refusing to share tips from a large entourage accompanying a famous Polish Rabbi visiting Jerusalem in 1928 for the Jewish holy days. The Polish Rabbi asked for a screen to be placed on the pavement during *Yom Kippur*. The Sephardi Beadle, still angry at the Ashkenazi Beadle for refusing to share the tips from the Rabbi's entourage, leaked news of the screen to the Arabs, who told the Mufti, who in turn notified Keith-Roach. Shaw Transcript and Exhibits, *op. cit.*, at 228–21, para. 6272 and Exh. 34; *see also* H. Cohen (2015), *op. cit.* at 101–02 (describing von Weisel's account of the feud between the Sephardi and Ashkenazi Beadles).

46 CO 733/160/16, Roach, *op. cit.* at 2–3, paras. 6–8.

47 Keith-Roach, *op. cit.* at 3, para. 9. Col. Frederick H. Kisch of the Palestine Zionist Executive praised Duff's actions to protect the Jewish community during the August 1929 outbreak of violence. F.H. Kisch, *Palestine Diary* at 290 (AMS Press, reprint from Victor Gollancz, 1938) ("Duff, for whom ten months ago no abuse was strong enough to satisfy the general Jewish feelings [after the 1928 *Yom Kippur* incident], has shown repeated acts of friendship since."). Kisch's diary, recording his activities as a former British military officer and Palestine Zionist official between 1923–1931, offers a remarkably clear and detailed recounting of several of the key episodes discussed in this study. This study relies both on Kisch's published Diary, as well as Kisch's contemporaneous typewritten diary pages housed at the Central Zionist Archives in Jerusalem.

48 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.12190, accessed 4 September 2019.

49 Luke Diary, handwritten entry for 24 September 1928, Sir Harry Luke Collection, Ref. No. GB165-0188, Box 1 File 1/3, Middle East Centre Archive, St. Antony's College, Oxford (examined 13 November 2018). Luke wrote the last sentence (containing the quote from Keith-Roach) in a different color ink (blue) than the rest of the 24 September entry (black ink), indicating he may have added the last sentence to the 24 September entry at a later date. By 1930 the Colonial Office had transferred Luke to serve as Lt. Governor of the island of Malta, where reportedly he was despised by the local population. *See* "Sir Harry Luke: benefactor or ruthless despot? – A look back at a colonial officer who ruled Malta," The Malta

Independent, 28 September 2014, www.independent.com.mt/articles/2014-09-30/local-news/Sir-Harry-Luke-benefactor-or-ruthless-despot-A-look-back-at-a-colonial-officer-who-ruled-Malta-6736122819, accessed 27 August 2019.

50 Luke Diary, *op. cit.*, handwritten diary entry for 25–26 September 1928. As chance would have it, Luke would once again step into the role of Officer Administering the Government (Acting High Commissioner) before, during and after the August 1929 outbreak of violence. Luke's conduct became one of the key focus areas in the proceedings before the Shaw Commission, and Luke spent more time under cross-examination than any other witness. Shaw Transcripts and Exhibits, *op. cit.*, Vol. I at 267–386.

51 *Id.* at 3–5, paras. 9–11.

52 *Jewish Daily Bulletin*, 26 September 1928 at 1. For a somewhat different contemporaneous Jewish description of the 1928 incident at the Wall, *see* M. Samuel, *op. cit.* at 39–42 (describing Keith-Roach's "clumsy" handling of the situation, the "unnecessary violence" of the British police in forcibly removing the screen, and suggesting that "any administrator of intelligence and level-headedness would have calmed the Arabs by telling them that the matter would be rectified the next day; that the Jews would be specifically forbidden to put screens up again; that it was a stupid thing to ask for police interference on such a trifling matter"); *see also* Segev, *op. cit.* at 296–97, 303 (criticizing Keith-Roach for his "gaffe" and Duff as "a violent man, a racist, a misogynist, and a fool" for using "excessive force without good judgment" and for his "disastrous handling of the affair").

53 CO 733/160/16, Telegram No. 367, Imperial Wireless Service via Empiradio.

54 Cmd. 3229, *op. cit.* at 2–3.

55 CO 733/160/17; *see also* Lundsten, *op. cit.* at 18 and n.45

56 Shaw Commission Report, *op. cit.* at 31.

57 Weizmann Archives, 4–1230, Memorandum from W. Aron to L. Stein (4 October 1928).

58 *Id.*

59 CO 733/160/16, Letter from F.H. Kisch, Zionist Organisation, Palestine Zionist Executive, to the Officer Administering the Government of Palestine (12 October 1928) ("I have the honour to request that this petition may be transmitted through the proper channels to the Secretary General of the League of Nations for the information of the Permanent Mandates Commission.").

60 In November 1928 the *Va'ad Leumi* (the National Council of Jews in Palestine) published an open letter to the Muslim community "emphatically and sincerely" declaring that "no Jew has ever thought of encroaching upon the rights of Moslems over their own Holy Places," and denying allegations that the Jews had designs on the *Haram* area itself as the "fruit of false imagination or wilful calumny." The letter ended with a call to "our Arab brethren … to disperse the poisonous clouds of the false rumours which have recently been circulated, and to create possibilities for constructive co-operation for the benefit of the country and all its inhabitants, in the place of hostility and dispute." Shaw Commission Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 108 at 1101–02.

61 League of Nations, Permanent Mandates Commission, Minutes of the Fifteenth Session Held at Geneva, 1–19 July 1929, Eleventh Meeting (6 July 1929), Annex 9-A-I, Telegram dated 7 November 1928, www.un.org/unispal/document/mandate-for-palestine-league-of-nations-15th-session-minutes-of-the-permanent-mandates-commission/Document C.P.M. 830, accessed 27 August 2019.

62 *Id.* [emphasis added].

63 *Id.*, Document C.P.M. 831; *see also* CO 733/160/18, Letter from the Secretary of the General Moslem Conference, Hassan Abul Sa'oud, to the High Commissioner dated 7 November 1928 (repeating the text of the various resolutions adopted at the 1 November conference, which was "convened with a view to … taking the necessary measures for the purpose of eliminating the menace of Jewish ambitions on the Prophet's Holy *Buraq*, and for the safeguarding of the rights of the Moslems in their Holy Places").

64 CO 733/163/4, "Petition from the Enir Chekib Arslan, M. Ishan Djarani and M. Riad Solh Concerning the Incidents at the Wailing Wall" (11 December 1928); *see also* League of Nations, Permanent Mandates Commission, Minutes of the Fifteenth Session, *op. cit.*, C.P.M. 837. Bentwich compared Muslim fears that the Jews secretly intended to seize the *Haram* and rebuild their Temple to a common British anti-semitic trope from the 17th century: "When request was made to allow Jews to resettle in England in the time of Cromwell, objection was taken that they would try to seize the Christian shrines and turn St. Paul's Cathedral into a synagogue. So the Moslems were made to believe that the Jews meant to turn the *Haram* into a synagogue or temple." Bentwich (1932), *op. cit.* at 177.

65 Id.

66 Cmd. 3229, *op. cit.* at 3–4. The parties could not agree on whether the word "permitted" meant *legally* authorized, or authorized in everyday practice. Memorandum on the Immediate Causes of the Disturbances in Palestine Beginning on the 23d August, 1929 at 21, Chancellor Papers, *op. cit.*, Box 12/6.

67 *Id.* at 4, 5.

68 *Id.* at 5.

69 *Id.* at 6.

70 *Id.*

71 CO 733/160/18, Despatch (Confidential) No. 19,482/28 from Chancellor to Secretary of State for the Colonies (15 December 1928).

72 *Id.*
73 Shaw Commission Report, *op. cit.* at 34.
74 CO 733/162/4, Despatch (Confidential) No. 17,064/28 from Luke to Colonial Office (26 October 1928).
75 The Shaw Commission said it initially understood the term *Zawiyah* as denoting a "sacred corner" or "sacred niche," but the Mufti later testified it meant a "hospice" or "convent." Shaw Commission Report, *op. cit.* at 36.
76 Some historians say the Muslims occasionally dropped bricks from the construction work atop the Wall onto the Jews praying below, and encouraged their mules to drop excrement on the pavement in front of the Wall. These and other alleged provocations and humiliations at the Wall "roused the Jews to a fever pitch" in late 1928 and 1929. B. Wasserstein, *The British in Palestine: The Mandatory Government and the Arab–Jewish Conflict, 1917–1929* at 225–26 (Royal Historical Society, 1978).
77 CO 733/160/19 (both photographs).
78 Id. at 33.
79 CO 733/162/4, Letter from F.H. Kisch, Palestine Zionist Executive to the Officer Administering the Government (18 October 1928). The letter quotes section 24A of the Antiquities Ordinance of 1920, providing that no antiquity shall "be altered, reconstructed or restored without the consent of the Director of Antiquities." The apparent conflict between this provision and Article 13 of the Mandate would eventually be submitted to the Law Officers of the Crown for their consideration and opinion.
80 Shaw Commission Report, *op. cit.* at 33.
81 CO 733/162/4, Despatch (Confidential) No. 17,064/28 from Luke to Colonial Office (26 October 1928).
82 CO 733/162/4, minute dated 7 November 1928.
83 *Id.* [emphasis added].
84 *Id.*
85 Hansard, HC Deb. 12, Vol. 222 at 471–73 (2 November 1928) (emphasis added). On 26 November 1928 Kenworthy again questioned Amery in the House of Commons regarding the Wall, this time asking if Amery was aware of "further infringements of the *status quo* at the Wailing Wall in Jerusalem by the Muslim authorities, including the establishment of a hospice at a house adjacent to the Wall, besides other building activities and alterations; that a *muezzin* now appears on a roof adjacent to the corner where the *Aronkodesh*, or Ark of the Holy Scrolls, stands on Saturdays and calls to prayer five times during that day according to the Islamic rite; that this was not permitted under the Ottoman regime; that the Jewish religious authorities have protested to the District Commissioner; and whether he will take steps to prevent such action in the future by the Moslems and further infringements of the *status quo*." *Id.*, HC Deb. 26, Vol. 223 at 10–11 (26 November 1928).
86 Following the 1929 riots, Lloyd was appointed to serve as the Secretary to the Shaw Commission and is regarded as the principal drafter of the Shaw Commission's report.
87 CO 733/162/4 (Lloyd minute, 13 November 1928).
88 CO 733/162/4, Despatch No. 18,830/28 from Luke to Secretary of State for the Colonies (Amery) (30 November 1928).
89 *Id.*
90 *Id.*, Memorandum from Norman Bentwich, Attorney-General of Palestine, dated November 1928.
91 CO 733/162/4 (various minutes).
92 *Id.*, Telegram No. 189, 30 November 1928. The Mufti's role in 1928 and especially 1929 would become a focus of the Shaw Commission. Some historians argue the Mufti's strategy in response to the 1928 *Yom Kippur* incident was to inflame Muslim passions to promote his ambition to unify the Palestinian Muslim community under his leadership, and that he had no interest in reaching any compromise with the Jews. *See, e.g.* M. Kolinsky, *Law, Order and Riots in Mandatory Palestine, 1928–35* at 37–39 (St. Martin's Press, 1993); *but see* Mattar (1983), *op. cit.* at 108 ("The Mufti's new strategy, which began in November [1928] … consisted of three thrusts: publicizing the issue [the Wall] to the Arabs of Palestine and to the Arab and Muslim worlds, in order to unite them on the issue; cooperating with the British and Palestine Governments while challenging them to adhere to and enforce their traditional policy of the *status quo*; and taking such action as would uphold Muslim rights around the Wall.").
93 CO 733/162/4, Telegram No. 190 from Luke to Secretary of State for the Colonies (1 December 1928).
94 Letter from O.G.R. Williams, Assistant Secretary, Colonial Office, to the Law Officers (9 January 1929), *reproduced in* Priestland, *op. cit.*, Vol. II. at 653–55. In a fascinating and very significant twist of fate, Merriman was hired several months later to serve as lead Counsel for the Jewish side in the Shaw Commission hearings (we will hear much more about Merriman in Chapter 3).
95 Despatch 57,580/28 [No. 13] from O.G.R. Williams on behalf of Amery to the Law Officers, *Western or Wailing Wall in Jerusalem. Action to be Taken with Regard to the Erection by the Moslem Authorities in Jerusalem of a Construction on the top of the Wall* (9 January 1928), *reproduced in* Priestland, *op. cit.*, Vol. II at 653–55.
96 CO 733/164/2, Letter from Law Officers' Department, Royal Courts of Justice to Secretary of State for the Colonies (16 February 1929). Lundsten incorrectly states the Law Officers delayed issuing their opinion for three months. Lundsten, *op. cit.* at 22. In fact, the opinion was delivered less than six weeks after it was requested.
97 CO 733/164/2, *Wailing Wall: Structure Erected by Moslems*, minute dated 16 February 1929 [Emphasis added].
98 *Id.*, Bushe minute, 27 February 1919.

99 *Id.*, Williams minute, 27 March 1929.
00 *Id.*, Shuckburgh minute, 2 May 1929.
01 Chancellor Papers, *op. cit.*, Box 11/5S; Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 120 at 1106, 1108 (copy of Minutes of a Meeting Held in the Office of His Excellency the High Commissioner on the 6th May 1929). The Mufti explained during the meeting that the Muslims had undertaken repair work in and around the area of the Wall and pavement "to avoid criticism that it was insecure and the neighbourhood dirty. The Jews always advance as an argument that they should acquire this place that it is badly attended to, so we decided to improve it." *See also* Wasserstein, *op. cit.* at 228.
02 CO 733/162/4, Letter from Colonial Secretary Amery to the High Commissioner dated 8 May 1929; *see also* Storrs Memorandum, *op. cit.* at para. 32.
03 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 118 at 1105–06.
04 Enclosure I (Confidential Letter from H. Sacher on behalf of the Palestine Zionist Executive to High Commissioner for Palestine, 3/256/29, 27 May 1929) to Confidential Despatch from Chancellor to Secretary of State for the Colonies (14 June 1929), Ref. No. 840/29, Chancellor Papers, *op. cit.*, Box 11/5.
05 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 55B at 1060–63 at paras. 4–9 (Letter from Harry Sacher, Palestine Zionist Executive to High Commissioner, 27 May 1929).
06 One of the supreme ironies of Sacher's argument is that most non-Orthodox Jews today cannot freely exercise their rights of worship at the Wall, not due to Muslim resistance, but because the Orthodox Jewish authorities will not allow men and women to pray together, and will not allow women to enter the newly excavated areas at the north end of the Wall. *See* Y. Reiter, *Feminists in the Temple of Orthodoxy: The Struggle of the Women of the Wall to Change the Status Quo*, Shofar 34 (2) 79–107 (2016).
07 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 55B at 1060–63 at paras. 15, 21 (Letter from Harry Sacher, Palestine Zionist Executive to High Commissioner, 27 May 1929).
08 Confidential Despatch from Chancellor to Secretary of State for the Colonies (14 June 1929) at 5, Ref. No. 840/29, Chancellor Papers, *op. cit.*, Box 11/5.
09 *Id.* at 5–6.
10 *Id.* at 6.
11 *Id.* at 2.
12 *Id.* at 7–8.
13 *Id.* at 7.
14 CO 733/163/4, Letter from H.C. Luke, Chief Secretary, Palestine Government to President, Supreme Moslem Council, Jerusalem, para. 2 (11 June 1929) [emphasis added].
15 CO 733/163/4, Letter from H.C. Luke, Chief Secretary, Palestine Government to Palestine Zionist Executive (13 June 1929).
16 Storrs Memo, *op. cit.* at para. 36.
17 *Times of London*, 31 March 1930 at 13.
18 Storrs Memo, *op. cit.* at para. 37. "The noise was such that it was well nigh impossible for the worshippers to continue their devotion." Bentwich (1932), *op. cit.* at 182.
19 Shaw Commission Report, *op. cit.* at 39.
20 Id.
21 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 114 at 1104 (Letter from L.G.A. Cust, Acting Deputy District Administrator, Jerusalem, to Chief Rabbi Kook, 21 July 1929).
22 *Id.*, Ex. 115, Petition addressed to His Majesty's Secretary of State for the Colonies (4 August 1929).
23 Chancellor did not return to Palestine until 29 August 1929. His top Deputy, Chief Administrative Officer Harry Luke, served as the Officer Administering the Government in Chancellor's absence during the crucial months of July and August 1929. N. and H. Bentwich, *Mandate Memories 1918–1948* at 131–32 (1965).
24 League of Nations, Permanent Mandates Commission, *Minutes of the Fifteenth Session Held at Geneva, July 1–19, 1929*, Eleventh Meeting (6 July 1929) at www.un.org/unispal/document/mandate-for-palestine-league-of-nations-15th-session-minutes-of-the-permanent-mandates-commission/, accessed 27 August 2019.
25 *Id.*
26 *See* Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 120 at 1106, 1108 (Minutes of a Meeting Held in the Office of His Excellency the High Commissioner on the 6th of May, 1929; the Mufti said he was "glad to stop the work temporarily, but solely as a favour to your Excellency personally and I must ask to be protected against assertions of the Jews in future that this part of the Wall also is under the *Status Quo*.").
27 Id. At their meeting on 6 May 1929, Chancellor suggested to the Mufti that the Muslims grant licenses to allow the Jews, for payment of a fee, to bring chairs or benches to the Wall. Chancellor suggested this would be a way to accommodate the Jews' reasonable request for a place to sit without ceding any property rights to the Jews. The Mufti rejected the idea, because "anything that might be done out of courtesy would in future be interpreted by the Jews as a right."
28 *See* letter from F.H. Kisch, Palestine Zionist Executive, to Chief Secretary, Government Office, Jerusalem, 6 October 1928, CO 733/163/7 (enclosing three photographs, two from 1910 and one from 1911, showing benches at the Wall. According to Kisch, "[t]he photographs illustrate the well-established fact, which it is painful for the Zionist Executive to record, that the

Jews enjoyed much greater freedom of worship at the Kotel-Maaravi before the mandate than is at present the case." One of these photographs appears at Figure 2.11 in this chapter); *see also* Minute of an Interview with His Excellency the High Commissioner (4 May 1929), Chancellor Papers, *op. cit.*, Box 11/5 at 3–4 (minutes of meeting with Kisch, Chancellor and Luke in which Chancellor stated "the Rabbinate had failed to bring any evidence that the use of such articles [various appurtenances] had been authorized" under Turkish rule, prompting Kisch to argue the *Status Quo* should be defined based on the actual practices at the Wall under Turkish rule rather than based on the language of various Turkish rulings, as the actual practices were more permissive).

29 CO 733/160/19, one of three photographs included in a letter from Kisch to Luke (6 December 1928).

30 Chancellor Papers, *op. cit.*, Box 24, photo entitled "The Wailing Wall."

31 *Id.*

32 One commentator has described Van Rees as the "legalistic Dutch member … [who] tended to say whatever he liked (often at length)." S. Pedersen, *Getting Out of Iraq in 1932: The League of Nations and the Road to Normative Statehood*, The American Historical Review 115(4) at 975, 982 (Oct. 2010).

33 *League of Nations, Permanent Mandates Commission, Minutes of the Fifteenth Session Held at Geneva, July 1–19, 1929*, *op cit.*, Twenty-Third Meeting (15 July 1929).

34 *Id.*

35 CO 733/163/4, Letter from Director of the Mandates Section, League of Nations, to World Zionist Organization (March 1929).

36 This fulfilled a requirement under the Mandate that the Jewish Agency "shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home." Cmd. 1785, *op. cit.*, Art. 4, para. 2.

37 Zionist Organisation, Resolutions of the 16th Zionist Congress, Zurich, July 28th to August 11th, 1929 at 11 para. 3 (1930).

38 Shaw Commission Report, *op. cit*. at 48–49.

39 Shaw Commission *In Camera* Transcript, *op. cit.*, Luke testimony at A.11–12.

40 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor letter to his son Christopher (30 September 1929).

41 Luke Diary, *op. cit.* 19 June 1929.

42 Shaw Commission Report, *op. cit.* at 38; M. Kolinsky, *op. cit.* at 40.

43 Shaw Commission Report, *op. cit.* at 44.

44 *Id.*

45 Quoted in Shaw Commission Report, *op. cit.* at 46.

46 *Id.*

47 *Id.* at 46–47.

48 *Id.* at 48–49.

49 Shaw Transcript and Exhibits *op. cit.*, Testimony of Major Alan Saunders at 5, paras. 19–24.

50 Shaw Commission Report, *op. cit.* at 49–50.

51 *Id.* at 50.

52 *Id.* at 51.

53 *Id.* at 53.

54 *Id.*

55 The Acting Commandant of the Palestine Police, Major Alan Saunders, later testified before the Shaw Commission that the Jewish "procession started down from the Lemel School[], came down the Street of the Prophets, Serge Street, Queen of Milisandra Street, Jaffa Road to Allenby Square, General Post Office, down Suleiman Road to Damascus Gate into the Old City to the Wailing Wall, returning from the Wailing Wall through the Street of the Chain up to Jaffa Gate past the Zionist Executive Offices to the Zionist Cinema and up to the headquarters of the Brith Trumpeldor." Shaw Transcript and Exhibits, *op. cit.*, Vol. I at 63, para. 1309.

56 Shaw Commission Report, *op. cit.* at 53–54.

57 *Id.*

58 Luke Diary, *op. cit.*

59 Shaw Commission Report, *op. cit.* at 55. The Report says the Beadle, "the only Jew present at the Wall, was hustled and his clothes were torn." According to Bentwich, most of the Muslim demonstrators "passed on in an orderly way." Bentwich (1932), *op. cit.* at 184. Samuels, in his book published only a few months later, says two other Jews beside the Beadle were at the Wall and an Arab policemen saved both of them. The Beadle, however, was "attacked and beaten by the crowd of Arabs." Samuels, *op. cit.* at 48.

60 Bentwich (1932), *op. cit.* at 185.

61 Luke Diary, *op. cit.*, 16 August 1929.

62 Shaw Commission *In Camera* Transcript, *op. cit.*, at A.9–10 [emphasis added].

63 Sir Harry Luke Collection, *Palestine Riots, 1929: Narrative by the Officer Administering the Government*, Ref. No. GB165-0188, Box 5 File 5/4, Middle East Centre Archive, St. Antony's College, Oxford.

64 Sir Harry Luke Collection, *op. cit.*, Box 5, File 5/3, Letter from Executive Committee, Palestine Arab Congress to Luke (18 August 1929).

65 Shaw Commission Report, *op. cit.* at 57.
66 *Id.* at 56.
67 Luke sent a lengthy despatch to the Colonial Secretary on 22 August summarizing all the events of the prior week. Chancellor Papers, *op. cit.*, Box 12/2, Confidential Despatch from Luke to Secretary of State for the Colonies (22 August 1929), Ref. No. 840/29. The Colonial Office's copy is at CO 733/175/2.
68 Shaw Transcript and Exhibits, *op. cit.*, Vol. I at 319, paras. 8173, 8177.
69 Luke Diary, *op. cit.*, 22 August 1929; N. Caplan, *Futile Diplomacy: Early Arab–Zionist Negotiation Attempts, 1913–1931 (Vol. I)* at 81 (Frank Cass, 1983).
70 Kolinsky, *op. cit.* at 44.
71 *Id.* at 45.
72 Shaw Commission Report, *op. cit.* at 62. Luke's diary entry for 23 August 1929 says he met with the Mufti and asked him to try to persuade the crowd to disperse peacefully. Luke says the Mufti "complied, but his arrival appeared to excite rather than to calm the mob." The remainder of Luke's diary entry for that day focuses on everything Luke did to bring police and military reinforcements to Jerusalem. Luke's entry is written, once again, to put his actions in the best possible light ("On first sight of troubles from my offices … I ordered up Armored Cars with all speed from Ramleh … I sent for an immediate cable to Secretary of State for a batallion … "). Luke Diary, *op. cit.*, 23 August 2023 1929.
73 Shaw Commission Report, *op. cit.* at 66–67.
74 Shaw Transcript and Exhibits, *op. cit.*, Vol. I at 314, para. 8074.
75 Shaw Commission Report, *op. cit.* at 64. The Mufti and other Muslim leaders issued a "Manifesto to our Arab Brethren" on 24 August to "quell the riot, avoid bloodshed and save life," but it had little or no impact. Chancellor Papers, *op. cit.*, Box 12/2.
76 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 8, *Report by Mr. Cafferata on Events in Hebron on the 23d and 24th of August, 1929* at 983, 985 para. 28.
77 *The Times*, A Visit to Hebron: Evidence of the Massacres, 2 September 1929 (original article pasted into Luke's Diary page for 2 September 1929); Shaw Commission Report, *op. cit.* at 64 (commending Cafferata's "exceptional personal courage"). For a more nuanced view of Cafferata's performance of his duty, *see* H. Cohen (2015), *op. cit.* at 125 (noting the "rumors, still accepted as true today by some elderly Hebron Muslims, that Cafferata had both egged on the murderers and killed them as well"); *see also* Letter from *Vaad Leumi* to High Commissioner Chancellor (5 September 1929), Chancellor Papers, *op. cit.*, Box 12/2 (accusing Cafferata of standing by and doing nothing while a Jew named Leibel Haitel was murdered in front of him and five other policemen).
78 Segev, *op. cit.* at 315.
79 Shaw Commission Report, *op. cit.* at 59. Luke had warned the Colonial Office in his 22 August dispatch that he did not believe "riots on a scale of appreciable dimension could be successfully quelled with the Police Force in Palestine at my disposal, and the Air Force and the Transjordan Frontier Force also at my disposal but on the east of the Jordan." Confidential Despatch from Chancellor to Secretary of State for the Colonies at 25, para. 17 (22 August 1929), Ref. No. 840/29, Chancellor Papers, *op. cit.*, Box 12/2.
80 Kolinsky, *op. cit.* at 51.
81 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor letter to his son Christopher, (8 October 1929).
82 Kolinsky, *op. cit.* at 42.
83 Sir Harry Luke Collection, *Palestine Riots, 1929: Narrative by the Officer Administering the Government, op. cit.*
84 CO 733/175/2, Letter from Weizmann to Lord Passfield at 4, para. 4 (29 August 1929). The Colonial Office informed Chancellor less than seven months later of their decision to transfer Luke to a different post away from Palestine. Chancellor Papers, *op. cit.*, Box 16/4, Shuckburgh letter to Chancellor (18 March 1930).
85 http://hdl.loc.gov/loc.pnp/matpc.03044, accessed 16 September 2019, original Proclamation located in Chancellor Papers, *op. cit.*, Box 5/2.
86 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 23 at 1036–37 (Letter from Arab Lawyers to High Commissioner, 4 September 1929); *see also* Letter to High Commissioner from Said al-Khatib on behalf of the Society for the Protection of the Mosque of *Aksa* and Moslem Holy Places (3 September 1929) (protesting against Proclamation).
87 *Id.* at 1037 [emphasis added].
88 Chancellor issued another Proclamation several days later, seeking to soothe Arab anger, noting the conduct of both sides during the disturbances would be scrutinized. Bentwich (1932), *op. cit.* at 188.
89 Id., *see also* Luke Papers, Box 5 file 5/2, Letter from Said al-Khatib, Society for the Protection of the Mosque of *Aksa* and the Moslem Holy Places to the High Commissioner (3 September 1929). The Palestine Arab Executive issued a separate counter-proclamation, but using the same language as al-Khatib's letter. *Id.*
90 *Id.*, Letter from Jewish leaders to the High Commissioner (2 September 1929).
91 League of Nations, Permanent Mandates Commission, *Seventeenth (Extraordinary) Session of the Commission (Geneva, June 3–21, 1930)*, Official No. C.355.M.147.1930.VI, C.P.M. 1042(1) and 1043(1) at 130–31.
92 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor diary entry (11 October 1929)
93 CO 733/163/5 (1 October 1929).
94 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 41 at 1047–48 (Letter from Chief Secretary Mills to Chief Rabbi Kook,

1 October 1929).

95 CO 733/163/5, Letter from Muhammad Amin, President, Supreme Moslem Council to Chief Secretary, 7 October 1929.

96 CO 733/163/5, Letter from Chief Rabbi Kook et al. to High Commissioner (13 October 1928).

97 Lundsten, *op. cit.* at 24 ("Muslim and Christian Arab leaders repeatedly and angrily protested" the new Instructions).

98 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 109 (Letter from Society for the Guardianship of the Mosque *al-Aksa* and the Moslem Holy Places to Chief Rabbi Kook, 14 November 1929).

99 Lofgren Commission Transcript, *op. cit.* at 753.

00 CO 733/175/3, Record of Interview with the President of the Supreme Moslem Council (1 October 1929).

01 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor letter to his son Christopher (7 October 1929). Chancellor later recorded in his Diary that *Yom Kippur* passed peacefully, as "[Pinchas] Rutenberg went to the Rabbis & made them arrange that after the ceremonies at the Wall, the congregation should march to a synagogue in the neighbourhood, where the Ram's horn should be blown to bring the service to a close, and that was done! How childish it all is!" *Id.*, Chancellor letter to his son Christopher (14 October 1929).

02 CO 733/163/5, Minutes of Meetings between the High Commissioner and the Arab Executive (Oct. 14 and 17, 1928). Chancellor sent a Telegram (no. 252) on 15 October 1929 and a more formal Despatch dated 19 October 1929 to the Colonial Office reporting on the two Muslim telegrams. *Id.*

03 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (24 October 1929). Chancellor confided to his son several months later he opposed "the policy of the Balfour Declaration & consider that it is unjust to the Arabs & detrimental to the interests of the British Empire & for that reason I do not like being associated with it." *Id.*, letter from Chancellor to his son Christopher (21 February 1930). This statement from the High Commissioner, the top British official responsible for complying with the directive under Article 2 of the Mandate to implement the Balfour Declaration, is remarkable.

04 CO 733/163/5, Bushe handwritten minute dated 20 September 1929.

05 Storrs Memo, *op. cit.* at 2, para. 6.

06 Despatch from General Clayton to the Foreign Office (31 August 1918), *reproduced in* Priestland, *op. cit.*, Vol. I at 232–33.

07 Despatch from General Clayton to the Foreign Office (1 October 1918), *id.* at 237–38.

08 *See* Segev, *op. cit.* at 71–73; Porath, *op. cit.* at 258–59, 265; H. Cohen, *op. cit.* at 70–72.

09 Mattar, *op. cit.* at 109.

10 *Id.*; *see also* Weizmann Archives 7–1236, Letter from Kisch to Weizmann (29 October 1928, advocating for initiative to be launched to buy the Wall for £100,000); *see also* Wasserstein, *op. cit.* at 224.

11 Weizmann Archives 34–1229, Letter from Kisch to Zionist Executive (3 October 1928).

12 FO 371/13,746, E 4223, Letter from Holman to Lord Monteagle, 26 August 1929. Menasce sent a handwritten letter to Weizmann later that same day reporting on his meeting at the British Embassy in Paris. Weizmann Archives 1-156L (letter from Menasce to Weizmann, 26 August 1929). Menasce wrote, *"J'ai la conviction c'est le moment psychologique de transfer tout l'argent necessaire, si jamais les Juifs deraint acheter ce Wakf … "* ("I am convinced that if the Jews are ever going to buy this Wakf, this is, psychologically, the right time to find all the necessary money … ") *Id*. (translation courtesy of Dr. Harriet Beegun Leva). No record has been found of Weizmann's reaction to the proposal, or whether he ever responded to Menasce.

13 *FO 371/13,476, E 4223*, Letter from Rendell to Holman (7 September 1929).

14 CO 733/163/7, Letter from Rutenberg to Lord Reading, 29 August 1929; *see also* CO 733/175/2, Letter from Weizmann to Lord Passfield (also 29 August 1929) (noting "a final and radical settlement of the Wailing Wall question is urgently necessary. Lord Reading will as soon as possible lay before you definite proposals representing what, in our considered opinion, is the minimum necessary if this question is to cease to trouble the peace in Palestine").

15 *See* Lundsten, *op. cit.* at 16 (*Va'ad Leumi* urged expropriation in October 1928).

16 CO 733/163/7, Letter from Lord Reading to the Prime Minister (30 August 1929).

17 CO 967/91, Commission of Enquiry on Disturbances of August, 1929, Chairman's Copy of Evidence Taken In Camera, Testimony of Pinchas Rutenberg, Managing Director, Palestine Electric Corporation at 45 (1 November 1929) [emphasis added].

18 CO 733/163/5, O.G.R. Williams minute (6 September 1929); *see also id.*, O.G.R. Williams minute (2 September 1929). Lord Reading persisted, writing again to Lord Passfield a few days later and urging him to "not close your mind to the possibilities of some method of acquisition of the property suggested other than by negotiation." CO 733/163/5, Letter from Reading to Passfield (4 September 1929).

19 League of Nations, Permanent Mandates Commission, *Minutes of the Fifteenth Session Held at Geneva, July 1–19, 1929*, Eleventh Meeting (6 July 1929), *op. cit.*

20 *Id.*; *see also* CO 733/163/4, Letter from High Commissioner Chancellor to Shuckburgh (12 January 1929).

21 Weizmann Archives 17–1969, Letter from Alec Alexander (Cairo-based British lawyer) to Weizmann (10 March 1937). In the same letter Alexander also described Ali Pasha as "the one person who could use his good offices to bring about peace between Muslims and Jews." Alexander also noted Lord Peel and Sir Horace Rumbold met with Ali Pasha on a visit to Cairo in early 1937 on behalf of the Palestine Royal Commission (*see* chapter 5, *infra*).

22 Sir Ronald Storrs described Ali Pasha as "Prince Muhammad, afterwards Regent, with his great 'lucky' emerald ring, the

revived Oriental splendours of his Manial Palace, his courtly bearing and graceful entertainment; his fine devotion to his mother." R. Storrs, *The Memoirs of Sir Ronald Storrs* at 102 (G.P. Putnam's Sons, 1937).

23 CO 733/163/5, Letter from Prince Mohammed Ali Pacha (spelled "Pacha" on the Prince's calling card, which he gave the Ambassador along with his letter) to High Commissioner John Chancellor (29 August 1929).

24 CO 733/163/5, Letter from Amb. George Clerk to Foreign Secretary Arthur Henderson (3 September 1929).

25 *Id.*

26 E4557/204/65, Foreign Office Index (1929).

27 Less than one month later, Chancellor sent a dispatch to the Colonial Secretary, Lord Passfield, enclosing a memorandum from Lieutenant-Colonel P.G. Peake, the Officer Commanding the Arab Legion, in which Lt. Col. Peake stated "I have very little doubt, however, that the Wailing Wall controversy, serious as it was, since religious matters are involved, could have been amicably and fairly settled … " There is nothing in Chancellor's dispatch indicating he was aware of the offer from Mohammed Ali Pasha three weeks earlier to sell the Wall to the Jews. Confidential Despatch from Chancellor to Lord Passfield, Ref. No. 5444/29 (21 September 1929), Chancellor Papers, *op. cit.*, Box 11/4. One year later, Luke told the Permanent Mandates Commission that during the early days of the British occupation of Palestine, "negotiations had been started by the Jews for the purchase of the pavement of the Wailing Wall from the Abu Wadian Waqf. These negotiations had broken down." Permanent Mandates Commission, Minutes of the Seventeenth (Extraordinary) Session held at Geneva, *op. cit.* at 18 (third meeting, 4 June 1930). Luke made no mention of the Ali Pasha letter, nor is there any indication in his files that he had ever learned of it.

28 CO 733/163/5.

3

THE SHAW COMMISSION

Introduction

Almost immediately following the terrible violence of August 1929, all three protagonists – Arab, Jewish, and British – once again invoked the law and the legal process as their tool or weapon of choice in the conflict between Jews and Arabs in Palestine. The parties quickly coalesced, for different reasons and with different agendas, around the need for a formal inquiry into the causes of the riots and to assign blame to those responsible.[1]

Britain responded by appointing the Shaw Commission to investigate the causes of the outbreaks and recommend steps to prevent a recurrence. The Commission conducted an unprecedented and dramatic three-way public trial in which the Jews, the Arabs, and the Mandatory Government – each represented by outside lawyers from England and Palestine – faced off against each other for more than two months. The lawyers made opening statements and closing arguments, cross-examined opposing witnesses under oath, and introduced hundreds of pages of documents into evidence. The Arab side persuaded the Commission to examine major policy issues, such as the McMahon-Hussein correspondence and ownership of the Wailing Wall. The Jewish side failed to convince the Commission that the Arabs had premeditated the August 1929 violence, or that the Palestine Government could have done more to protect the Jews. The Commission eventually issued a report blaming both the Jews and the Arabs for the violence, while exonerating the Mandatory Government. The result represented a sweeping victory for the Arabs in the first-ever courtroom clash between the two sides.

Formation of the Shaw Commission; Weizmann's role

Chaim Weizmann, the President of the Zionist Organization and Chair of the Jewish Agency, personally and very actively led the effort for the Jewish side to convince the British Government to appoint a commission of inquiry. On 25 August 1929, the day after the Hebron massacres, Weizmann sent an urgent cable to Prime Minister Ramsay MacDonald, requesting an independent inquiry to determine responsibility for the violence of the prior week: "Further distressing news from Palestine compels me to address you respectfully urgent request to take all measures to prevent further pogroms and institute independent inquiry which would clearly elucidate responsibility."[2]

Weizmann met with the Colonial Secretary, Lord Passfield, three days later to discuss the Jewish position on how to address the recent violence. Weizmann memorialized their discussion in a letter to Passfield the following day, 29 August.[3] Weizmann recapitulated the Jewish

demands: first, a "final and radical settlement of the Wailing Wall question is urgently necessary"; second, re-arm the Jewish Constables and the Haganah; third, compensate the Jewish victims of the violence; fourth, remove both Luke and Cust from their jobs; fifth, reiterate Britain's commitment to the Balfour Declaration; and sixth, issue a "substantial number" of immigration certificates to be placed at the disposal of the Jewish Agency for dissemination as they saw fit.[4]

That same day, 29 August, High Commissioner John Chancellor cabled Passfield, stressing the urgent need to appoint a commission of enquiry composed of impartial British members.[5] The next day Passfield informed Chancellor he had spoken to the Prime Minister and decided:

> [T]o send a Commission of Enquiry to Palestine with terms of reference to enquire into causes which have led to recent outbreak and action necessary to prevent a recurrence in the future. It will be made clear that the scope of the enquiry will be definitely limited to these points and that no reconsideration of our position in Palestine or of Mandate is contemplated. I propose to appoint as Chairman a Colonial Chief Justice serving or retired or a person of similar standing and other members of Commission will probably be one member of Parliament from each Party.[6]

Lord Melchett wrote a "secret and personal" letter to Lord Passfield on 30 August 1929 urging him to appoint a "statesman, a soldier and a lawyer" to a commission of inquiry, and to give the Jews and Arabs the ability to retain counsel to examine witnesses and proffer evidence.[7] On 2 September 1929, the leaders of the major Jewish organizations in Palestine also wrote to Chancellor, requesting the British Government appoint an independent commission of enquiry.[8]

The next day, 3 September 1929, the Society for the Protection of the Mosque of Aqsa and the Muslim Holy Places also wrote to Chancellor, demanding "an impartial inquiry be made by outsiders whose sense of justice is not disturbed by Zionist influence … [w]e are confident that an impartial inquiry will no doubt be in favor of the Arabs." The letter expressed the expectation that such an inquiry would reveal the two sole causes of the disturbances were that (i) the Jews "exceeded every limit in their ambitions and transgressions even upon sanctuaries and religious rights," and (ii) the British pursued pro-Zionist policies while delaying enforcement of the 1928 White Paper.[9]

The British Government acted without delay. The Colonial Office notified the press that same day, 3 September 1929, that His Majesty's Government had decided to appoint a Commission of Enquiry to be chaired by Sir Walter Shaw, the former Chief Justice of the Straits Settlements.[10] The other Commissioners, named later, were MPs representing the three major British political parties: Sir Henry Betterton (Conservative), Rhys Hopkin Morris (Liberal) and Henry Snell (Labour). Snell was the only member of the Commission without legal training.[11] Thomas Ingram Lloyd of the Colonial Office subsequently was appointed Secretary of the Commission.[12]

The Colonial Office's public announcement regarding the newly appointed Commission said:

> At the request of the High Commissioner, the Secretary of State for the Colonies is appointing a Commission of Enquiry which will proceed to Palestine this month to enquire into the immediate causes which have led to the recent outbreak, including the extent to which it may be regarded as having been preconcerted or due to organized action. In view of suggestions which have been made in certain quarters, the Secretary of State desires to make it clear that the government has no idea of reconsidering the British tenure of the Mandate for Palestine and that no inquiry is contemplated which might alter the position of the country with regard to the Mandate or the policy laid down in the Balfour Declaration of 1917 and embodied in the Mandate of establishing in Palestine a national home for the Jews. The inquiry now initiated, therefore, is limited to the immediate emergency and will not extend to considerations of major policy. When its report has been received it will be a matter of earnest consideration by His Majesty's government along what lines within the terms of the Mandate, the future policy in Palestine should be directed.[13]

Behind the scenes, the Colonial Office explained its strategy for selecting Shaw, who was "slightly deaf and of no great reputation."[14] The Commission was to be something of a lightweight body, not composed of "eminent statemen or distinguished soldiers." Thus, no matter what the outcome, the Commission would lack sufficient stature and prestige to enable the Jews to pressure the Government to change the manner in which the Mandate was being administered, or the Arabs to pressure the Government to abandon the Mandate altogether.[15]

Chancellor, evidently unaware of these internal discussions, cabled Passfield on 5 September, noting

> [i]n view of the fact that the Inquiry to be conducted by the Commission appointed by you will necessarily be largely of a judicial character and in view of the probability that much of the evidence laid before it will be of a conflicting nature I strongly urge that as many as possible of the members of the Commission be selected for legal and if possible judicial experience.[16]

Chancellor was not impressed, however, when he met Shaw in person for the first time shortly after Shaw and the other Commissioners arrived in Palestine. Chancellor wrote, "I like the Chairman Sir Walter Shaw, though I am doubtful he is a person of much force."[17]

Meanwhile, Weizmann pushed the British Government to ensure the Shaw Commission would conduct a thorough, judicial-type inquiry, and be vested with the appropriate legal powers to do so. On 9 September, he wrote to the former British Chief Political Officer for Palestine, Richard Meinertzhagen,

> I am today making an application for judicial powers to be given to the Commission, and for us to be allowed to engage counsel and cross-examine witnesses on oath. That is the only way to make the Commission of Enquiry a real thing and not a purely whitewashing business.

Weizmann went on to speculate about the final, as yet unfilled seat on the Commission, saying,

> I understand that the Conservative member of the Commission is not yet appointed, nor is the secretary. I wonder whether Passfield will make this offer [to sit on the Commission] to you. We would then feel there is at least one who would see to it that justice is done. … The most important thing is to save the Commission, otherwise we shall have no redress at all.[18]

The next day Weizmann wrote to Passfield, lobbying the Colonial Secretary to give the Commission sufficient judicial and legal powers, including subpoena power:

> The Jewish Agency is … making the necessary arrangements to be represented by Counsel before the Committee which is about to enquire into the disturbances in Palestine. We shall be glad to learn that the Committee has been directed to hear Counsel, and to permit Counsel to call and to examine and cross-examine witnesses. We also assume the Committee will have power to call for witnesses and documents and to take evidence on oath. It may be that an emergency Ordinance should be passed in Palestine in order to give the Committee these and all the other powers of a judicial body as understood in England …[19]

On 19 September Weizmann wrote to Passfield again, saying

> [T]he matter is now of such urgency that it has become of vital importance that all such questions of procedure as can be settled at this stage should be decided without delay. It is understood unofficially that the Commission propose to permit Counsel to appear on behalf of interested parties, but the Jewish Agency would be glad to have official confirmation of this point.[20]

Terms of Reference and procedure

Terms of Reference

Meanwhile, the British Government wrestled with how to define the Terms of Reference for the Shaw Commission. Two key issues dominated the internal discussion; first, whether the Commission should explore major policy issues, such as the Balfour Declaration, the Mandate, Jewish land purchases, and Jewish immigration, as had been urged by the Arabs; and second, whether the Commission should determine, as already indicated in the 3 September public announcement, "the extent to which [the violence] may be regarded as having been preconcerted or due to organized action."[21]

On the first issue, the Arabs had urged very broad terms of reference to allow the Commission to delve into all aspects of British policy in Palestine and Zionism, hoping the Commission could be used as a legal lever to attack the Balfour Declaration.[22] The Government, on the other hand, wanted a more limited and less politically sensitive inquiry, focused on the causes of the violence and how to prevent recurrences. Ultimately the Government stood its ground and refused to broaden the terms of reference. Passfield noted a "Commission of this character is the right course, as not arousing expectation of reconsideration of mandate, or indictment of past administration."[23] As we shall see, however, the lawyers for the Arab side succeeded in persuading the Commission to receive evidence and consider major policy issues anyway, arguing it was important to do so to understand the "impression" those issues had made on the "state of mind" of the Palestine Arabs.

Regarding the second issue, the Government decided to eliminate the "preconcerted or due to organized action" language from the terms of reference, while quietly informing the Commission it could investigate premeditation anyway if it chose to do so. The Government was concerned that allowing the language to remain in the official Terms of Reference would anger the Arabs, who were sure to read the phrase "preconcerted or due to organized action" as signaling the British had already decided the Arabs were guilty of having premeditated the violence, much as Chancellor had appeared to do in his 1 September 1929 Proclamation. The British did not want to give the Arabs any excuse to boycott the Commission, and therefore they deleted the language.

Thus, the final Terms of Reference for the Commission were to "enquire into the immediate causes which led to the recent outbreak in Palestine and make recommendations as to the steps necessary to avoid a recurrence."[24] Behind the scenes, however, the Colonial Office privately told Shaw he could interpret the Terms of Reference as "intended to include inquiry into the extent to which the outbreak may be regarded as having been preconcerted or due to organised action."[25]

Weizmann also asked Passfield to clarify whether the Commission would have the power

> to enquire into or decide or report upon the rights and wrongs of the controversy in regard to the Wailing Wall, or, indeed, to go more fully into this matter than would be sufficient to establish to what degree, if any, the existence of such a controversy was one of the immediate causes of the outbreak.[26]

The Arabs agreed to participate in the hearings under protest, while continuing to press for the Commission to address major policy issues. An official of the Arab Executive noted in a late October 1929 letter to the Commission that the only way to truly understand what happened in August 1929 and prevent recurrences would be for the Commission to render judgment on the "real causes which have engendered and will engender disturbances in the country."[27]

Testimony under oath; cross-examination

In addition to the debate over the Terms of Reference, the British Government also wrestled with two key procedural questions; first, whether the Commission, as Weizmann had repeatedly demanded, would have full judicial powers, including the power to compel witnesses to testify under oath, to subpoena witnesses and documents, and to permit counsel to cross-examine witnesses and make opening statements and closing arguments.[28]

Second, the British Government considered whether the Mandatory Government should be required to appear before the Commission as a party to the proceedings. The Prime Minister had suggested the Palestine Government participate not as a neutral observer, but as a party, meaning its conduct during the riots was to be included as an issue for the Commission to scrutinize.[29] The Colonial Office acquiesced, and the Commission required the Government of Palestine to appear as a party to the proceedings.

The Commissioners initially decided not to conduct a judicial-type inquiry, meaning the parties would not be allowed to question witnesses under oath,[30] prompting Weizmann to ask Lord Reading to intercede with the Prime Minister.[31] A few days later, the Commission reversed itself and agreed to allow a full-scale, trial-type proceeding, with witnesses sworn and subject to cross-examination, as well as permitting opening statements and closing arguments of counsel.[32]

The Commission justified the change of course at the very beginning of its Report by noting:

> After consideration of the question of the procedure to be adopted in the conduct of our enquiry we decided to seek powers enabling us to require evidence to be given on oath or declaration and to compel the attendance of witnesses and the production of documents … Though the enquiry which we were commissioned to make was not in any sense a public judicial proceeding we felt that the object of our mission would be furthered by the appointment of persons to represent before us the interests of the parties principally concerned in the enquiry … namely the Palestine Government, the Palestine Arab Executive and the Palestine Zionist Executive.[33]

The Colonial Office also decided to request approval from the Treasury for the expense of preparing and printing verbatim transcripts of the public proceedings and testimony, to avoid any later accusation from the League of Nations that the British Government had in any way attempted to suppress the evidence presented to the Commission.[34]

Counsel selection

Weizmann also took the lead in hiring lawyers to represent the Jewish side. Weizmann wrote to Louis Lipsky, the President of the Zionist Organization of America on 13 September that "[w]e are making all preparations for best legal talent."[35] Weizmann approached the New York-based banker Felix Warburg about helping fund the cost of lawyers,[36] while simultaneously fending off Warburg's attempt to send American lawyers to handle the case for the Zionists:

> Arrangements already far advanced with [Lord] Reading's advice for legal representation Jewish interests including engagement eminent counsel here, competent lawyers now at work in Palestine on collection evidence. [Harry] Sacher leaves next week to take charge preparation of our case. Appreciate suggestion regarding [Jonah] Goldstein and Louis Levy [American lawyers], whose services would doubtless be valuable, but anxious to avoid possibly overlapping due multiplicity legal advisers …[37]

Weizmann wrote to Kisch of the Palestine Zionist Executive a few days later:

> Now that the Commission of Enquiry has been definitely constituted, the preparation of our case has become a matter of the utmost urgency and importance … Eminent counsel are being engaged here to conduct the case before the Commission on our behalf … As a result of a conference last Friday at which the leading Counsel whom it is proposed to brief, namely Sir Boyd Merriman, a former Solicitor-General, and Lord Erleigh, were present, the general lines on which it is thought that our case should be presented were agreed upon and Sacher is fully cognizant of the main points to be borne in mind in the collection of evidence and the general preparation of the material.[38]

The Shaw Commission, having acceded to Weizmann's demand to conduct a full-scale, trial-type proceeding, allowed the Arab and Jewish parties to name a maximum of six lawyers to represent each side, thereby further underscoring "the legal character of the inquiry."[39]

Table 3.1 identifies the most important players in the hearings.

TABLE 3.1 Shaw Commission: key players

Commissioner/Counsel	*Affiliation*	*Client*
Sir Walter Shaw, Chairman	Former Colonial Judge	N/A
Sir Henry Betterton, Commissioner	Conservative MP	N/A
Sir R. Hopkin Morris, Commissioner	Liberal MP	N/A
Henry Snell, Commissioner	Labour MP	N/A
Sir Boyd Merriman	Former (and future) UK Solicitor General (Conservative Party); one of two Law Officers rendering 1929 opinion regarding *Status Quo*; future President of London Divorce Court, signed final decree granting divorce to Wallis Simpson, leading to abdication of King Edward VIII in 1936	Palestine Zionist Executive
Lord Erleigh (Gerald Rufus Isaacs)	Barrister, son of Lord Reading	Palestine Zionist Executive
William Stoker	Former Colonial Attorney General	Palestine Arab Executive
Auni Bey Abdul-Hadi	Lawyer and Palestinian nationalist; future leader of *Istiqlal* Party	Palestine Arab Executive; Supreme Moslem Council
Kenelm Preedy	Junior Barrister, United Kingdom	Government of Palestine
Robert Drayton	Solicitor General, Government of Palestine	Government of Palestine

The Arab Executive appointed William H. Stoker, a former Colonial Attorney General to serve as its Chief Counsel.[40] The Arabs also selected the well-known, "forceful and eloquent" Arab lawyer Auni Bey Abdul-Hadi,[41] plus Reginald Silley and M.E. Moghannam.

The Zionist Organization retained Sir Boyd Merriman, the former Solicitor General of the United Kingdom in the prior conservative government. Merriman was one of Britain's most famous barristers, and he served as one of the two Law Officers who had rendered the legal opinion regarding the Wailing Wall only a few months earlier.[42] The Zionist side also retained Lord Reading's son, Lord Erleigh, plus Solomon Horowitz, W.A. Davies, S.E. Karminiski and Leonard Stein.[43]

The Colonial Office arranged for the Mandatory Government to be represented by Kenelm Preedy, "a barrister with a reputation for combativeness," assisted by Robert Drayton, the Solicitor General of Palestine.[44] Chancellor wrote:

The Jews have engaged expensive counsel in England to represent them. The Arabs will probably now do so too, & the Sec. of State [Passfield] has recommended that the Government of Palestine should engage experienced Counsel from England to represent them before the Commission, as the acts of a number of Government officers will be attacked by the Jews. I have of course agreed to that suggestion, as I want to give my fellow officers every protection in my power.[45]

FIGURE 3.1 Sir Boyd Merriman

(Shutterstock Images).

As will be seen, the transcript of the hearings[46] reveals two important aspects about the various lawyers for all three sides. First, Merriman was the most impressive courtroom lawyer,

demonstrating a superb mastery of the facts, including the contents of the massive amounts of documents that would become part of the evidence before the Commission. At the same time, however, Merriman also displayed an alarming level of arrogance and ego that overshadowed his legal skills. He repeatedly irritated the other lawyers and frequently goaded Preedy into trivial clashes over matters that bore little or no relevance to the key issues in the proceeding.

Perhaps Merriman's role as the former Solicitor General of the United Kingdom and his reputation as one of Britain's top barristers caused him to believe he could have his way with the other counsel and the Commission, or perhaps he was simply a supremely self-confident and egotistical trial lawyer who thought he was better than everyone else in the courtroom. Preedy also relished the combat with Merriman and the Jewish witnesses, frequently engaging in highly unprofessional behavior in the hearing room. Bentwich later bemoaned that "[w]hat might have been an open and straightforward enquiry into the events of the riots became a forensic contest which was dominated by the arts of Counsel."[47]

Stoker, on the other hand, while not a great trial lawyer, somehow managed to do by far the best job for his clients. Before the hearings began, the Palestine Government in Chancellor's 1 September Proclamation had publicly accused the Arabs of perpetrating the massacres. By the time the hearings had concluded, however, Stoker had quite effectively managed to align the Arab side with the Palestine Government and put the Jews on the defensive.

Stoker also succeeded in engaging the Commission's interest in considering the very matters of major policy the Arabs had always hoped to include and the British Government and Weizmann had hoped to avoid. The Jews had clearly underestimated Stoker, as revealed in this exchange between Weizmann and Lord Lugard, the British member of the Permanent Mandates Commission of the League of Nations:

> Lugard: Pity you didn't ask me about Stoker before. He was a puny [sic, 'puisine'] judge in Nigeria when I was Governor and he is a poor creature.
>
> Weizmann: I answered that I really wasn't interested in Stoker's reputation, he was not our counsel but the counsel for the Arabs, and I was surprised the Arabs couldn't get a better man as they had plenty of money …[48]

High Commissioner John Chancellor decided the Jewish Attorney General of Palestine, Norman Bentwich, should not participate in the proceedings due to his Zionist sympathies.[49] As it happened, Bentwich would not have been able to participate fully anyway, as an Arab messenger for the Palestine police shot Bentwich on 24 November 1929, midway during the hearings, wounding him in the thigh.[50]

The Shaw Commission was entering uncharted territory, effectively agreeing to an unprecedented, three-way public trial in which the Jews, Arabs, and the Mandatory Government and its top officials would face off against each other's lawyers.

Opening hearing

The Shaw Commission arrived in Palestine on 14 October 1929 and remained until 29 December. The Commission held its first public sitting on 24 October 1929. Chairman Shaw began with a lengthy statement, noting "[t]he tragic events which have recently occurred in Palestine have shocked the conscience of the whole world."[51] Shaw described the Commission's terms of reference – to enquire into the immediate causes of the disturbances and to make

recommendations to prevent future recurrences. Shaw noted the Commission was "precluded from considering questions of major policy. Such questions do not fall within the terms of our reference."[52]

FIGURE 3.2 Sir Walter Shaw (front center), with Sir Henry Betterton (front left), Henry Snell (front right), R. Hopkin Morris (rear left), and T.I.K. Lloyd (rear right)[53]

Shaw next discussed the procedure the Commission intended to follow. He began by saying the Commission was "not here to hold a public or judicial enquiry, nor have we the power of a

judicial or legal body."[54] Shaw said the witnesses would all testify only in private sessions closed to the public. As we shall see, however, the Commission revered itself on both counts – it took almost all witness testimony in public, and in every other respect acted as a court and conducted the proceedings as a trial. Shaw also drew a distinction between the British Government and the Palestine Government, explaining the Commission acted solely on behalf of the former and not the latter. He identified the three parties to the proceeding as the Palestine Arab Executive, the Palestine Zionist Executive, and the Palestine Government.

Shaw concluded the discussion of procedure by saying the Palestine Government should present its case first, prompting Preedy, the lawyer for the Government, to say "I am unaware at the moment of any charges against the Government."[55] Preedy complained to Chancellor later that day, saying "it is really very wrong to have put the Government in the same position as the two other parties."[56] The Arab side would follow the government, with the Jewish side presenting its case last. The Commission took no testimony at its first session, adjourning for a long weekend until Monday, 28 October 1929, the day before the global financial crash.

During the next two months the Commission conducted 46 public sessions and 11 *in camera* sessions in Jerusalem between 24 October and 27 December 1929. The Commission heard testimony from 110 witnesses during the public sessions and from 19 witnesses *in camera*, including several witnesses who had previously testified in public. Of the 110 witnesses who testified in public, 26 were called by the Palestine Government, 47 by the Arab side and 37 by the Jewish side. The Commission also received into evidence 187 documents or collections of documents.[57]

The Commission published its report on 31 March 1930, and also published the transcripts of the public sessions, along with copies of the documentary evidence.[58] The transcripts of the *in camera* sessions were not published. The Chairman's copy of the *in camera* testimony has been stored ever since at the British National Archives in two file folders, containing the testimony of nine of the *in camera* witnesses.[59] Transcripts of all *in camera* witness testimony are stored at the National Library of Wales in the Rhys Hopkin Morris collection.

The trial

Saunders testimony

On the first day of testimony, the parties agreed that before giving opening statements it would be best to hear the testimony of Major Alan Saunders, who had served as the Acting Commandant of the Palestine Police and Prisons Department during the riots, to give the Commission an overview of the facts.[60] The discussion about how much of the facts the parties would be able to elucidate from Saunders' testimony led to the first of many flare-ups between Preedy and Merriman, with Merriman sarcastically accusing Preedy of not giving him "credit for having a little knowledge of the rules of advocacy."[61]

Following Preedy's direct examination of Saunders, Stoker conducted the first cross-examination of the hearings, but treated Saunders as a friendly witness. Stoker, ignoring the limitations of the Terms of Reference, immediately asked Saunders about an issue of major policy – Muslim ownership and Jewish rights of access to the Wall and the pavement in front of the Wall:

Q: What is called the Wailing Wall is, I understand, part of the wall including the Mosque?

A: That is so.

…

Q: I may put it quite shortly. It has been well established that [the pavement in front of the Wall] is the property of what is called *Wakf*?

A: The whole area is the property of the Moslem *Wakf*.[62]

Stoker then elicited an admission from Saunders that the Jewish practice of bringing "chairs and tables and other things" to the pavement was an "innovation," meaning a breach of the *Status Quo*.[63] Merriman did not object to any of these questions, even though they clearly fell well beyond the scope of the Commission's Terms of Reference.

A short time later, during Merriman's cross-examination of Major Saunders, Commissioner Hopkin Morris interrupted to ask Merriman about the applicability of Article 14 of the Mandate to the Wailing Wall. Merriman reminded the Commission he had served as one of the Law Officers who had been consulted about the legal status of the Wailing Wall, and thus would need to recuse himself from any discussion of those issues. Merriman said he would have to express his opinion on the subject "very guardedly," and the question put him in the "very gravest difficulty," meaning he did not want to be in the position of having to choose between his former client (the British Government) or his current client (the Palestine Zionist Executive).[64] As the hearings proceeded, however, the issue of the parties' rights at the Wall repeatedly came up, but Merriman never again raised any concerns about the potential conflict between his prior role as one of the Law Officers and his current role as Counsel for the Palestine Zionist Executive.

The evidentiary door opens

During Saunders' testimony, Preedy suggested that even though the Commission would not be making any legal decisions regarding the Wall, "you will certainly have to ascertain what was in the minds of the people of this country which led to these disasters." The Arab and Jewish "state of mind" was, Preedy argued, relevant to the Commission's determination of both the causes of the violence and their recommendations to prevent any recurrence. Commissioner Betterton, who had been leaning against allowing the testimony and adhering closely to the Terms of Reference, suddenly embraced Preedy's argument as "another point altogether."[65] Stoker immediately joined in, saying "[t]hat is the reason, if I may say so, why I introduced the subject."[66] Merriman then walked right into the trap: "I agree entirely with what Mr. Preedy has said. You cannot ignore … the nature of the controversy at the Wailing Wall and the incidents that happened around it …"[67]

From that moment forward, the door was open to allowing enormous amounts of evidence regarding major policy issues that should have been out of bounds, such as the impact of the McMahon-Hussein correspondence on the Arab "state of mind" regarding the legitimacy of the Balfour Declaration; the parties' "state of mind" regarding infringements on their legal rights at the Wall; and the Arab "state of mind" regarding Jewish immigration and land acquisition.

Merriman had unwittingly agreed to the very Arab demands regarding the scope of the Commission's inquiry that Weizmann and the British Government had resisted when discussing the Commission's Terms of Reference.[68] As Bentwich later noted, the Arabs "adroitly shifted the emphasis of their case from the events of August 1929 to the grievances about the Mandate, the broken promise of Arab independence, the Jewish immigration and the dispossession of Arabs from the land."[69]

Ineffective cross-examination

Merriman's cross-examination of Saunders ran six times longer than Stoker's.[70] Merriman spent nearly the entire cross-examination challenging the conduct of the police and the Palestine Government, placing his clients in an adversarial posture against the Palestine Government and its police force. Merriman grilled Saunders on a broad range of issues, alleging through his questions that the police could have done more to stop the 16 August Arab counter-demonstration in Jerusalem; the police should have disarmed the Arabs and further armed (instead of disarming) the Jews; the police should have done more to afford "some measure of protection" to the Jews; Saunders should have urged the Mufti to call upon the Arabs to stand down; and while no Jewish constables had fired on any Arab civilians, armed Arab police had fired on Jewish civilians.[71]

Merriman also focused on Arab rumors spreading through Palestine that the Jews had thrown a bomb at the Mosque of Omar, killing Muslims.[72] Merriman pointed to several other examples of Muslim "incitement" during the week of 16–23 August. Merriman also characterized the mysterious movements of key Arabs around Palestine during the days preceding the worst violence, and the Mufti's apparent effort to obtain a visa to leave Palestine for Syria, as evidence the violence had been planned in advance.

Saunders, however, refused to concede the violence had been premeditated:

> *Q*: With the information now at your disposal, have you any doubt whatever that this outbreak was premeditated?
>
> …
>
> *A*: I have a doubt that it was premeditated, as I told you just now. I made it quite clear that it was undoubted to me, with the reports at my disposal here, that in the events which happened, with the atmosphere which was created before the outbreak, that at some time or other, if that atmosphere was not disposed of, an outbreak was bound to occur, but I cannot come nearer to the conclusion of premeditation than that with the information at my disposal.[73]

Stoker seized on this point during his follow-up cross-examination of Saunders, asking Saunders about a conversation he had with the Mufti on Friday, 23 August:

> *Q*: His [the Mufti's] influence, in your opinion, had been in the direction of peace, and not warfare, and you thanked him for his efforts in that direction?

A: That is so.[74]

The question of Jewish rights at the Wall came up again during Preedy's redirect examination of Major Saunders, except this time it came directly from the Chairman of the Commission:

> *Q*: [Chairman Shaw]: I gather that you … knew that these young Jews were not going there [to the Wall on 15 August] for a legitimate purpose. They were not going there to pray, and that was a *trespass on the property*?
>
> *A*: Yes …[75]

Thus, by the time the first witness had completed his testimony, the dynamic for the remainder of the hearing had been set. Merriman had positioned the Jewish side as adverse to the Palestine Government, accusing it of not having done enough to prevent the violence. As one historian had noted, "[t]he Palestine administration, itself being charged by the Jews with passive, if not active, complicity in the violence that occurred, understandably gave its support to the Arab version of what took place."[76]

Chancellor criticized Merriman's aggressive cross-examination of Major Saunders and other Government witnesses, noting in a letter to his son:

> The Inquiry Commission continues its proceedings. The evidence of the police witnesses have not yet been completed. Boyd Merriman and Erleigh the Counsel for the Jews have made many unsuccessful efforts to prove by cross-examination that the British police officers failed in their duty. These attempts have not made a favourable impression on the members of the Commission, I am informed, & when one remembers what a handful of British Police do in beating off mobs of frenzied Arabs & saving the lives of countless Jews, it seems to me to be an unworthy line to adopt for an ex-Solicitor General [Merriman] of a Conservative Government.[77]

Making matters worse, Merriman had already clashed repeatedly with both Preedy and Stoker, changing the adversarial dynamic from a three-way "enquiry" involving Arabs, Jews and the Palestine Government into a trial in which the Jews were the plaintiff and the Arabs and Palestine Government were co-defendants, with a common interest in refuting the Jewish claims against them.[78] This tactic, according to Bentwich, who was reduced to a mere observer of the proceedings, backfired: "The attitude of the Zionists in attacking the Palestine Administration," he later wrote, "had another regrettable consequence in estranging official and English sympathy, and driving the Administration to the side of the Arabs."[79]

Notably, Weizmann himself shares the blame for this aggressive and misguided attack on the Palestine Government during the hearings. Weizmann, who was not present in Jerusalem but was actively monitoring the hearings from London, sent a cable during the middle of the hearings directing Sacher to make sure "Luke should be pressed in cross-examination more on Government Bulletins published after disturbances giving impression Jews Arabs engaged interracial conflict, thus obscuring character Arab attacks. Consider also point objectionable behavior officials on certain occasions should be raised."[80] Not content with just a telegram, Weizmann also wrote a letter to Sacher the same day, expressing concern whether "in tackling Luke, Merriman has done all that could be done; he hasn't examined him closely on the Bulletins which were issued during the time of the upheaval."[81]

Weizmann also wrote to Warburg midway through the hearings, expressing delight that the Palestine Government had been put on the defensive:

> [N]ow they find themselves practically in the dock, because the evidence, as far as it has been produced, goes very much against them. Moreover … something has happened which is very much unprecedented in the annals of British Administration, namely that a British Administration finds itself attacked and accused instead of being the impartial judge. … In other words the Administration is a party and not above parties. This, of course, has never happened before and the Enquiry is taking quite a different turn from what the Colonial Office intended, or has been accustomed to in previous enquiries. Of course, we cannot anticipate the results of the enquiry, but, from the evidence available at present … it seems that it is going very well.[82]

As we shall see, Weizmann and Merriman had both miscalculated. Stoker and the Arab lawyers took full advantage of this courtroom dynamic, enabling them to join forces with the Palestine Government against the Jewish side. In addition, as one commentator has noted, the result of the Commission allowing the Arab side to present its case *before* the Jewish side "gave them the opportunity of converting their case from one of defense into one of attack."[83] Stoker and Auni Bey introduced as much testimony as they could on two issues of major policy that were supposed to have been off-limits under the Terms of Reference – the legitimacy of the Balfour Declaration, and Arab rights to the Wall and the pavement in front of the Wall.

McMahon-Hussein and the legitimacy of the Balfour Declaration

The Arab lawyers began their attack on the Balfour Declaration by starting with the legal argument, well-developed by 1929, that the Balfour Declaration was void *ab initio* because it conflicted with Britain's prior wartime promise of Palestine to the Arabs. The Arab lawyers pursued this theme with several witnesses during the hearing.

In his brief opening statement, Stoker referred to the

> latent feeling and sense of injustice conceived by the Arab population to be suffered by them in the application to Palestine of the Balfour declaration of November, 1917, and of the Mandate of 1922 founded thereon; in breach of the pledges and promises made to them by Great Britain in 1915 ….[84]

Ezzat Effendi Darwazer, a member of the Arab Executive, later testified "[o]ne of the natural demands of the Arabs of Palestine is the abrogation of the Balfour Declaration."[85]

During his cross-examination of Luke, who had been called as a witness for the Mandatory Government, Stoker noted the Arab revolt against the Turks had been encouraged with British promises of independence, and the subsequent Balfour Declaration had interfered with those promises and caused the internal situation in Palestine to become "volcanic … it was like a thing loaded with explosives which may go off at any moment."[86]

The Arab side also called the Mayor of Nablus, Haj Tewfik Hammad, as one of its early witnesses. Under direct examination by Auni Bey, Hammad said he believed the Zionist acceptance of the White Paper of 1922 was not sincere, and the true Zionist objective was "[t]o get hold of Palestine."[87] Hammad later emphasized his point by adding, "I think I would make an example of this glassful of water – and this water might overflow, and that would absolutely answer about the future destiny of the country …"[88]

The Arab side next called Subhi Bey al Kadra, one of the Arab lawyers who had signed the 4 September 1929 letter to Chancellor protesting Chancellor's 1 September 1929 Proclamation regarding the riots. Stoker's colleague Reginald Silley asked al Khadra on direct examination about his experience as an officer for the Turkish army during the War, and his decision to switch sides and join the revolt against the Turks. Al Kadra mentioned the leaflets the British had air-dropped over Arabia urging people to join the Sherif and rise up against Turkish rule.

Merriman then interrupted and had the following exchange with Silley, in which Merriman managed to insult Silley but accomplish nothing else:

> *Merriman*: May I ask my friend to indicate … whether this is an "immediate cause" of the riots or it is a matter of major policy?
>
> *Silley*: One of the terms of reference is to make recommendations as to the avoidance of them in the future.
>
> *Merriman*: But not on major policy.
>
> *Silley*: It is not major policy. It is a matter of history.
>
> *Chairman*: It might possibly be the cause of the riots.

Merriman: If my friend says so; he did not say so.

Silley: If you give me an opportunity of speaking, I might say something.

Merriman: That is merely rude …

Silley: I was about to say when you stopped me that … [i]f the other side are to be allowed to go back and to the Balfour Declaration and take their stand upon it and raise certain things to-day, we are entitled also to go back to certain declarations and take our stand on them to-day. What is sauce for the goose is sauce for the gander.

…

Chairman: I do not think we can shut it out at any rate.

Silley: May I express the hope that anything that records any pledge given by the Government of Great Britain to any country should be given the position of at least having judicial cognizance taken of it?

Merriman: Let us go back to Magna Carta then.[89]

Silley kept his cool and continued pressing the Arab position that British wartime promises to the Arabs, including the McMahon-Hussein correspondence, were relevant to the Commission's inquiry. A few moments later Silley had the following colloquy with the Chairman, who clearly was losing his grip on holding the inquiry to the strict limits of the Terms of Reference:

Silley: I propose to show there was correspondence between His Majesty's representative and the Sherif of Mecca whereby –

Chairman: We have all that. We have the [1922 and 1928] White Papers at which we are entitled to look. We do not want evidence given of the content of the White Papers.

Silley: I am not submitting evidence as to the content of the White Papers. *I am submitting evidence as to the effect the contents of those papers produced on the minds of this [witness] and the people he represents. I submit it is more than material, it is essential to the inquiry.*

Chairman: For what it is worth we will hear what effect it has had on this gentleman's mind.[90]

Several days later the Arab side called the Grand Mufti of Jerusalem, Haj Amin al Husseini, as a witness. As a courtesy the Commission agreed to take his testimony in private at his home, but like the other witnesses he too was placed under oath.[91] During his direct examination, conducted by Stoker, the Mufti discussed the McMahon-Hussein correspondence:

Q: [W]hat, in your experience and from what you have seen, are the practical results to the people as regards the application of the Balfour Declaration and the Mandate …?

A: … In 1915, during the most critical period of the Great War, the Sherif Hussein, who

> was the leader of the Arabs as a whole at that time, entered into negotiations with Great Britain and the Allies through Sir Henry McMahon. The first communication which Sherif Hussein addressed to Sir Henry McMahon was in 1915, and after negotiations and deliberations concerning the boundaries of the Arab kingdom, Sir Henry McMahon sent his last [sic] letter. That letter was sent in October 1915 … As a result of these messages … the Arabs joined with the British and Allies in the war and deserted Turkish military ranks. They rendered great service to the British cause … The inhabitants of Palestine also took part in the War because their country is included in the pledges. Many of them deserted the Turkish lines and ran away to the British lines.[92]

A few moments later the Chairman, now clearly interested in the issue, remarked, "[i]t all depends on the construction of the McMahon correspondence."[93]

The Mufti, who had studied law in Cairo, took advantage of the opportunity as a testifying witness to continue making the legal case for the Arab side. He read aloud the text of Articles 20 and 22 of the Covenant of the League of Nations, arguing

> it would have been necessary in accordance with the declarations and provisions in this article [Article 20] that the Balfour declaration should be abrogated as it is inconsistent with the terms of Article 22 of the Covenant of the League of Nations.[94]

Stoker picked up this theme and continued with the Mufti, asking his own witness a series of leading questions without objection from either Merriman or Preedy:

> *Q*: The consequences of that [Balfour] declaration are to be found in the Mandate, are they not …?
>
> *A*: Yes.
>
> *Q*: It is under the Mandate that the application of the Balfour Declaration is going on, is it not?
>
> *A*: Yes.
>
> *Q*: And it is the effects of that which the Arabs in Palestine are feeling to-day?
>
> *A*: Yes.
>
> *Q*: And have been feeling ever since the Mandate?
>
> *A*: Yes. I would like to mention some of them. In 1922 the League of Nations ratified the Mandate for Palestine. The Mandate and the terms of the Mandate did not refer to the protection of the political rights of the Arabs but refer only to the political rights of the Jews. If there is any mention of political rights in the Mandate it is only in connection with the rights of the Jews. The Mandate altogether is inconsistent with the pledges given previously to the Arabs. It is also inconsistent with the undertakings of the Covenant of the League of Nations.[95]

At that point Commissioner Betterton finally interjected:

> The witness is now going to what is clearly beyond our terms of reference. He is stating, for instance, that the Mandate does not come up to the pledges previously given. All that we are concerned with is whether it is considered by him to be such a grievance as to contribute to the recent disturbances.

The Chairman concurred, noting "[a]ll that is relevant is the effect on the Arab mind."[96] Despite this parsing, Stoker and the Mufti had succeeded in putting on the record their argument that the Balfour Declaration and the Mandate were both illegal given Britain's prior pledge of Palestine to the Arabs.

Several days later the Arab side continued this line of argument, calling to the stand the Sheikh of Beersheba, Freih Abu Lidyen. Under direct examination by Auni Bey, the Sheikh testified:

> *Q*: What are the reasons which moved the Moslem tribes of Beersheba to slaughter and kill the Moslem Turks?
>
> *A*: It is true that the Turks are Moslems and we are Moslems, but since our King, King Hussein, made an agreement with Great Britain and became an ally of Great Britain we follow him, we do not follow the Turks. We follow our King; therefore we joined in the War against the Turks because we are Arabs.
>
> *Q*: Did you know the subject of the Treaty which was made between King Hussein and the British Government?
>
> *A*: The subject was that we would form an Arab Government and be independent of the Turks and we united with Great Britain.
>
> *Q*: Did you obtain the Arab Government?
>
> *A*: We saw nothing of the sort. Instead of establishing an Arab Government for us they brought Jews to the country to compete with us.
>
> …
>
> *Q*: Do you really believe the Government is favouring the Jews and not the Arabs?
>
> *A*: I have given an oath and this is what I conscientiously believe, but I think that the Government is always hesitating between both parties, the Arabs and Jews. They gave a declaration to the Jews and they also promised King Hussein to be Governor of this country.
>
> *Q*: Has the Government brought in the Balfour Declaration or carried out the promise given to King Hussein?
>
> *A*: The Government enforced the Balfour Declaration …
>
> *Q*: You believe, then, that there are two promises, one given to the Jews and one to King Hussein, and the Government has enforced the Balfour Declaration? Did the Government enforce any part of the promise given to King Hussein?
>
> *A*: Not at all.
>
> *Q*: What do you think, which promise was given first, the promise to King Hussein or the

Balfour Declaration?

A: If we knew that the promise was given to the Jews we would not have before given any assistance to Great Britain. How did we know about the Balfour Declaration? Only after the War it came to our knowledge.

Q: When did you first know of the Balfour Declaration?

A: When Sir Herbert Samuel was King of Palestine.[97]

Merriman did not cross-examine the witness on any of these points. Nor did Merriman put up much of a fight against the Arab claim that the Balfour Declaration had contradicted the McMahon pledge, thereby inflaming the Arab "state of mind" in Palestine. Merriman's one major effort came during his cross-examination of Subhi Bey al Kadra. Merriman read Feisal's 1 March 1919 letter to Felix Frankfurter and tried to force al Kadra to admit the letter was authentic. The evidence was important and would have damaged the Arab claims about the McMahon-Hussein correspondence.

Not surprisingly, Al Kadra testified he had never heard of the letter, and could not believe Feisal would ever have written such a letter.[98] On redirect examination Silley went further, questioning the authenticity of the letter.[99] The dispute became an embarrassment for Merriman, who should have been able to establish the letter's bona fides without difficulty. Instead, a few days later the Arab side produced a telegram from Feisal (now King of Iraq) denying any recollection of having written the letter to Frankfurter. Merriman had no choice but to withdraw the letter from the Commission's consideration, sheepishly admitting, "I had better say no more about it. I had not intended to refer to it again."[100]

Ultimately the letter played no role in the Commission's deliberations. Merriman had lost the opportunity to undermine the Arab case regarding the McMahon Pledge.[101] On 5 December Weizmann asked that copies of his 3 January 1919 Agreement with Feisal be sent to Stein on the Jewish legal team,[102] but Merriman never introduced the Weizmann-Feisal agreement into evidence before the Commission.

Stoker, on the other hand, drove home during his closing argument the Arab claim that the McMahon Pledge rendered the Balfour Declaration invalid:

> I do, with great submission and respect, urge and press on this Commission that they should, if they possibly can, do so, obtain this correspondence, the whole of it, and see for themselves whether or not there was not a complete promise by the British Government, through Sir Henry McMahon, after considerable correspondence and interchanging of letters on the subject, to include in the independence which was to be given to the Arabs, the whole of Palestine.[103]

The Commission considered this argument as relevant in its final report, noting:

> The first [Arab] argument is that His Majesty's Government have failed to give effect to promises which they made to the Arab people of Palestine during the War. We have mentioned … the exchange of letters – now known as the McMahon correspondence – as a result of which the Arab people within the Ottoman Empire came to favour the cause of the British Empire and her allies in the Great War. In the course of that correspondence Sir Henry McMahon, who at that time was His Majesty's High Commissioner for Egypt, gave an undertaking that in certain areas, where they were free to act without detriment to the interest of France, His Majesty's Government were prepared to recognize and to support the independence of the Arabs. The question is one of interpreting a declaration by Sir Henry McMahon excluding from the territory covered by this undertaking an area which he defined geographically and by reference to certain administrative units in Syria. His Majesty's Government have consistently interpreted the declaration as excluding Palestine from the area covered by their undertaking to recognize and support Arab independence.

> It clearly does not fall within the scope of our enquiry to examine and comment upon the McMahon correspondence. We are, however, concerned with the interpretation which is placed upon it by the political leaders of the Arabs in Palestine. Rightly or wrongly they feel that the promise of independence made by Sir Henry McMahon extended to Palestine and no argument is likely to shake their belief that, upon the true construction of this correspondence, Palestine was in fact included within the area in respect of which the undertaking on behalf of His Majesty's Government was given.[104]

Rights and claims to the Wailing Wall

The hearings before the Shaw Commission also offered both the Arabs and Jews the opportunity to assert their rights and claims to the Wall and the pavement in front of the Wall. Although the Commission paid lip service to the notion that its Terms of Reference did not allow it to make any determinations of those rights and claims, it allowed the parties to introduce enormous amounts of evidence on exactly that subject. The parties introduced testimony and documents regarding the practices allowed during Turkish rule, as well as the *Yom Kippur* 1928 incident, the subsequent Muslim building operations atop the Wall and at the *Zawiyah*, the opening of the new doorway, the introduction of the *Zikr* service, and stationing the *Muezzin* to issue the prayer call from the adjacent roof.

As discussed above, Stoker immediately broached the Wall/pavement ownership issue during his cross-examination of the Palestine Government's first witness, Major Saunders. Stoker and his team continued raising the issue throughout the hearings with several other witnesses. The Jewish side, acting on instructions from Weizmann, refrained from making any claims of actual ownership of the Wall, but pressed its rights of access and prayer through a variety of witnesses.[105]

Cust, author of the Mandatory Government's 1927 "*Status Quo*" Memorandum, testified at length as a witness for the Palestine Government regarding the respective rights of the parties at the Wall. On direct examination Cust acknowledged the *Zikr* ceremony was "very loud indeed," and rendered any Jewish attempts to pray at the Wall "quite impossible." Cust described the *Zikr* ceremony as an "innovation" the Muslims had intentionally introduced to interfere with Jewish prayer rights at the Wall.[106]

A few minutes later, during Cust's testimony regarding the new doorway that had been opened at the southern end of the pavement near the *Zawiyah*, the following argument erupted over the rights of the parties to the Wall, which ended with Merriman once again conceding a point to Stoker:

> *Chairman*: Before we leave this new building, what was the position about the door in the wall? I understand that was one thing that was objected to, a door in the wall?
>
> *A*: Yes, the door was also in an incomplete state.
>
> *Preedy*: That was one of the causes of the complaint, was it not, by the Jews?
>
> *A*: Yes.
>
> *Q*: The door and the flight of steps leading up to it. It had the result of converting the pavement of the Wailing Wall into a thoroughfare leading into the Mosque instead of it being a cul-de-sac as it was?

A: It made it physically possible to pass from the Mosque by the Wailing Wall into the town.

Q: That was one of the reasons why the building was suspended while that was being considered?

A: Yes, it was one of the objections which had led to the suspension.

Q: That area, that part is private property?

A: It is the property of the Moghrabi *Wakf.*

Chairman: With certain rather undefined rights of easement over it – I do not know whether you are a lawyer, but what we call in England an easement, a right to do something on somebody else's property … That is the whole case about the Wailing Wall … We cannot go into this or try this question at all, but the Jews have a sort of prescriptive right over the Moslem property there and they object to having anything done to interfere with the exercise of that right.

Merriman: There is a servitude of worship there.

Stoker: That is an extremely new allegation … It is an indulgence which has been allowed for some time. They [the Jews] are allowed to do certain things and they are restricted to certain things.

Merriman: *You are stating the case perfectly accurately. Nobody has, as far as I know, claimed anything in the nature of a right of way up there* …[107]

Merriman used his cross-examination of Cust to establish the Arabs had never ascribed any religious significance to the pavement in front of the Wall, and that Cust had never heard the Muslims use the term "*El-Burak*" to refer to the Wall prior to 1928.[108]

Luke testified for nearly eight days in public, from 14–23 November, far longer than any other witness. At one point Merriman read portions of the Mufti's letter to *The Times* dated 27 August 1927, in which the Mufti had written

> [t]he Jews for long have been permitted, as well as followers of all creeds, to visit the *Burak*, but with no pretensions to prayers, preachings, or anything that may be interpreted as a kind of worship, as registered and acknowledged by the Turkish as well as the British Governments.

Luke testified the Mufti's statement was not accurate.[109]

For the most part, however, Merriman aggressively cross-examined Luke, treating him as a hostile witness and devoting considerable time grilling him about the sequence of events at the Wall following the *Yom Kippur* 1928 incident, including the Muslim "innovations" such as the new door, the *Zawiyah*, the *Zikr* ceremony, the *Muezzin*, and other acts creating an "annoyance or disturbance to the Jewish worshippers."[110] Merriman also questioned Luke about the Mandatory Government's actions during and after the riots, accusing Luke and the Government of putting the Jews at risk by disarming the Jewish Constables and otherwise not doing enough to protect the Jews.

High Commissioner Chancellor was so angry with Merriman's questioning of Luke that he

complained to the Colonial Office. Shuckburgh responded with a cautious defense of Luke, noting the Jews "have had their knives into him [Luke] for a long time past. It all arises from their belief (unfounded, *so far as I know*) that he comes from a family of converts from Judaism."[111]

Luke also complained to Chancellor that Merriman's attacks on the Mandatory Government and its employees were taking a huge toll on official morale:

> All the British civil servants are so sore at what they consider the unfair way they have been treated by the Colonial Office through being put on their defence before the Commission & at the constant stream of abuse to which they are exposed from Jews & Jewish newspapers all over the world that if they could afford to do so every one of them would resign their appointments in Palestine.[112]

Chancellor, in a letter to his son, added his own bleak assessment after hearing Luke's report: "All my officers in the administration & the police are now suffering from the strain of the last three months; and I am afraid we shall have a number of nervous breakdowns before long."[113] Chancellor noted in the same letter that he had implored Shaw to "to meet the wishes of the Arabs" to avoid another outbreak of violence.[114]

At the conclusion of Luke's public testimony, Chancellor praised Luke's performance, but had harsh words for Merriman's conduct:

> He gave his evidence very well. Merriman subjected him to a very searching cross-examination &, as far as I could see, scored no points against him. Merriman has been very venomous in his conduct of the Jews' case and has lost his temper several times, in fact he behaves like a cad. He won't even say good morning to Preedy the Government's Counsel, & on Saturday, because the Chairman of the Commission gave a point against him, turned to his junior & audibly threatened to withdraw from the case.[115]

Merriman's strategy of putting the Mandatory Government and its officials in the dock clearly backfired. Merriman, a former high-ranking British Government official, should have known it was highly unlikely a British Government commission would condemn the British Administration in Palestine. Merriman also should have known his attacks would only cause the local British officials to circle the wagons and harden the Mandatory Government's attitude toward the Jews, which could only benefit the Arabs.

Luke also testified *in camera* before the Commissioners. During his *in camera* testimony, Luke noted "the age long Jewish sentiment for the Wall which everybody knew about and respected, could not, however strong and genuine it was, be set against the fact that the others were the legal owners."[116] Luke mentioned Professor Klausner had told him during a meeting on 16 August, the same day as the Muslim counter-demonstration at the Wall, that "the Wall was the unquestionable property of the Jewish people, not only the pavement but the Wall itself."[117]

Luke then candidly explained to the Commissioners his understanding of how the *Status Quo* had actually functioned during the Ottoman regime:

> *Luke*: In the days of the Turks there was never any real difficulty about the Wailing Wall because the Jews were then politically, as far as the Turks were concerned, an unimportant, non-dangerous, docile minority. There was no Balfour Declaration in those days. The Jews were not in any sense a menace to the Turks and when the Jews wanted to take down a bench, stool, or an extra ark, anything of that sort, all they did was to put a few piastres in the hands of the trustee of the Moghrabi *Wakf* who only was too glad for his part to turn an honest penny and everybody was satisfied. The Moslems got their backsheesh out of it and

the Jews took down the benches for the old people and so forth …

Snell: Is it right, if I interpret what you said, that the Jews in the time of the Turks both could and did obtain privileges by these rather surreptitious means?

Luke: Yes.[118]

One of the first Arab witnesses to testify was Haj Tewfik Hammad, the Mayor of Nablus. On direct examination he claimed "the ambitions of the Jews are aimed at the Temple and the Temple was the site of what the Mosque of Omar is at the present time, and the Jews used the *Burak* as a way towards achieving that end."[119]

The Mufti also testified at length about the Muslim position regarding the Wall and pavement, claiming maximum rights for the Muslims and denying the existence of any particular Jewish rights. Stoker asked the Mufti to address the legal status of the Wall and the surrounding area:

Q: I want to know first of all who is the legal estate in, and then who has the management of it?

A: The *Wakf* is the property of nobody, it is the property of God. It used to be the private property of *al Ghoth*, and he dedicated it as a *Wakf* to God.

From there Stoker asked the Mufti to describe the Muslims' religious feelings about the Wall. The Mufti told the story of Mohammed tying his horse to the Wall and ascending to Heaven from the Rock above the Wall on the Temple Mount. Stoker asked the Mufti to describe the extent to which the Wall and the surrounding pavement were holy to Muslims. The Chairman interjected, mentioning the Terms of Reference and indicating the question was not proper for the Commission to consider.

The following exchange ensued, again demonstrating Stoker's effectiveness in persuading the Commission to permit the introduction of evidence helpful to the Arab side under the guise of relevance to the Arab "state of mind":

Stoker: The witness is the Supreme Moslem lawyer in the place.

Chairman: We do not want to go into this. We are not deciding the rights of any body in the property of the Wailing Wall.

Stoker: But the witness can give evidence of the blessing, as far as it goes.

Betterton: Are you not getting very near to Article 14 [of the Mandate]?

Stoker: I think that is rather another question. The question I am asking this witness is as to what the Moslem people believe really as to what the surroundings are which are holy according to this statement in the Koran. That is a matter which only a Moslem can answer.

Chairman: It is not a question which we can answer and it is no use bringing it before us.

Stoker: It seems to me the question is perfectly permissible and material.

Chairman: I am only concerned in not taking up unnecessary time by dealing with matters

which we have no power to decide.

Stoker: *I should like a note made that the Commission declined to allow the question and the transcript will speak for itself.*

Betterton: That was not the way you put it. You did not ask what his Eminence believed. You asked him what in point of fact were the rights.

Stoker: *That is so. I propose to modify the question in view of the statement of the Commission. What is the Moslem belief of the extent of the surroundings of this place which is blessed*?

A: The Mosque which is referred to as blessed is the whole *Haramesh Sharif* area and what is meant, what we believe by surroundings, is what is outside the wall of that area and the extent of the holiness which covers the outside of the area is a question of how near or how far the places are to the wall …[120]

The Mufti continued testifying, still on direct examination, that the November 1928 White Paper had made two incorrect statements regarding Jewish rights at the Wall. First, the Mufti said the Jews did not have any "right" of access to the Wall and the pavement; instead, they only enjoyed a "custom" of access. Second, the Jews had no special entitlement for "prayer or devotion" at the Wall, but instead only to pay a "mere visit" to the Wall.[121] From there the Mufti argued that despite their minimal rights, the Jews were plotting to take over not just the Wall but the entire *Haram* area. The Mufti mentioned as proof certain Jewish postcards and pictures in Jewish books depicting a Menorah and other Jewish symbols against the backdrop of the *Haram* and the Dome of the Rock.[122]

The Mufti also cited the infamous *Protocols of the Elders of Zion* as proof of Jewish intentions to take not just the Wall but also the entire *Haram*. Merriman objected, arguing the book had been proven a forgery and banned from Palestine in 1926. Stoker contended the book had been written by Russian Zionists, but that other Zionists did not want it published and therefore concocted the forgery claim. Stoker argued that even if the book had been a forgery, it would still be admissible in evidence "as something that affected the mind of the Arabs." Stoker went even further, however, drawing the ludicrous and offensive comparison that the book had been translated into many languages, "*just as … Shakespeare's plays have been published in almost every language and this is in the same category*."[123]

On cross-examination, Merriman tried to force the Mufti to admit that Britain, which ruled hundreds of millions of Muslims in the Middle East and India, would never allow the Jews to take the *Haram*:

Q: Does your Eminence truly believe that the Jews intend to take the Dome of the Rock?

A: Yes.

Q: Does your Eminence truly believe that the Jews intend to take the al Aqsa Mosque?

A: Yes.

…

Q: Is your Eminence aware that the British Empire contains the largest collection of Moslems in the world?

A: Yes, I am aware of that.

Q: Have you considered whether it is likely that the British Government would allow any of these things to happen?

A: I have thought of this. Before I used to think that it is impossible, but after I have seen the attitude of the British Government towards the unfair policy adopted in Palestine I started to doubt.

Q: Are you aware that the Mandate itself guarantees the immunities of the Moslem shrines?

A: I have read that.

Q: Now I put the question to you again as an educated statesman. Do you still assert that you believe that it is possible that the Jews could take any of these places?

A: They would if they would be able to do so.

Q: Do you think there is a remote possibility of their being able to do so?

A: No one can know anything about that. It depends upon the future events.[124]

Merriman spent a significant portion of the remainder of his cross-examination quibbling with the Mufti regarding the photographs and postcards the Mufti had cited as evidence of Jewish designs on the *Haram*. Merriman also asked about the Muslim building operations at and near the Wall. The Mufti adroitly claimed the projects had been undertaken to keep the area in a good state of repair, to prevent the British from condemning and expropriating the area.[125]

The Mufti also addressed Jewish attempts to buy the Wall and the Moghrabi *Wakf*, saying "intermediaries" had approached him in 1928, offering £400,000 "for the whole lot and that with this sum a property should be purchased in exchange for the *Wakf* there for the Moghrabis and the remainder distributed among us and also used for bribing the newspapers to keep them quiet."[126]

Merriman's cross-examination of the Mufti was largely ineffective. Chancellor said Merriman did "not seem to have got much out of him."[127] Indeed, Merriman managed to score only one minor victory, but mostly at the expense of Auni Bey:

Q: As a matter of form you would not smoke in the *Haram* area?

A: In any case I smoke neither in the *Haram* area nor anywhere else.

Q: Would any educated Moslem smoke openly in the *Haram* area?

A: No.

…

Q: I understand that your Eminence has a room which overlooks the pavement [in front of the Wall]?

A: I have a house which overlooks the pavement.

Q: Did you look out of the window on the day the Commission and some of us went to examine the Wall, about 10 days ago?

A: Yes.

Q: Did you observe that when we were standing on the pavement some members of the party were smoking?

A: I can assure you I have not noticed that. If I had seen you, I would have taken notice.

Q: Did you notice that Auni Bey was smoking?

A: Possibly.

Q: If this pavement is of such holiness, why is smoking allowed there and not in the *Haram* area?

A: … Its holiness is not the same as that of the *Haram* area.[128]

In every other respect Merriman failed to achieve anything meaningful for the Jewish side with his cross-examination of the Mufti, who was by far the most important Arab witness of the entire proceeding. The Jewish side knew the chance to cross-examine the Mufti presented a great opportunity, and they went to great lengths to prepare. Before the hearings began, for example, Weizmann had heard from Lord Lloyd, the former British High Commissioner in Egypt, that a source told Lloyd the Mufti's speech at the Mosque of Omar on 23 August may in fact have been intended to incite violence. Weizmann wrote to Lloyd asking for more information, "in order that our representatives in Palestine may be able to follow up this clue with a view to bringing the evidence thus obtained before the Commission."[129] But nothing came of this during the Mufti's testimony.

One historian noted the Jewish side's failure to pin any responsibility on the Mufti for the violence:

> The Jews … charged the Mufti with direct responsibility for fomenting the violence. But neither the massive evidence produced before the Inquiry Commission, nor the forensic skill of Sir Boyd Merriman … could substantiate this … The precise nature of the Mufti's role in the riots remains obscure and ambiguous; but whatever his motives or intentions, there can be little doubt that the key to what occurred in Palestine in August 1929 was the Mufti's year-long campaign rousing the Arabs of Palestine to stand against the alleged threat to the Muslim holy places in Jerusalem.[130]

Even more surprisingly, Preedy, the lawyer for the Mandatory Government, asked the Mufti only six questions on cross-examination, mildly suggesting that perhaps the British could do more to help the Arabs if the Arabs would offer more cooperation.[131] As we shall see, the contrast between Preedy's almost friendly cross-examination of the Mufti with his angry and hostile cross-examination of the Jewish witnesses, especially Braude and Sacher, could not have been more striking.

During his presentation of the Jewish case, Merriman sought to rebut the Mufti's claims of a

secret Jewish plot to seize the *Haram* and rebuild Solomon's Temple on the site. Merriman called the Chief Rabbi of Jerusalem, Abraham Issac Kook, to testify from an Orthodox perspective that Jews were forbidden from taking any physical or political action to regain the *Haram*:

> In accordance with the commands in our Torah we are not even allowed, *until the day of redemption*, we are not even allowed to enter the area surrounding the Holy Temple and it is my custom on the days of Jewish holidays when there is a number of tourists, visitors, coming to this town to send out warning to Jewish visitors that they should not enter the place because we are not worthy of entering this holy place *until the time when the redemption will come and when it will be the action of the Lord Himself, without action being taken by any of us, to achieve that end.*[132]

The testimony, while somewhat helpful, did not dispel the Commission's view that the Muslim "state of mind" regarding Jewish designs on the *Haram* remained a relevant consideration.

One of the last witnesses to testify for the Jewish side was Yossel Kives, who recounted how in the late 19th century the Jews, with the permission of the Turkish authorities, paid to re-pave the passageway in front of the Wall. The Turks had engaged in other roadworks in the area and in so doing had created a sewage canal in front of the Wall. The Jewish community purchased large paving stones to cover the canal and keep the immediate area in front of the Wall clean.[133] The testimony was intended to show the pavement area was less than holy to the Muslims (despite the Mufti's testimony to the contrary), yet so important to the Jews that they took responsibility for re-paving the area.

Jewish case against the Mandatory Government

Merriman's presentation of the Jewish case focused largely on accusing the Mandatory Government of not doing more to protect the Jews, not only from the Arabs but also from the Jews themselves. Merriman gave a lengthy opening statement on 31 October 1929, at the Commission's Fifth Sitting.[134] Merriman said the British Government, acting through the Palestine Administration, had a duty to carry out the terms of the Mandate, including the Balfour Declaration, with "rigid determination and unswerving loyalty."[135] Nevertheless, Luke had so consistently yielded to Arab demands and Arab pressure that he harbored "an imperfect sympathy with the policy which it is his duty to carry out."[136]

Merriman further accused Luke of ignoring the rumors that had swept the country during the few days before the Hebron attack, and failing to order more Mandatory police and British troops to keep the peace. Merriman criticized Luke's decision to disarm the Jews as "amazing," especially given the Jews often had been able to survive only by protecting themselves in the absence of British police or soldiers.[137] Merriman also accused the Mufti of stirring the controversy over the Wall as a way to consolidate his power over the Supreme Moslem Council and ensure a lifetime appointment for himself as President of the Council.

Merriman contrasted the Palestine Zionist Executive's condemnations of the *B'rith Trumpeldor* with the Mufti's exploitation of the Arab–perpetrated violence. Merriman then accused the Mufti of having premeditated the violence:

> Whether the Mufti's motives were confined to securing his own personal position in the hierarchy is a matter upon which I beg leave to doubt, but whatever that may be, this is certain, that from the moment these disturbances took place, they were in fact exploited politically by the whole Arab world in Palestine, and from that moment began demands for the revocation of the Balfour Declaration, for the expatriation of Jews from Palestine, and demands of that sort. … [I]t is

> impossible that these outbreaks should take place in different parts of the country almost simultaneously without premeditation.[138]

Merriman called Pinchas Rutenberg, the Managing Director of the Palestine Electric Corporation, to testify how he tried to convince Luke to prevent the 15 August Jewish procession to the Wailing Wall, because "trouble was bound to come."[139] Luke testified he had no recollection of Rutenberg asking him to prevent a potential Jewish procession to the Wall.[140]

Rutenberg, ever the pragmatic businessman, also testified he had even asked Luke to close the Wailing Wall for prayer on *Yom Kippur* 1929, after learning the British had banned the Jews from blowing the *Shofar* at the Wall:

> I had officially demanded that the Government should stop the access of the Jews to the Wailing Wall on the Day of Atonement … if the Government thought that the fact of blowing the *Shofar* would bring trouble. Because I told Mr. Luke that it was a case of either closing the Wailing Wall for prayer on the Day of Atonement or, if Jews will pray, then it is clear that they will blow the *Shofar*; therefore, if he thought that the fact of blowing the *Shofar* would bring trouble, then I officially demanded the Government to close for this Day of Atonement the Wailing Wall for access to Jews.[141]

Merriman's strategy in introducing this testimony seemed intended to show the Commissioners the lengths some prominent Jews were prepared to go to avoid violence and provocation, even if that meant sacrificing certain of their prayer rights at the Wall in certain circumstances. But this evidence made little or no impression on the Commission, which completely absolved the Mandatory Government of any blame or responsibility for the outbreak.[142]

The Commission also heard *in camera* testimony from Rutenberg, who pulled no punches during the private session. Rutenberg voiced extreme dissatisfaction with the Palestine Mandatory Government. He read aloud from a draft telegram he had written to Felix Warburg, in which he said "Palestine Government constantly demanding Jews yield Arab demands under threat Arab outbreaks. 170,000 Jews live in a trap. Jewish life unbearable."[143] Shaw then asked the following question:

> *Chairman*: Is it, Mr. Rutenberg, that you think the present administration of the country is incompetent or that it is pro-Arab?
>
> *A*: I should say it was much worse than that, it is pro-nothing.[144]

Rutenberg blamed the Mandatory Government for the outbreak of violence, accusing it of not doing enough to take adequate steps to prevent the rumor-mongering and press incitement that led to the violence.[145] Rutenberg insisted the Wailing Wall dispute could be solved with "reasonable Government Administration pressure and it is essential to bring the two parties together, and then the Jews will pay and the question will be settled."[146]

Rutenberg also criticized the Mandatory Government for its enforcement of what it deemed to be the *Status Quo* at the Wall:

> The British Empire representing a large part of this world organized in its political and economic life is a great thing from the point of view of the progress of humanity and I cannot see how it is possible for this Great Britain to permit such a state of affairs that I should have to go to Mr. Luke to request that an old Jewess should be allowed to have a chair on the Day of Atonement during her 26 hours of fasting.[147]

Rutenberg argued further that

> all these young gentlemen who are running around Palestine in very nice cars to incite simple *fellaheen* against the Jews

> have acquired their wealth from Jews … the Balfour Declaration is the pump which is showering on [the Arabs] money and wealth.[148]

Rutenberg added, "if you would look around you would find many Arabs in responsible positions who are of the opinion that the Balfour Declaration is a very useful thing for the Arabs of this country."[149]

Isaiah Braude, the Zionist Executive accountant who had been left in charge of the Jerusalem office while the leadership had traveled to Zurich, also testified during Merriman's case. Merriman again wanted to show, through Braude's testimony, that the Mandatory Government was on notice that trouble was brewing and should have taken more robust action to maintain security in the country.

After recounting the events in Jerusalem during and after the *Tisha b'Av* procession, Braude faced hostile cross-examination from both Auni Bey and Preedy. Auni Bey, for example, challenged Braude's view that the creation of the new door from the *Zawiyah* could have led to trouble, given that the pavement in front of the Wall had been converted from a cul-de-sac into a thoroughfare, but Braude fought back:

> *Q*: Supposing I or my friends wanted to pass through that area at any time, through the old passage way, while the Jews were at their worship, in order to visit the area, could you or anybody else stop us and say what business have you here?
>
> *A*: I do not think that it was intended.
>
> *Q*: Don't you think that if it was really the intention of the Arabs to provoke the Jews at worship, they could have gone through the passage without the new door being made if they wanted to at any time?
>
> *A*: I am surprised such a question should be asked of me by Auni Bey, who was present when Jamal Husseini told me in his presence that the *muezzin* and the drum [*Zikr*] were used as a pretext. They did not want a drum before and they would not want it to-morrow. It was only as an issue to force something through; he knows that very well.[150]

Preedy then cross-examined Braude far more extensively and even more aggressively than had Auni Bey. Preedy began by questioning a letter dated 29 July 1929 Braude had written to the members of the Palestine Zionist Executive who had traveled to Zurich for the Zionist Congress. In that letter, Braude informed the Executive of a recent meeting with Luke's Deputy, Mills, in which Braude informed Mills that various Muslim innovations in the area of the Wall had infringed the *Status Quo*. Preedy challenged Braude:

> *Q*: [Y]ou took up the position that it was an infringement of the *status quo*?
>
> *A*: As I said, I thought it was an unfortunate expression because it would lead to trouble in the end.
>
> *Q*: Look at the earlier part of the paragraph that I read to you, that it was an infringement of the *status quo*?
>
> *A*: I do not profess to be an expert on these questions. As I said, it was the first time I knew

of it, and this was a letter I wrote to the Executive asking for instructions in case I made mistakes.

Q: I am not suggesting that you are an expert, but you have made the definite representation that it is an infringement of the *status quo*. Is that not so? Now come, answer my question?

A: I understood that the Jews were praying there at all times of the day and night.

Q: Would you mind attending to my question? Were you not representing to Mr. Mills that this matter … was an infringement of the *status quo*?

A: That was my opinion, yes.[151]

Preedy continued applying intense pressure to Braude during the cross-examination. Preedy scoffed at Braude's prior testimony that the Mandatory Government did not do enough to protect the Jews. Preedy also argued with Merriman and Merriman's co-counsel Horowitz when they occasionally objected ("What is it, Mr. Horowitz? I cannot go on with a running fire of interruptions."[152]). The transcript shows Preedy repeatedly badgering and challenging Braude at every step.

By the time Preedy's cross-examination of Braude was winding down, tempers were flaring:

Q: I only want you to look at one more cable. Just tell me what this refers to … this is the thing I want to draw your attention to: "Please inform Rutenberg from Horowitz his Haifa people hysterical and their reports grossly exaggerated." Do you see that?

A: Yes.

Q: Can you tell me what that refers to?

A: I remember it quite clearly: we used to receive all kinds of messages and information from all over the country. This was our greatest difficulty to judge which of the information was 100 per cent correct and which was not entirely correct … We noticed particularly that from Haifa the reports were terribly exciting. When the person gave it over the phone he could hardly control himself …

Q: Who?

A: The people who rang us up and gave us information …

Q: You are not answering my question.

Merriman: Let him finish.

Q: He is not answering the question and you know it.

…

Merriman: This is not the first time that my friend has said that the witness was not answering the questions and that I knew he was not answering them; that is the second time my friend has said that.

Preedy: The question I asked was a very short one and only required a very short answer …

Merriman: You still persist in saying I knew that he was not answering the question.

Preedy: At that time he was not answering the question.

Chairman: It is no good disputing about it.[153]

The hostility between Merriman and Preedy hurt the Jewish side far more than the Mandatory Government. Chancellor noted the Commissioners had told him Merriman was "habitually los[ing] his temper."[154] Chancellor speculated Merriman

> must feel the case he came out here to fight is not as good a one or so easy as he was probably led to believe by the Jews in London; & in many cases the charges he has made have broken down owing to his clients having made false statements in their instructions to him.[155]

Harry Sacher, a British-born lawyer/journalist and member of the Palestine Zionist Executive since 1927, also testified for the Jewish side regarding the Wailing Wall and other matters.[156] Sacher said resolving the Wailing Wall controversy should have been "perfectly simple … the correct view of the Wailing Wall is that there are certain religious claims on one side and certain property rights on the other. That seems to be the only problem."[157]

Merriman also asked Sacher about his 27 May 1929 letter to the High Commissioner, in which he argued as a matter of law the Mandate provided far broader rights to the Jews than simply the *Status Quo*, which the British Government had too narrowly defined as meaning only those practices permitted under Turkish rule.[158]

Stoker's first line of attack on cross-examination aimed at Sacher's 27 May letter and the legal theory it espoused as needlessly provoking Muslim sentiment:

> *Q*: I am not suggesting that you are not entitled to do that, but my question is, having regard to the tension going on, was it a very wise thing to do?
>
> *A*: … I cannot admit for one moment the right of any person to feel angry or annoyed at my submitting in cold, clear terms my view of our legal rights … You might just as well tell me that I must not walk along the streets because somebody may shoot me because my presence provokes him.[159]

But Stoker also pressed Sacher to admit the Jews had no rights of ownership over the Wall or the pavement:

> *Q*: … I take it that you are not claiming on behalf of the Jewish community ownership or possession of any part of this [the Wall and the pavement]?
>
> *A*: What is being claimed is certain rights of user [sic] and I imagine, I do not know that, for technical purposes of the jurisdiction of the courts, that would be sufficient to come within the term "possession" for purposes of jurisdiction. That is my view of the law.

Following an overnight break in the cross-examination, Sacher asked for an opportunity to

make a statement before his cross-examination resumed (presumably following consultations with Merriman). Sacher reiterated the key point in the Jewish case, taking aim at the Palestine Government:

> The Administration of Palestine did fail to secure the rights of the Jews at the Wailing Wall. The first point I would make is this, that in the [November 1928] White Paper there is an implied assumption that the final rights of the Jews in regard to the Wailing Wall are identical with what is called the *status quo*, and the assumption implied is, in my view, an incorrect statement of the law. My second observation is this, that I think the particular interpretation put upon the *status quo*, in so far as the ruling of 1912 was adopted as authentic and final, is to be questioned; and my third observation is this, that I think the mode in which Mr. Keith-Roach determined the question of fact as to the status was not a correct mode.[160]

Preedy's cross-examination of Sacher continued in a very hostile and aggressive manner, even more than his highly adversarial cross-examination of Braude a few days earlier. The Sacher cross-examination was most likely what Bentwich had in mind when he later wrote "[t]he examination of the many witnesses before the Commission by the Zionist and Government Counsel was conducted with great acrimony."[161]

During direct examination Sacher suggested the Colonial Office, as part of its responsibility under the Mandate to implement the Balfour Declaration, should provide training regarding Zionism to Colonial Officers assigned to Palestine, because "many of the people sent out here … are profoundly ignorant of the problems of Zionism, of the Jewish National Home and of the Mandate."[162] Preedy pressed Sacher on cross-examination regarding who would conduct the training and how the training would be implemented. Preedy asked Sacher sarcastically whether the Zionist Organization itself should be empowered to decide which Colonial Officers could serve in Palestine.[163]

At one point Sacher became exasperated and retorted, "It is very interesting to note what you are saying on behalf of the Government of Palestine. I take notice of that."[164] Preedy snapped back, "May I tell you at once that you will not deter me from asking questions by making comments."[165]

Preedy also took direct aim at Sacher's criticism of the Palestine Government for not doing more to prevent the outbreaks of violence. For example, Sacher had testified the Mandatory Government itself should have issued proclamations and other public statements corroborating Jewish denials of any intention to take possession of the *Haram*. Sacher had also criticized the Mandatory Government for not taking aggressive action against press incitement, which had been a growing problem among both the Arab and Hebrew newspapers in Palestine subsequent to the *Yom Kippur* 1928 incident.[166]

Preedy again attacked Sacher during this portion of the cross-examination, accusing him of making baseless charges against the Mandatory Government in a letter Sacher had written to the *Manchester Guardian* shortly after the violence ended:

> *Q*: Pausing there for a moment, that is fairly strong language to use of [sic] the Government, is it not?
>
> *A*: I think that it is just language.
>
> *Q*: That is not my question. It is fairly strong language …
>
> *A*: To say that a Government is weak and blundering, I should have thought that it was

impossible to write about a Government without saying that.

Q: You do not mean to have a very good opinion of Governments?

A: Most of us who write about Governments have very little opinion of them, that is true.

…

Q: But this is the Government in particular?

A: This is the Government in particular.

Q: A Government responsible for the country here?

A: Yes.[167]

Preedy even appeared to be acting as the Mufti's lawyer when he asked Sacher about certain statements in his letter to the *Guardian*, in which Sacher had also accused the Mufti of acting as the "principal promoter and agitator" of the violence, and "refus[ing] to intervene to induce the Arabs to refrain from murder and pillage":

Q: You, an old pressman and relying upon the Press, thought that a safe thing to do when you were making a charge against some one?

A: That is so.

Q: Do you still say, Mr. Sacher, that it is fair to the Mufti to say that he had refused to intervene to induce the Arabs to refrain?

A: I have no evidence to the contrary.[168]

Preedy went on from there, aggressively pursuing Sacher for criticizing the Mandatory Government for not doing enough to implement the Balfour Declaration. "You are now before a Commission of impartial people," Preedy declared in obvious anger, "and perhaps you can spare a little time to justify [your criticism of the Mandatory Government]."[169]

The highly adversarial dynamic between Preedy and Sacher could not have helped the Zionist cause in the hearings. It pushed the Palestine Government away from the Jewish side and closer to the Arab side, seriously undermining any pretense of neutrality on the part of the Palestine Government. It also must have made a significant impression on the Commissioners, who after all were high-ranking British officials and MPs who probably did not take kindly to a Jewish witness who had criticized the Mandatory Government and evoked so much hostility from the Government's lawyer. Preedy's conduct was far more offensive and unprofessional than any of the other lawyers in the hearing, but ultimately that did not matter, as he was representing the Mandatory Government in a proceeding conducted by British officials.

Sacher's testimony included some unusual moments as well. For example, during cross-examination by Stoker, Sacher testified the Arabs disliked the British so much that they proposed an anti-British alliance with the Jews, prompting Auni Bey to object:

Q: What you say is that, if the Jews were not here, the feelings of the Arabs would be anti-British?

A: Most certainly. I have had repeated conversations with Arabs who have been good enough to suggest that the simplest way of getting rid of the antagonism between Jews and Arabs in this country would be for the Jews to join the Arabs against the English. It is the commonest method of approaching Jews in this country.

Q: Do you believe that they thought that?

A: It is very difficult to believe any Arab at any time.

Q: What Arabs?

A: Auni Bey was one.

Auni Bey: I said this?

A: Yes, you did.

Q: That the Arabs and Jews should combine to throw out the English?

A: Certainly.

Auni Bey: I deny positively that.[170]

On 20 December 1929, the day after Sacher had finished his testimony and as the hearings were winding down, Chancellor wrote a candid and revealing report to Shuckburgh at the Colonial Office, focusing especially on Preedy's hostility to Braude and Sacher:

> I think the situation in Palestine is perceptibly better during the last ten days. The Arabs are satisfied with the Commission, and, although their counsel do not state their case well, they are hopeful that some of its recommendations will be favourable to their cause. Lloyd told me this morning that within the last two days or so Preedy has become apparently very bitterly anti-Zionist in his cross-examination of the Jew witnesses. This is unfortunate, as he is presenting the Government's case. He should content himself with rebutting the attacks upon the Government and leave general issues alone. Of course the attacks made upon the Government have been unjust and in many areas malignant, and it is not surprising that Preedy, who is a combative person, warmed to his work when he had Sacher in the witness box. However, I hope that he will realise the limitations imposed upon him as counsel for the Government. Lloyd told me that he had been given a hint.[171]

Shuckburgh responded to Chancellor on 2 January 1930:

> I was amused by what you tell me about Preedy and the Zionist witnesses … The Jews have only themselves to thank. It was they who insisted on representation by Counsel in the first instance; and it was certainly they who took the lead – by their dead set against Luke – in introducing the element of personal animosity into the whole proceedings. No doubt they like hitting better than being hit. Most people do. Speaking for myself, I am not disposed to waste empathy on them.[172]

On 20 December 1929, as the Shaw Commission hearings were nearing completion, Balfour, Lloyd George, and General Smuts published a Letter to the Editor of *The Times*. Apparently concerned that the Shaw Commission had ventured well beyond its Terms of Reference into areas of major policy, the three wartime British leaders urged the government to appoint a separate commission to examine such issues. Several days later, Prime Minister MacDonald advised the House of Commons the Shaw Commission would remain faithful to the Terms of

Reference and not include any discussion of major policy issues in its report.[173]

Closing arguments

By the time the testimony had concluded, Stoker and Auni Bey had succeeded in positioning the Arab side as the *victims* of Jewish incitement and encroachment on Muslim legal and proprietary rights to the Wall. They had also successfully transformed the hearings, with Preedy's help, from a narrow inquiry into the events of August 1929 into a far broader litigation encompassing the litany of Arab grievances against the Jews and the British, beginning with the McMahon-Hussein correspondence and continuing through the Balfour Declaration and the manner in which the British were implementing the Mandate.

As Bentwich later noted:

> The implied exclusion [of major policy issues from the Commission's Terms of Reference] only whetted the appetites of the Arabs for broadening the basis of inquiry. For some weeks the tribunal listened to the evidence of Government witnesses, police officers, district officers and the like, as to the exact happenings [of August 1929], till they were wearied with the story. But when the Arabs opened their case, they were taken at once into a more spacious area and listened to picturesque accounts of the Jewish peril. An Arab notable of Nablus [Haj Tewfik Hammad] gave them a striking illustration of Arab feeling by seizing a glass of water and demonstrating the filling up of the cup. The Jewish case was the last to be presented; and while an attempt was made by their Counsel to bring back the inquiry to the terms of reference, it was obvious that the interest of the Commission was concentrated on the Arab indictment.[174]

It was against this backdrop that the lawyers gave their closing arguments to the Commission.

Merriman closing argument

Merriman gave the first closing argument, followed by Stoker, and finally Preedy. Merriman, whose anger with Preedy had reached a near-boil throughout the hearings, wasted a significant portion of his argument defending himself in his various squabbles with Preedy. Merriman further argued that Preedy's disrespectful attitude toward him and the hostile manner in which Preedy had cross-examined the Jewish witnesses should be regarded as *evidence* of the Palestine Government's lack of commitment to implementing the Balfour Declaration, as required by the Mandate:

> I come now to my last complaint and that is a lack of sympathy … with the policy of a Jewish National Home. Sir, I want to call your attention to some statistics … in regard to the cross-examination administered by Mr. Preedy to the Arab and Jewish witnesses respectfully. Forty-eight Arab witnesses were called … and during the whole of this transcript now running to 43 days, 39 pages are occupied by Mr. Preedy in cross-examining Arab witnesses, 39 pages, and Sir, in the course of those 39 pages, with all the resources of Government at his disposal, not one single question has been put to an Arab witness in regard to the *Burak* campaign, in regard to any form of provocation of incitement against Jews, of any Press agitation, anything which would suggest premeditation, anything which would suggest complicity on the part either of the press, notables or anybody else, nor has there been any question suggested either to the Mufti or to any member of the Arab Executive as to their activities whether in this country or out of this country by post, telegraph or otherwise since the outbreak.[175]

Commissioner Hopkin Morris interrupted Merriman, noting

> that is an argument on the procedure … I would for my own part say, without hesitation, that if I am expected to draw deduction from the actual conduct of the case, certainly I am not going to do it.[176]

Merriman, however, stubbornly insisted on continuing the argument:

> Cross-examination was administered to these Jewish, responsible Jewish people … the effect of which was to suggest that their activities, so far from being helpful in those days, in spite of that being the case, as was said not only by these police officers but by Mr. Luke himself … that their activities were wholly malevolent and when they, to put it quite bluntly, when they came into conflict with a Government witness, they were lying. … I am concerned that day after day for the last fortnight that sort of attitude has been adopted both by Mr. Preedy and as I say by the Solicitor General in regard to respectable and responsible Jewish witnesses. … I mean to say the contrast is too marked between the failure to cross-examine any Arabs on these grave and vital matters, and the attack which was made upon the Jewish witnesses … I have said what I have to say in regard to the Arab community, that there was not one single question in a hostile sense on the vital issues in this case addressed to the Arab witnesses. On the other hand I say there has been administered to responsible and respectable Jewish witnesses the most severe cross-examination.

> *Chairman*: If you will only try and keep on good terms with the Counsel on the other side and not let this degenerate.

> *Preedy*: I have put up with it for two months.[177]

Following this exchange Merriman still would not let go. He focused on Preedy's cross-examination of Sacher and Preedy's questions to Sacher about the Zionist Congress in Zurich. Merriman characterized those questions as unfair, given the Zionist Executive had maintained a close and cooperative working relationship with the British Government.

Merriman again claimed Preedy's hostile cross-examination of Sacher demonstrated the Palestine Government's lack of sympathy with Zionism and the Balfour Declaration. Commissioner Hopkin Morris once again interjected, saying he did not see the point of this line of argument. Merriman, clearly frustrated, and likely realizing "it was obvious … that the Tribunal was unsympathetic to the Jewish case,[178] suddenly announced "I propose to conclude my address … I have said all that I intend to say after that."[179]

The *New York Times* headline the next day proclaimed, "Merriman in Anger Ends Jewish Case." The correspondent covering the hearings wrote:

> The Jewish case came to a dramatic close at today's hearing of the Palestine Inquiry Commission, when Sir Boyd Merriman, counsel for the Jews, who was about to finish his summing up … declined to continue because of interruptions by R. Hopkin Morris, the member of the British Commission representing the British Liberal Party. … Sir Boyd abruptly seated himself, stating "after that I have no more to say."[180]

Colonel Kisch of the Palestine Zionist Executive described the abrupt end of Merriman's argument as "a painful scene."[181]

Stoker closing argument

Stoker gave the next closing argument. Stoker first addressed the McMahon-Hussein correspondence, arguing Palestine was included in the McMahon pledge. Stoker reiterated the Arab legal view of the correspondence as having the binding force of a treaty or contract, or as Stoker described it, a "constitution" for Arab independence. Stoker argued the Balfour Declaration "was entirely at variance with what they [the Palestinian Arabs] had understood as to the McMahon agreement … threatening them as it did with wholesale extermination, and the institution of the Jewish National Home, filled them with consternation."[182]

Stoker summed up the Arab position on this point, arguing "the Mandate is so bad, so much a breach of the Covenant of the League of Nations, that it ought, by rights, to be reconsidered altogether with a view to being rescinded or torn up."[183]

Stoker then addressed the issues regarding the Wailing Wall:

> [T]he Moslem case is this, that the Jews are allowed, they have always allowed Jews to come to the Wall. That is what is called a right of access or a visit to the Wall … When they allow them access to the place to visit, they can pray or think, if they like, or stop there as long as they like, but they object to appurtenances being brought up there which would turn it into a place of public worship for them. … Now considerable stress has been placed by Sir Boyd Merriman on the fact that a declaration has been issued by the Zionist Executive that they had no designs on the holy places. … I think anybody who has studied international history has become aware of the fact that when a power is on the brink of warfare that it is very often the time chosen for making the most pacific declarations, and it is scarcely to be wondered … that the Moslems should not pay attention to this assertion that the Jews did not intend any harm in the holy places. I do not suppose anybody can think that the Jews, an ambitious race as they are, with their aspirations as regards the National Home, are likely to be content to wail at the Wailing Wall for ever … that undoubtedly the Jews have, as a proud and self-respecting people, a hope or desire that some day King Solomon's Temple will be erected physically on its old site, which is the same site as the Mosque of Aqsa.[184]

Preedy closing argument

Preedy, who developed a strong anti-Jewish bias during the proceedings,[185] then gave his closing argument on behalf of the Mandatory Government. Preedy defended the conduct of the Government and the police, while rejecting Merriman's accusation that his cross-examination of the Jewish witnesses had betrayed a bias against the Zionists and the Balfour Declaration. Preedy proudly said, "I stand by every word I put to those gentlemen in cross-examination."[186] Preedy also offered a strong defense of Luke's conduct:

> Mr. Luke is a Civil Servant who has to carry out, it is his duty to carry out, the policy laid down by the British Government in the first place. … [W]hen Mr. Luke or any other British official is accused of being in imperfect sympathy with the policy of the Jewish national home, … my answer to that is that, if it is alleged that they are not carrying out the policy laid down in the White Paper of June, 1922, that is not really what they are charged with, because really what they are charged with is not carrying out or lack of sympathy with something more, which the Zionists think they ought to have. But, so far as any evidence goes before you, I submit that there is no evidence against Mr. Luke or any other British official here that they have not loyally adhered to the principles that are laid down in that Command Paper.[187]

Chancellor later wrote to Shuckburgh praising Preedy's representation of the Palestine Government before the Shaw Commission. "Preedy put his heart into the case and presented the Government's case with great care and skill," Chancellor wrote.[188]

The Shaw Commission Report and reactions

Near the end of the hearings Chancellor became concerned the Commission appeared to be divided into two camps, with Shaw and Snell on one side and Betterton and Hopkin Morris on the other. Chancellor feared the Commissioners would issue two separate reports.[189] These fears turned out to be unfounded, as Shaw ended up joining Betterton and Hopkin Morris to produce a majority Report, with a partial dissent from Snell.

The Report

The Report of the Shaw Commission was released 31 March 1930, and "produced great heart-burning among the Jewish people and great satisfaction among the Arabs."[190] The Report exonerated the Palestine Government of all the accusations Merriman had leveled, and exonerated the Mufti of having premeditated and planned the violence.[191] The Report also found

the violence did not represent an Arab uprising against British rule in Palestine.[192] The Commission concluded, "racial animosity on the part of the Arabs, consequent upon the disappointment of their political and national aspirations and fear for their economic future, was the *fundamental cause* of the outbreak of August last."[193] But the Commission also concluded the *immediate cause* of the outbreak was the 15 August 1929 Jewish demonstration at the Wailing Wall.[194]

Regarding the Balfour Declaration, the Commission urged the British Government to issue a "firm definition of policy, backed by a statement that it is the firm intention of His Majesty's Government to implement that policy to the full."[195] The Commission seemed to signal, however, it supported a less robust commitment to the creation of a Jewish National Home. Thus, the Commission urged the Government to adopt a new policy containing at minimum (i) "a definition in clear and positive terms of the meaning which His Majesty's Government attach to the passages in the Mandate providing for the safeguarding of the rights of the non-Jewish communities" in Palestine, and (ii) "directions more explicit than any that have yet been given as to the conduct of policy on such vital issues" as Jewish land acquisition and Jewish immigration.[196]

The Commission finally recommended the British Government "should take such steps as lay within their power to secure the early appointment, under Article 14 of the Mandate for Palestine, of an *ad hoc* Commission to determine the rights and claims in connection with the Wailing Wall."[197] As we will see in Chapter 4, the British Government had already moved forward to appoint the Lofgren Commission even before the Shaw Commission had released its Report.

The Report also strayed far beyond the Commission's Terms of Reference, making additional major policy recommendations regarding Jewish immigration and land purchases.[198] As to immigration, the Report concluded the Arabs feared excessive Jewish immigration beyond the economic absorptive capacity of the country would harm Arab livelihood and eventually subject them to majority Jewish rule. Those fears, according to the Report, had contributed to the atmosphere leading to the outbreak of violence. The Commission therefore recommended "His Majesty's Government should issue at an early date a clear and definite declaration of the policy which they intend to be pursued in regard to Jewish immigration to Palestine, and, in the framing of that declaration, should have regard to our conclusions on immigration."[199]

Regarding land acquisition, the Commission found many Arab tenant farmers had been evicted from land sold to Jews. While the Commission commended Jewish purchasers for compensating those evicted tenants, it nevertheless concluded, "a landless and discontented class is being created. Such a class is a potential danger to the country. Unless some solution can be found to deal with this situation, the question will remain a constant source of future disturbance." The Commission recommended on this issue a scientific study to determine how to improve crop yields and use land more efficiently, along with steps to check "the present tendency towards the eviction of peasant cultivators."[200]

Commissioner Snell filed a separate "Note of Reservations," in which he dissented in part from certain of the Commission's findings and recommendations. For example, Snell disagreed with the Commission's decision to exonerate the Mufti:

> I therefore attribute to the Mufti a greater share in the responsibility for the disturbance than is attributed to him in the report. I am of the opinion that the Mufti must bear blame for his failure to make any effort to control the character of an

> agitation conducted in the name of a religion of which in Palestine he was the head.[201]

Regarding the causes of the violence, Snell said he agreed "the animosity and hostility of the Arabs toward the Jews" was the fundamental cause of the outbreak. But Snell disagreed that the immediate cause was the 15 August Jewish procession to the Wall, noting instead "the activities of the Moslem religious societies and the campaign of propaganda among the less-educated Arab people were the most important of the immediate causes of the disturbances."[202]

Arab and British reaction

The Arabs "celebrated loudly,"[203] and "with jubilation," viewing the report as a victory and a "vindication of their case against the Jewish Home."[204] But the Arabs may have read too much into their courtroom victory. An Arab delegation traveled to London at the very end of March 1930 to make new demands on the Government to halt Jewish immigration entirely, to halt sales of Arab land to Jews, and to establish a representative government based on the relative size of the Arab and Jewish populations. The British rejected those demands a few weeks later, leaving the Arabs dissatisfied.[205]

Nevertheless, the British Government said it was "delighted with the findings and recommendations of the Commission, which it wholeheartedly accepted."[206] Prime Minister MacDonald, however, expressed concern about the Commission overstepping its bounds by addressing major policy issues.[207]

Jewish reaction

Even before the Shaw Commission had issued its Report, Weizmann was expecting bad news. Weizmann had already gone on the attack against Shaw and two of the other commissioners. Weizmann described Shaw, "based on the opinion of our lawyers and of those who had an opportunity of observing him as definitely of reactionary and anti-Semitic type. He is half deaf, very slow, and it was difficult for him to grasp the problem at all."[208] Weizmann also disparaged Shaw as "third-rate," Hopkin Morris as suffering from a "Lloyd George complex," and Betterton as a "sad, useless hypochondriac."[209]

In a 16 March 1930 letter to the British feminist and human rights campaigner Ethel Snowden, Weizmann said he was "afraid there is every justification for being apprehensive of what this Commission is going to say."[210] Weizmann added:

> If the Report is really what we all fear it is likely to be, then it will no doubt have a depressing effect on the Jews, – but we shall get over it. The Arabs will, of course, be elated, and this elation can express itself in one way, and in one way only. They will say to themselves: we have organized a massacre; we have killed so and so many innocent people; there was an Enquiry, this Enquiry may possibly condemn savage brutality, but to a certain extent it finds justification for it in the Policy. The Policy therefore is wrong; we have only got to persist in our methods, and we shall win. It therefore seems to me, and I am not saying it lightly, that the responsibility for what has happened in Palestine, and for what may happen after the Report has been published, in spite of all preventive measures the Government may take, will rest heavily on the Commission.[211]

When the Report was finally issued on 31 March 1930, Weizmann's worst fears were realized. He wrote the following to Prime Minister Ramsay MacDonald the following day:

> The Report … has come as a terrible blow to the whole Jewish nation. … I hear, but in view of our conversation I refuse to believe it, that a checking of our immigration and a curtailment of our freedom of land purchase are contemplated. Either of these limitations would to us be tantamount to cancellation of the policy of the Jewish National Home in Palestine. I would much rather that this policy were openly given up by Great Britain than that the Jewish nation should have to undergo the agony of a slow frustration of its endeavours and extinction of its hopes. Forgive me for writing to you in this strain, but you will surely understand the pressure under which I am laboring.[212]

Weizmann also sent a private letter to Charles Prestwich Scott, the editor of the *Manchester Guardian*, listing a variety of grievances about the Report.[213] Several days later the *Guardian* published a much lengthier critique from Weizmann. Weizmann accused the Commission of "a complete lack of understanding of the world-wide Jewish problem for which a remedy is being sought in Palestine, as well as the solemn international pledges which form the basis of Great Britain's mandatory responsibilities … On the strength of our historical connection with Palestine, a national home was assigned to us in that country by the unanimous verdict of the civilized world. We are in Palestine 'as of right, not on sufferance.'"[214]

In a subsequent letter to Warburg, Weizmann claimed Prime Minister MacDonald "thought the report an unfair one and that the Government was in an embarrassing position because of this Report, and because it is the only official document about Palestine."[215]

By the end of May, Weizmann had grown so upset and frustrated that he threatened, in a letter to Malcolm MacDonald, to resign as Chair of the Jewish Agency if the British Government were to endorse the Shaw Report at the upcoming meeting of the Permanent Mandates Commission of the League of Nations.[216] Weizmann wrote, "although no man can lightly declare the bankruptcy of the policy that has been his life's work, should His Majesty's Government before the whole world fully endorse the Shaw Report, I, for my part, could not avoid taking that step [resignation] any longer."[217]

Weizmann, still furious at the end of June, referred to the Shaw Commission Report as "an iniquitous document."[218] He continued:

> I must say I have seen a great many reports in my life – I remember the report written by Count Ourousoff after the Kisheneff pogrom, and it was by far a fairer document than the one the British Administration and the Commission of Enquiry have produced … Don't wonder, therefore, that the Jews, at any rate the Zionist Jews, see in this Report an attempt to take away their birthright.[219]

Aftermath

Following the publication of the Lofgren Report, Leonard Stein, one of the lawyers for the Jewish side during the Shaw Commission hearings and Honorary Legal Advisor to the Jewish Agency, submitted a very lengthy memorandum (simultaneously published in pamphlet form) to the Permanent Mandates Commission (PMC), setting forth the official Jewish Agency response to the Shaw Report.[220]

The Stein Memorandum began by criticizing the Shaw Commission for exceeding the limits of its Terms of Reference by addressing issues of major policy. Stein also criticized the Commission's view that evidence regarding the Arab "state of mind" regarding those issues was relevant, noting "in many cases the Commission does not clearly distinguish between what the Arabs think, what it thinks the Arabs think, and what it thinks itself."[221] Stein attacked other aspects of the report as "subtly misleading" for failing to provide the full context of various factual and historical issues.[222]

Stein next addressed the Commission's conclusion that the "immediate cause" of the violence was the 15 August 1929 Jewish procession to the Wall. After reviewing the evidence, Stein argued:

> To sum up:–
>
> 1. There is no reason to believe that the procession of August 15th, though the Jewish authorities rightly discountenanced it, would, in fact, have had any serious repercussions if the Moslem authorities had not used it as a pretext for an intensified campaign of incitement.
> 2. The background to the demonstrations was the long series of provocations by the Moslem authorities.
> 3. These provocations included the persistent contention that the Jews had no rights at the Wall at all, beginning with the Mufti's statement to that effect as early as October 1928. At the same early stage the Moslem authorities were already doing their best to persuade the Moslem public that the Jews had designs on the Holy Places.
> 4. Throughout this early period and, indeed, as late as July, 1929, neither the Jewish authorities nor even the Jewish Press was guilty of any action which the Commission sees reason to describe as provocative.[223]

Stein further criticized the Shaw Commission for straying into questions regarding the respective rights of the parties to the Wall, noting "the merits of the Wailing Wall controversy were outside the competence of the Commission and it is a little surprising to find the Report … prejudging a question on which the Commission was clearly unqualified to pronounce."[224]

Stein also criticized the Commission for not paying greater heed to the evidence indicating the violence was not spontaneous, but in fact had been planned and organized in advance. Stein finally criticized the Commission for disregarding the evidence of the Mufti's complicity in the outbreak and for exonerating the Mufti.[225]

Another British Jewish barrister, Horace Samuel, published a short pamphlet later in 1930 containing a very detailed and highly critical analysis of the Shaw Commission's Report. Samuel criticized the Commission for considering major policy issues far beyond the limits of its Terms of Reference, arguing the Commission's findings had been tainted by the Arab case against the Balfour Declaration. Samuel accused the Commission, out of a "bureaucratic sense of loyalty," of protecting the Mandatory Government from adverse findings, downplaying or ignoring evidence favoring the Jewish case and stretching other evidence to favor the Arab and Government cases.[226]

This meant, according to Samuel:

> [T]he Commission can be shown, by reference to its own Report and to the actual evidence on which that report is based to have been at the best slovenly and guilty of elementary faults in judicial procedure, and at the worst prejudiced and biased, in the sense that it allowed its handling of the material, and its findings of facts, to be influenced by the views formed by it on the broad Jewish–Arab issue and by what was a perfectly normal desire to protect the Government on whom it was sitting in judgment.[227]

The Stein Memorandum served as a sort of appellate brief for the Jewish side before the PMC, which convened in Extraordinary Session in June 1930 to consider the findings of the Shaw Commission.[228] Luke and Lloyd appeared on behalf of the British Government, along with two other British officials.[229] The Minutes of the PMC meeting demonstrate remarkable skepticism toward the Mandatory Government, and a level of sympathy with Zionism that would be unheard of in today's United Nations. As Weizmann put it, "the British Delegation had a severe crossing and were very much taken to task by the Permanent Mandates Commission."[230]

Following opening comments by the British officials, the PMC members peppered Luke with a series of questions expressing skepticism with some of the key findings and conclusions of the Shaw Commission. The questions also showed the PMC harbored concerns about the manner in

which the Palestine Government was implementing the Mandate.

For example, the PMC criticized the Mandatory Government for not taking steps prior to the November 1928 White Paper to define the *Status Quo*. The PMC also questioned how the Mandatory Government could, on one hand, insist on relying on the prior practices under the Ottoman regime as defining the *Status Quo*, only to issue in its own set of detailed Instructions on 1 October 1929 that appeared to create a *new Status Quo*.

Commissioner Rappard questioned how the Palestine Government could claim it had acted impartially toward Arabs and Jews when it had prohibited the Jews from setting up screens at the Wall, but then allowed the Muslims to construct the *Zawiyah*, "which was a reprisal measure and intended to annoy the Jews."[231] Commissioner Van Rees agreed:

> The screen was not deliberately intended to annoy the Arabs; it was brought there to separate men from women. The placing of the screen was not in itself a circumstance which would justify reprisals about eight months after the incidents of 1928. The placing of a screen was on a different footing from the re-establishment of these ceremonies [*Zikr*] which had apparently only been introduced with a definite intention to annoy.[232]

Commissioner de Penha Garcia said the Mandatory Government would have been able to avoid "a good deal of trouble" if they had notified both the Muslims and Jews from the beginning "that they might claim and establish their legal rights later, when the final decision was given, but that in the meantime only such practices would be allowed as had been allowed in previous years."[233]

The Commissioners expressed further frustration with the Mandatory Government for not stopping the 15 August 1929 Jewish procession to the Wall. They noted that even though the procession was peaceful, it should have been prevented. The PMC also criticized the Shaw Commission for failing to identify the violent Arab counter-demonstration the following day as an immediate cause of the outbreak. Commissioner Van Rees pointedly criticized the Mandatory Government and its police force, noting responsibility for the outbreak of violence "lay with the local authorities who had failed to surround the [Jewish] demonstration with the necessary guarantees."[234]

Van Rees also spoke at length during the PMC's fifth meeting, repeatedly criticizing the findings and conclusions of the Shaw Commission as unjustifiably pro-Arab. Van Rees thought it highly unfair that "[n]o Chapter of the Commission of Enquiry's report was devoted to the legal side of the position of the Jews in Palestine."[235] Van Rees stressed the Balfour Declaration, as codified in the Mandate, provided the legal basis for the Jewish presence in Palestine, and he criticized the Shaw Commission for glossing over "this point of capital importance."[236] Van Rees also took issue with the Commission's conclusion that the violence had not been premediated, or at least not tacitly encouraged by the Muslim leadership, especially the Mufti.[237]

As the PMC's consideration of the Shaw Commission report stretched into a period of several days, the members of the Commission seemed to grow increasingly irritated with the British defense of the Shaw Report and increasingly sympathetic to the Jewish case. For example, Commissioner Rappard criticized the Mandatory Government for having done "practically nothing concrete … to encourage close settlement by Jews on the land." This led the highest-ranking British representative, Dr. T. Drummond Shiels, a Scottish MP and Undersecretary of State for the Colonies, to remark that Commissioner Rappard "seemed to sympathize with the Jewish point of view." Rappard shot back that he had been "speaking of the Mandate. It was not a matter of sympathy, but of the application of the Mandate." Rappard, clearly irritated, added he "resented" his "observations being attributed to any particular sympathies with one side."[238]

In its Report to the Council of the League of Nations, the PMC said the evidence cited in the Shaw Commission Report did not support the Report's conclusions regarding lack of premeditation. The PMC Report also criticized the Shaw Commission for the "kindly judgment" it rendered on the "attitude of the Arab leaders."[239]

The British Government, clearly irritated with the PMC, submitted a strong letter to the Council of the League in response to the PMC's Report. Among many other objections, the British were especially angry the PMC had taken into consideration information received *ex parte* from the Jewish side after the Shaw Commission had completed its work. Ironically, whereas the British Government and the Commission itself originally had said the Commission was not intended to function as a judicial body, the British Government now took the opposite position before the PMC, defending the Commission's findings as the product of a careful judicial process:

> His Majesty's Government note that the findings of the Shaw Commission on questions of fact, such as the causes and responsibility for the outbreak, have been in some cases ignored and in others called in question. Whatever view may be taken as to the conclusions arrived at by the Commissioners, their verdicts on questions of fact, coming, as they do, from so authoritative a source, and based, as they are, upon actual evidence tested by rigorous cross-examination, make surprising the attitude towards them of the Mandates Commission. This is the more striking when contrasted with the fact that at the same time criticisms taken from a Jewish memorandum (which reached the mandatory Power too late for an accompanying comment to be made upon it) have been adopted, and when it is freely admitted by the Commission that account has been taken of criticisms from various sources upon which also no opportunity of comment could be open to the mandatory Power.[240]

The Government also defended the various conclusions of the Shaw Commission Report to which the PMC had taken exception, especially the finding that the violence had not been premeditated.

Assessment

The Shaw Commission hearings reflected the drama, division, and bitterness among the Arabs, Jews, and British following the calamitous events of August 1929. The British Government responded to the outbreak of violence by invoking the law and legal procedure, seeking to conduct a quasi-judicial inquiry as it had done with the Palin and Haycraft Commissions earlier that decade, and hoping to demonstrate to the world its even-handedness and commitment to upholding the rule of law in Palestine. Both the Colonial Office and the High Commissioner wanted to maintain control of the process, to ensure the substantive outcome did not embarrass either His Majesty's Government or the Mandatory Government. But the conflicting political agendas of the Arabs, Jews, and the Mandatory Government all combined to convert the Shaw Commission into a messy, poorly managed, full-blown courtroom trial pitting the Jews against both the Arabs and the Palestine Government. Each of the three sides responded differently, with vastly different results.

The Jewish side approached the trial with the strategic objective of achieving a verdict finding the Arabs (especially the Mufti) culpable for the riots, and condemning the Mandatory Government and its top officials for failing to protect the Palestinian Jews. But the tactics the Jewish side employed undermined their ability to achieve that objective. Weizmann's insistence on including the Mandatory Government as a party in the dock alongside the Arabs backfired badly, as it drove the Mandatory Government and the Arabs together as joint adversaries against the Jews. Weizmann should have realized His Majesty's Government would never have abided a

verdict against the local British administration in Jerusalem.

Weizmann also should have realized the Commission's composition – an obscure former Colonial Judge and three politicians from each of the major parliamentary factions – made it even less likely that a verdict of guilt could be achieved against the Mandatory Government. But Weizmann failed to apprehend or appreciate this dynamic, and instead used his connections with the highest-ranking officials in Britain to push his demands for a full-blown trial in which the Arabs and the Mandatory Government would be treated as *joint* defendants.

Weizmann further blundered when he selected Merriman to serve as counsel for the Jewish side. Merriman may have been one of Britain's most highly renowned (and most expensive) Barristers and, in Chancellor's words, an "attractive" person outside the courtroom, but inside the courtroom this famous but over-rated lawyer pursued a devastatingly weak and counter-productive trial strategy. Merriman demonstrated an astonishing level of arrogance that had the triple-effect of alienating the Commissioners, rallying the British Government to support the accused Mandatory Government, and driving the Arabs and the Mandatory Government into an unlikely alliance that proved extremely harmful to the Jewish cause.

Rather than attack and try to humiliate the Mandatory Government with such ferocity in the courtroom, Weizmann should have instructed Merriman to focus solely on the Arabs as the responsible party, and to have left it to Weizmann to deal with the Prime Minister and Colonial Office behind the scenes to press for changes in the Mandatory Government. Instead, the Jewish tactics backfired badly, driving the Mandatory Government and the Arabs into each other's arms, and alienating the Colonial Office as well.[241] No wonder Shuckburgh was so dismissive of the Jewish complaints about Preedy's cross-examinations of Sacher and Braude. "They have only themselves to thank," he wrote of the Jewish side, adding "I am not disposed to waste empathy on them."[242]

The Mandatory Government, stung by criticism that it had failed to afford an "adequate measure of protection" to the Palestine Jews, and unhappy with London for having succumbed to Weizmann's pressure to relegate it to the status of a mere defendant, on an equal footing with the Arabs and Jews, defended itself and attacked the Jewish witnesses ferociously. Chancellor wanted a "fighter," and Preedy did not disappoint. Not surprisingly, the Shaw Commission rejected Merriman's attacks and completely exonerated the Mandatory Government. In the end, only Luke was sent away from Palestine, quietly "promoted" to Lieutenant Governor of Malta.

The Arabs initially approached the Shaw Commission hearings with a high level of mistrust, but with the clear strategic objective of converting the proceedings into a trial against the Balfour Declaration and the Mandate, against Jewish claims to the Wailing Wall, and against overall British policy in Palestine. Despite the strict Terms of Reference ruling all such "major policy issues" out of bounds, Stoker successfully persuaded the Commission to consider these issues anyway, arguing they were relevant to understanding the impact on the "Arab state of mind" leading up to the riots.

The strategy was brilliant. Stoker and Auni Bey Abdul-Hadi maximized its effectiveness by focusing on the Jews as culpable *both* for provoking the Arabs with the *Tisha b'Av* demonstration, *and* for pressuring the British with their aggressive assertions of pro-Zionist, anti-Arab demands. Unlike Merriman, Stoker was careful not to alienate the Mandatory Government, instead entering into an unwritten but powerful courtroom alliance with Preedy against the Jewish side. To the extent gaining British support was critical to the outcome of the trial,

Merriman failed miserably, and Stoker succeeded beyond all expectations.

But the Arabs' courtroom triumph amounted to a deceptively weak victory in many respects, because of the Mufti's refusal to regard the victory as an opportunity to negotiate a settlement with the British and the Jews. The Shaw Commission handed the Mufti a huge short-term win, exonerating him and clearing the Arabs of the charges of premeditation and sedition. The Mufti had a strong hand to play following the verdict, and he could have taken advantage of the opportunity to press for a long-term settlement before the Jewish side had time to recover. But the Mufti's consistent unwillingness to make *any* concessions, no matter how miniscule, ultimately proved self-defeating.

Nevertheless, one can only admire the effectiveness of the Arab side in using the trial as a platform for broadening the political discussion well beyond the Shaw Commission's Terms of Reference, striking at the very heart of the Balfour Declaration and eventually causing the British Government to reconsider its core commitments to the Jewish people.

Therefore, and notwithstanding the PMC's strong criticisms, the Shaw Commission hearings and Report must be viewed as a crushing defeat for the Jewish side.

The lingering question remains whether the British had decided beforehand to use the Shaw Commission as an opportunity to begin building a record that would justify the actions they would take later to put the brakes on Zionist aspirations, or whether they started the process from a neutral position and only turned against the Zionists because of the poor tactics of the Jewish players.

The evidence suggests some combination of both. On one hand, Chancellor had urged Shaw to "meet the wishes of the Arabs" to avoid further violence.[243] Lloyd, the Commission's Secretary and the Colonial Office's eyes and ears, signaled early in the process that the Report (which he ended up drafting in his capacity as Secretary to the Commission) would be written "to go some way in the direction of meeting Arab opinion."[244] Not only did the report exonerate the Mufti and blame the Jewish *Tisha b'Av* demonstration at the Wall as the "immediate cause" of the violence, it also expressed sympathy with the Arabs on major policy issues such as Arab grievances regarding the Balfour Declaration and the Mandate, Arab ownership of the Wall and the very limited Jewish rights of access, as well as Jewish land acquisition and Jewish immigration.

On the other hand, the evidence suggests Merriman's unrelenting and personal attacks on the Mandatory Government and its officials, Weizmann's pressure campaign in London and his lobbying in Geneva, and Stoker's and Preedy's courtroom strategy all combined to cause official London to begin to lay the foundation for constricting Zionist ambitions over the next decade.

The Shaw Commission thus should be viewed as a turning point in the history of the Mandate, marking the beginning of the end of Britain's original commitment to the Zionist program. As will be discussed in Chapter 5, Britain's slow but steady reversal of its pro-Zionist policy began with the Shaw Commission Report, followed several months later by the Hope Simpson Report and the Passfield White Paper. While the Peel Commission endorsed the creation of a Jewish State in a much smaller area of Palestine, a follow-on British technical commission recommended against the idea. Soon afterward Britain issued the MacDonald White Paper of 1939, severely restricting Jewish immigration to Palestine on the eve of the Holocaust and dramatically rolling back its commitment to implement the Balfour Declaration.

The Shaw Commission experience also demonstrated both the limits and the opportunities

afforded by the law and the legal process to the parties. The Jews hired the best British barristers money could buy, yet faltered in the courtroom by pursuing the dubious strategy of attacking the Mandatory Government for manifesting "imperfect sympathy" with the Zionist cause. In so doing, the Jewish side alienated the majority of the Commissioners and drove the Mandatory Government into a tacit alliance with the Arab side. Merriman's haughty and arrogant manner during the hearings also harmed his client's case and provoked Preedy into open hostility with the Jewish witnesses. Stoker, who entered the hearings as the decided underdog among the lawyers, emerged along with Auni Bey as the winner of the first-ever head-to-head, courtroom trial of Arabs against Jews.

A few months later Auni Bey would once again represent the Arab side in a trial against the Jews in Jerusalem, this time before the Lofgren Commission, in an epic courtroom battle over the rights and claims to the Wall itself.

Notes

1 *See* Chapter 2, *supra* at nn.183–84 and accompanying text.

2 C. Dresner and B. Litvinoff (eds.), *The Letters and Papers of Chaim Weizmann* (hereafter "*Weizmann Letters and Papers*"), Vol. XIV, Series A at 7 (Transaction Books, 1978), Letter No. 9 (Telegram from Weizmann to Prime Minister Ramsay MacDonald, 25 August 1929).

3 CO 733/175/2, Letter from Weizmann to Lord Passfield, 29 August 1929. 29 August 1929 was the same day High Commissioner John Chancellor finally returned to Palestine from his home leave. It was also the same day Rutenberg sent to Lord Reading his proposal to expropriate the pavement in front of the Wall, and the same day Mohamed Ali Pasha hand-delivered to the British Ambassador in Istanbul his proposal to sell the Wall to the Jews.

4 *Id.*

5 Telegram No. 139 from Chancellor to Secretary of State for the Colonies (29 August 1929), Chancellor Papers, *op. cit.*, Box 13/2; P. Ofer, *The Commission on the Palestine Disturbances of August 1929: Appointment, Terms of Reference, Procedure and Report*, Middle Eastern Studies 21(3) at 349 and n.7 (1985).

6 *Id.*, Telegram No. 130 from Secretary of State for the Colonies to High Commissioner for Palestine (30 August 1929).

7 CO 733/176/2, Letter from Lord Melchett to Lord Passfield (30 August 1929).

8 Sir Harry Luke Collection, *Palestine Riots, 1929: Dossier for the Chief Secretary*, Ref. No. GB165-0188, Box 5 File 5/2, Middle East Centre Archive, St. Antony's College, Oxford (examined 13 November 2018) (Letter from Said al-Khatib, Society for the Protection of the Mosque al-Aksa and the Moslem Holy Places to the High Commissioner, 3 September 1929).

9 *Id.*

10 CO 733/176/2, Shuckburgh minute recommending appointment of Shaw (31 August 1929), Lord Passfield minute (31 August 1929) responding, "I have asked Sir Walter Shaw in the first instance," and handwritten letter from Shaw to Lord Passfield (1 September 1929) stating "I shall have much pleasure in placing my services at the disposal of the Government"; N. and H. Bentwich, *Palestine Memories 1918–1948* at 139 (Schocken, 1965); "British Commission to Visit Palestine," *New York Times*, 4 September 1929 at 10. Shaw had no prior experience in Palestine. Kolinsky, *op. cit.* at 73.

11 Bentwich (1932), *op. cit.* at 190.

12 CO 733/176/2 (Draft Press Notice regarding appointment of Commissioners and Secretary to the Commission, 13 September 1929); Weizmann later described Lloyd as "definitely hostile." *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 159, Letter No. 143 (Letter from Weizmann to Harry Sacher, 9 December 1929).

13 *Jewish Daily Bulletin*, 4 September 1929 at 1. The Colonial Office announcement also stated, "Instructions were issued some days ago by the Palestine government for the collection of evidence, before it disappeared, as to whether the disorders which commenced on the twenty-third of August were spontaneous or preconcerted. In the meantime, while His Majesty's forces are actively cooperating with the Palestine government for restoring order, energetic steps are being taken by the civil authorities to bring to trial the guilty individuals. Many arrests were made and considerable progress has already been made in dealing with summary cases. Special measures taken provide for impartial tribunals to cope with what will probably be a large number of cases." *Id.*

14 N. and H. Bentwich, *op. cit.* at 139. Weizmann said the Prime Minister had told him in September 1929 the Government had selected a "dull" Commission, to avoid giving the impression to the world that the Government harbored any doubts about its presumably pro-Zionist policy in Palestine. *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 328 (Letter 309, Weizmann to Lewis Namier, 4 June 1930); *but see* CO 733/176/2, Telegram No. 106 from Lord Passfield to Prime Minister MacDonald (4 September 1929), describing Shaw as "a man of great ability and wide judicial experience, possessing also

the temperament, personality and presence which would command confidence and respect."

15 Karlinsky, *op. cit.* at 72–73 (1993), quoting draft letter from Passfield to Lord Melchett, 3 September 1929; *see also* M. Karlinsky, *Premeditation in the Palestine Disturbances of August 1929?*, Middle East Studies 26(1) at 20 (1990) (same).

16 Telegram No. 168 from Chancellor to Secretary of State for the Colonies (5 September 1929), Chancellor Papers, *op. cit.*, Box 13/2.

17 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor Letter to his son Christopher (24 October 1929).

18 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 18, Letter No. 23 (Letter from Weizmann to Richard Meinhertzhagen, 9 September 1929)

19 *Id.* at 21, Letter No. 27 (Letter from Weizmann to Lord Passfield, 10 September 1929).

20 *Id.* at 34–46, Letter No. 49 (Letter from Weizmann to Lord Passfield, 19 September 1929).

21 P. Ofer, *The Commission on the Palestine Disturbances of August 1929: Appointment, Terms of Reference, Procedure and Report*, Middle Eastern Studies 21(3), 349–52 (1985).

22 Porath, *op. cit.* at 3.

23 CO 733/176/2, Lord Passfield minute (4 September 1929).

24 CO 733/176/2 (Draft letter from Lord Passfield to Shaw, 19 September 1929); Shaw Commission Report, *op. cit.* at 3 and Appendix I.

25 CO 733/176/2, O.G.R. Williams minute (9 October 1929).

26 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 34–36, Letter No. 49 (Weizmann to Lord Passfield, 19 September 1929).

27 *Id.*, quoting letter from Yaqub Farraj, Vice President of the Arab Executive to the Commission of Inquiry (28 October 1929).

28 *Id.* Weizmann also asked Lord Passfield whether "Counsel appearing before the Tribunal will … be required to wear the robe."

29 *Id.* at 75–76, Letter No. 89 (Letter from Weizmann to Felix Warburg, 13 November 1929).

30 Telegram No. 188 from Secretary of State to High Commissioner for Palestine (23 September 1929), Chancellor Papers, *op. cit.*, Box 13/2. Chancellor responded that he agreed with the decision not to permit counsel to cross-examine witnesses. *Id.*, Telegram No. 211 from High Commissioner for Palestine to Secretary of State (25 September 1929). Kisch and other members of the Palestine Zionist Executive met with Chancellor and argued the proposed limitations on counsel's ability to cross-examine witnesses would "make it almost impossible for the Commission to arrive at the truth." Kisch Diary Note, 25 September 1929, C.Z.A. F38\1247-5.

31 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 55–56, Letter No. 68 (Letter from Weizmann to Sir John Shuckburgh, 26 September 1929).

32 Telegram No. 196 from Secretary of State to High Commissioner for Palestine (28 September 1929), Chancellor Papers, *op. cit.*, Box 13/2. In a later Telegram the Colonial Office explained the initial decision not to allow counsel to cross-examine witnesses caused "intense dissatisfaction to the interested parties in this country," and that the change of course was politically advantageous to the British Government. *Id.*, Telegram No. 200 from Secretary of State to the High Commissioner for Palestine (28 September 1929).

33 Luke Papers, op. cit. Box 5, File 5/2, Letter from Luke to Palestine Zionist Executive enclosing Letter from T.I.K. Lloyd, Secretary to the Commission, 30 September 1929 regarding revised procedure for the Shaw Commission hearings; *see* also Ofer, *op. cit.* at 353; Palestine Commission of Enquiry, Draft Minutes of Second Preliminary Meeting, para. 2 (28 Sept. 1929), Rhys Hopkin Morris Papers, National Library of Wales, Box 3, File15.

34 CO 733/176/2, O.G.R. Williams minute (16 October 1929).

35 *Weizmann Letters and Papers*, op. cit., Vol. XIV, Series A at 26, Letter No. 37 (Telegram from Weizmann to Louis Lipsky, 13 September 1929).

36 The legal fees for the Jewish side ended up at £50,000, an "enormous sum" according to Weizmann. Warburg agreed to pay half but never did. *Id.* at 138, Letter No. 129 (Letter from Weizmann to Isaac Naiditch, 4 December 1929); *Id.* at 46, Letter No. 58 (Letter from Weizmann to Lord Melchett, 23 September 1929). Merriman received a retainer fee of £10,000, plus £250 per day, plus expenses; *Id.* at 52–53, Letter No. 64 (Letter from Weizmann to Shalom Horowitz, 25 September 1929); Weizmann Archives 130-33L (Letter from Nathan to Goldsmid discussing fees and expenses incurred by counsel for the Jewish side, 6 January 1930). Chancellor seemed stunned when he heard about Merriman's fee. Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (10 October 1929).

37 *Id.* at 27–28, Letter No. 39 (Telegram from Weizmann to Felix Warburg, 13 September 1929).

38 *Id.* at 30–31, Letter No. 43 (Letter from Weizmann to Frederick H. Kisch, 16 September 1929).

39 Bentwich (1932), *op. cit.* at 190; Shaw Commission Report, *op. cit.* at 3.

40 Shaw Commission Report, *op. cit.* at 3. The Arabs greeted Stoker as a hero when he arrived in Palestine. As Stoker's train stopped in Lydda, "a large crowd of Arabs … staged a demonstration. They bore a white flag bearing the inscription: 'We demand justice! Down with the Balfour Declaration!' The main purpose of this demonstration was to welcome … Stoker, the counsel for the Arabs … [Stoker] addressed the crowd from the station platform, after which they picked him up and carried him on their shoulders." *New York Times*, 25 October 1929 at 4.

41 N. and H. Bentwich, *op. cit.* at 195. In 1937 the British High Commissioner for Palestine described Auni Bey, who by that

time had ascended to the leadership of the Istiqlal Party, as "one of the most extreme and influential of the Arab leaders." CO 733/320/10, Letter from Sir Arthur Wauchope, High Commissioner for Palestine, to Sir William Ormsby-Gore (12 January 1937). Auni Bey had served as one of Feisal's top aides and confidants at the Versailles conference, and remained close to Feisal until Feisal's death in 1933. A.M. Lesch, *Arab Politics in Palestine, 1917–1939: The Frustration of a Nationalist Movement* at 105, 142 (Cornell Univ. Press, 1979).

42 Chancellor had lunch with Merriman and Erleigh a few days later, writing to his son that he found Merriman "very attractive" and Erleigh "very pleasant." Chancellor Papers, *op. cit.*, Box 16/2, Chancellor letter to his son Christopher (11 October 1929). After another brief stint as Solicitor General, Merriman eventually ended up presiding over the divorce court in London. In an interesting twist of history, a few years later "the bewigged Sir Boyd Merriman, president of the divorce court," ended up granting a final decree of divorce in the most famous marital dissolution case in British history, the divorce of Mrs. Wallis Warfield Simpson from Ernest Aldrich Simpson. *The Times*, 19 March 1937 at 16; *New York Times*, 4 May 1937 at 27.

43 Weizmann Archives 26–1301, Letter from Lord Melchett to Felix Warburg (16 September 1929, discussing counsel selection and disclosing that Lord Erleigh was Reading's son and Melchett's son-in-law). Davies and Karminski eventually were both appointed to the High Court in England.

44 N. and H. Bentwich, *op. cit.* at 136. The Colonial Office had suggested it would be wise for the Palestine Government to be represented by "experienced Counsel from England. This would not of course involve reflection on your legal advisors who could scarcely be able to undertake so heavy a task in addition to normal work." Telegram No. 198 from Secretary of State to Chancellor (29 Sept. 1929), Chancellor Papers, *op. cit.*, Box 13/2. Chancellor agreed but asked that his Solicitor General, Robert Drayton, act as junior to the trial counsel. *Id.*, Telegram No. 226 from High Commissioner to Secretary of State (30 September 1929). Drayton later prepared a secret briefing memorandum for Chancellor on 24 October 1929. The memorandum reviewed the procedure the Commission intended to follow and discussed the anticipated Arab and Jewish arguments. Chancellor Papers, *op. cit.*, Box 12/6. The Colonial Office eventually notified Chancellor they had retained Preedy, who had acted for various colonial governments in the past, for a retainer fee of 1,000 guineas plus 25 guineas per day while overseas, plus expenses. *Id.*, Telegram No. 220 from Secretary of State to High Commissioner for Palestine (11 October 1929). Grattan Bushe, the Deputy Legal Advisor at the Colonial Office, offered Preedy the representation. CO 733/176/10, Letter from Bushe to Preedy (8 October 1929). Preedy wrote back the next day accepting the assignment. *Id.*, Letter from Preedy to Bushe (9 October 1929). Chancellor originally wanted a King's Counsel, but the Colonial Office persuaded him to accept the far cheaper services of a Junior Counsel such as Preedy. *Id.*, Telegram No. 226 from Chancellor to Secretary of State for the Colonies (30 September 1929) (requesting "eminent Counsel from England … a King's Counsel of standing"); *Id.*, Telegram No. 232 from Chancellor to Secretary of State for the Colonies (4 October 1929) ("I agree that Counsel representing the Government of Palestine may be good Junior and that fee on basis of 500 for one month may be offered."). Chancellor later recorded in his diary that he had received a telegram from London notifying him of the selection of "a junior Counsel for us named Kenelm Preedy. I know nothing of him. Instead of 500 proposed, he is to cost us 1,000 & 25 for every day he is absent from London. I hope that he will prove to be worth the money!" Chancellor Papers, *op. cit.*, Box 16/2, Chancellor Letter to his son Christopher (12 October 1929). Several days later Chancellor wrote, "[o]ur barrister Mr. Kenelm Preedy arrived last night. He is a very agreeable man, intelligent & alert & I think a fighter, so he will be a great help I believe." *Id.*, Chancellor Letter to his son Christopher (24 October 1929).

45 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor letter to his son Christopher (29 September 1929).

46 The hearings were recorded in shorthand, from which the typewritten transcripts were prepared.

47 Bentwich (1932), *op. cit.* at 191.

48 *Weizmann Letters and Papers*, *op. cit.*, Vol I, Series B at 584 (3 December 1929).

49 Bentwich later questioned the wisdom of Weizmann's choice of such high-powered British counsel, noting "[i]t had the consequence of turning the enquiry into a forensic battle, with the sympathies of the Tribunal – and the English press – on the side of the Government and of the Arabs as the weaker parties, who could not compete with advocates of such eminence." N. and H. Bentwich, *op. cit.* at 136. Throughout 1929 the Muslims had demanded the removal of Bentwich, a Jew and ardent Zionist, from his position as Attorney General of Palestine. By October 1929 the Colonial Office had also turned against Bentwich, with its legal adviser Grattan Bushe characterizing him as "not efficient as an Attorney General. His drafting is notoriously bad. His conduct of cases upon the rare occasion when he appears in court borders on the ridiculous, and his knowledge and sympathy of English and Colonial law and institutions is lacking." CO 733/175/3, Bushe minute (4 October 1929). For additional discussion of the tensions Bentwich experienced and the Colonial Office's increasing view of him as "unconsciously biased" during 1929, *see* C. Townshend, *Going to the Wall: the Failure of British Rule in Palestine, 1928–31*, Journal of Imperial and Commonwealth History 30(2) at 46–48 (May 2002).

50 Shaw Transcript and Exhibits, *op. cit.* at 388 (expressions of sympathy from the Chairman and Counsel toward Bentwich the day after the attack). Bentwich had to be hospitalized, but his wound was not life-threatening. Chancellor Papers, *op. cit.*, Box 19/8, Telegram no. 141 from Chancellor to Colonial Office (25 Nov. 1929). Mrs. Bentwich later recalled when she arrived at her husband's office she found him lying on a table in good spirits. Bentwich recovered from his wound and, in a noble gesture, served as the defense lawyer for his would-be Arab assassin. Wasserstein, *op. cit.* at 214.

51 Shaw Transcript and Exhibits, *op. cit.* at 1.

52 *Id.*

53 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.03047, accessed 4 September 2019.
54 *Id.*
55 *Id.*
56 Chancellor Papers, *op. cit.*, Box 16/2, Chancellor letter to his son Christopher (24 October 1929).
57 Shaw Commission Report, *op. cit.* at 4–5. The Commission also took testimony (with no parties or counsel present) from Vladimir Jabotinsky when it returned to London in January 1930. Rhys Hopkin Morris papers, National Library of Wales, Box 3, File 14.
58 The Shaw Commission Report was published as a Command Paper (Cmd. 3530). The Transcripts and Exhibits were published separately in three volumes as a Colonial Office Paper (Colonial No. 48).
59 Shaw Commission *In Camera* Transcript, *op. cit.* The Shaw Commission Report (App. III-B at 188) contains a list of the witnesses who testified *in camera*.
60 Shaw Transcript and Exhibits, *op. cit.* at 3.
61 *Id.* at 4.
62 *Id.* at 25, paras. 407, 410; *see also id.* paras. 411–12, 417; *id.* at 26, para. 436.
63 *Id.*, para. 420.
64 *Id.* at 46–47.
65 *Id.* at 47.
66 *Id.*
67 *Id.*
68 Near the end of Saunders' testimony Stoker (on further cross-examination) spent considerable time asking questions about the 1928 White Paper and the appurtenances the Jews had brought to the Wall during Ottoman rule, as well as the October 1929 "Instructions" the Palestine Government had just issued. Shaw interjected that he did not want "to go into the question of the rights regarding the Wailing Wall," but Preedy responded "no, but it is impossible to understand the problem until you understand the conflicting views of the two sides." *Id.* at 62. Merriman sat silently during this exchange.
69 Bentwich (1932), *op. cit.* at 191.
70 Merriman's cross-examination of Saunders consumed 30 transcript pages. Stoker needed only five pages.
71 Shaw Transcript and Exhibits, *op. cit.* at 30–60.
72 *Id.* at 42, paras. 920–25.
73 *Id.* at 43, paras. 941, 944.
74 *Id.* at 60, paras. 1256–61.
75 *Id.* at 64, para. 1321 [emphasis added].
76 M. Sicker, *Pangs of the Messiah, The Troubled Birth of the Jewish State* at 85 (Praeger, 2000).
77 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (11 November 1929).
78 Merriman (and occasionally Erleigh) clashed repeatedly with Preedy and Stoker throughout the hearings. *See, e.g.* Shaw Transcript and Exhibits, *op. cit.* at 65 (Preedy and Merriman accusing each other of misstatements); id. at 69 (Merriman accuses Stoker of making "a most offensive remark"); *id.* at 141 (Merriman makes sarcastic remark about Preedy's question); *id.* at 163 (Erleigh tells Stoker "I am getting tired of these interruptions"); *id.* at 195 (Stoker tells Merriman "that is your opinion … we are dealing with facts not with your opinions"); *id.* at 382 (Merriman accuses Preedy of asking leading questions of Luke on redirect examination, provoking an argument in which each accuses the other of asking leading questions of their own witnesses); *id.* at 440 (Merriman accuses witness Frances Newton during cross-examination of passing government documents to the Arabs during the British military occupation of Palestine; Stoker objects and complains "one has to watch every time these questions are put to witnesses by Sir Boyd Merriman"); *id.* at 557 (Merriman accuses Preedy of not communicating with him properly regarding the availability of a witness, saying "my friend must not talk to me like this or to anybody else like it"); *id.* at 711 (Merriman argues with Stoker about the manner in which Stoker objected to one of Merriman's questions, saying, "if you are going to make an objection get up and make it, but don't tell the interpreter as to the form in which he is to put my question"); *id.* at 721–22 (Merriman accuses Arab side of witness intimidation); *id.* at 855 (Merriman and Preedy argue over whether an allegation is being made against a Mandatory Government official, causing Merriman to say, "[i]f anyone criticizes the Government in any respect, Mr. Preedy tries to raise a charge against them. It is really getting beyond endurance"); *id.* at 903–06 (Merriman accuses Preedy of engaging in hostile cross-examination of Jewish witnesses, but not Arab witnesses, as evidence of Palestine Government's anti-Zionist bias).
79 Bentwich (1932), *op. cit.* at 191. Merriman even clashed with one of the Arabic interpreters during the hearing, accusing the interpreter of coaching a witness and mistranslating the testimony. The interpreter, deeply offended, threatened to resign immediately, saying "I have not made any mistranslation. I have been translating for 10 years with the High Commissioner. I will not give way to anybody else." Shaw Transcript and Exhibits, *op. cit.* at 474–75.
80 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 86–87, Letter 94 (Telegram from Weizmann to Felix Green, 19 November 1929).
81 *Id.* at 88–89, Letter 95 (Letter from Weizmann to Harry Sacher, 19 November 1929).
82 *Id.* at 75–77, Letter 89 (Letter from Weizmann to Felix Warburg, 13 November 1929).
83 Esco Foundation for Palestine, *Palestine, A Study of Jewish, Arab and British Policies*, Vol. II at 616 (Yale Univ. Press,

1947).

84 Shaw Transcript and Exhibits, *op. cit*. at 70.

85 *Id.* at 583, para. 14,714.

86 *Id.* at 348–49 paras. 8892–05 (the quote is Stoker's, explaining to the Commissioners the crux of his case for the Arab side).

87 *Id.* at 473, paras. 11,902–09.

88 *Id.* at 474, para. 11,933.

89 *Id.* at 483–84.

90 *Id.* at 485 [emphasis added]. Weizmann, who was monitoring the hearings from London, sent a copy of the "Treaty" he had signed with Feisal in 1919 and asked Sacher to see if Merriman could "make the necessary use of it, in particular in view of the evidence brought out by Abdul Hadi … when apparently they tried to make as much capital as possible out of the McMahon pledges." *Weizmann Letters and Papers, op. cit.*, Vol. XIV, Series A at 146–48, Letter 137 (Letter from Weizmann to Harry Sacher, 5 December 1929).

91 Shaw Transcript and Exhibits, *op. cit.* at 492. The Commission also afforded the same courtesy to Abraham Isaac Kook, the Chief Rabbi of Jerusalem, but Rabbi Kook chose to appear at the Commission's courtroom and testify in public. *Id.* at 687, paras. 17,316–18; s*ee also* Shaw Commission Report at 186 (noting the press was not permitted to attend the Mufti's testimony).

92 Shaw Transcript and Exhibits, *op. cit.* at 511–12 paras. 12,854–55.

93 *Id.* at 512.

94 *Id.* at 513, para. 12,864.

95 *Id.* at 513, paras. 12,869–72.

96 *Id.* at 513.

97 *Id.* at 549–50, paras. 13,638–40; 13,659–63.

98 *Id.* at 486, para. 12,318.

99 *Id.* at 492, paras. 12,492–95.

00 *Id.* at 847; *see also* H. Laurens, *La Question du Palestine*, Vol. II at 193 (Fayard, 2002). The Jewish Agency submitted a Memorandum to the Palestine Royal Commission (the Peel Commission) in November 1936 discussing the Feisal-Frankfurter letter and establishing its authenticity, noting the letter had been published in or referred to many times prior to 1929, including as early as 5 March 1919, when the *New York Times* published the full text of the letter. The Memorandum also noted Frankfurter himself had personally confirmed the authenticity of the letter in a telegram to the Jewish Agency. *Memorandum Submitted to the Palestine Royal Commission on behalf of the Jewish Agency for Palestine* at 73–74, paras. 125–26, *reproduced in* A. Kleiman (ed.), *The Rise of Israel*, Vol. 23 (Garland, 1987). Merriman appears to have been unaware of these facts.

01 In response to the Arab objection to the Feisal letter, Frankfurter "was quick to rebut the charge. He wrote a detailed account of the famous meeting: how he went to Paris in 1919 on behalf of the Zionists and how an interview was arranged with Feisal. There, with Colonel T.E. Lawrence as the interpreter, Frankfurter explained the importance that Zionists put on cooperation with the Arabs, and the prince in return voiced his support for the Zionist program. It was agreed that the views of the two men would be made public in the form of letters that covered the points of the verbal exchange. Lawrence drafted Feisal's letter in English; it was signed by the prince …" N. Cohen, *The Year After the Riots: American Responses to the Palestine Crisis of 1929–30* at 130 (Wayne State University Press, 1988). Unfortunately Merriman either was unaware of Frankfurter's response, or if he was aware he chose not to use it to establish the authenticity of Feisal's letter.

02 Weizmann Letters and Papers, *op. cit.*, Vol. XIV, Series A at 138–40, Letter No. 130 (Telegram from Weizmann to Felix Green, 5 December 1930); Weizmann Archives 6–133 (Letter from Weizmann to Sacher, 5 December 1930).

03 Shaw Transcript and Exhibits, *op. cit.* at 907. Stoker also reiterated in his closing argument the Mufti's legal theory that the Balfour Declaration was inconsistent with the Covenant of the League of Nations. Stoker noted the Sherif had brought two representatives with him to Versailles, one for the Syrian Arabs and the other (Auni Bey Abdul Hadi) for the Palestinian Arabs, meaning the Palestinian Arabs expected the Peace Conference would award Palestine to them. Id. at 911–13.

04 Shaw Commission Report, *op. cit.* at 125–26.

05 *See* Weizmann Letters and Papers, *op. cit.*, Vol. XIV, Series A at 38, Letter No. 51 (Letter from Weizmann to Oskar Wassermann, 19 September 1929).

06 Shaw Transcript and Exhibits *op. cit.* at 168–69, paras. 4358–60; 4374–76.

07 *Id.* at 170–71 [emphasis added].

08 *Id.* at 259, paras. 6983–84.

09 *Id.* at 276, para. 7426.

10 *Id.* at 279–81, paras. 7482–525; *see also id.* at 329, para. 8444 ("these Zikrs were not part of Orthodox Moslem ritual but are accretions … calculated to cause annoyance and disturbance to Jewish worshippers at prayer").

11 Chancellor Papers, *op. cit.*, Box 16/4, Letter from Shuckburgh to Chancellor (18 November 1929).

12 *Id.*, Box 16/2, Chancellor letter to his son Christopher (7 November 1929).

13 *Id.*

14 *Id.*

15 *Id.*, Letter from Chancellor to his son Christopher (23 November 1929); *see also id.*, letter from Chancellor to his son

Christopher (12 December 1929) (describing Merriman's cross-examination of Luke as "merciless & venomous").

16 Shaw Commission *In Camera* Transcript, *op. cit.* at A.5 (Luke Testimony; exact date does not appear in the transcript but questions refer to Luke's public testimony as having occurred several days earlier).

17 *Id.* at A. 13.

18 *Id.* at A.14.

19 Shaw Transcript and Exhibits, *op. cit.* at 474, para. 11,933.

20 *Id.* at 494, para. 12,549 [emphasis added].

21 *Id.* at 495, para. 12,564; *see also id.* at 516, para. 12,945 (reiterating on cross-examination that Jews enjoy only the ability to conduct a "mere visit" to the Wall).

22 *Id.* at 496–97, paras. 12,572–94.

23 *Id.* at 499 [emphasis added].

24 *Id.* at 515, paras. 12,893–904.

25 *Id.* at 529, paras. 13,152–53.

26 *Id.* at 529, para. 13,152.

27 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (12 December 1929).

28 Shaw Transcript and Exhibits, *op. cit.* at 529–30, paras. 13,157–58, 13,170–75.

29 Weizmann Letters and Papers, *op. cit.*, Vol. XIV, Series A at 53–54, Letter 66 (Letter from Weizmann to Lord Lloyd, 26 September 1929).

30 Wasserstein, *op. cit.* at 234.

31 Shaw Transcript and Exhibits, *op. cit.* at 539, paras. 13,431–46.

32 *Id.* at 687, para. 17,322 [emphasis added].

33 *Id.* at 856, paras. 21,486–510; *see also id.* at 676, paras. 17,061–73 (testimony of Chaim Solomon, Vice Mayor of Jerusalem regarding Jewish repaving of area in front of the Wall in approximately 1891).

34 *Id.* at 70–73.

35 *Id*. at 70.

36 *Id.* at 71.

37 *Id.* at 71, 73.

38 *Id.* at 72.

39 *Id.* at 332, para. 8500.

40 Shaw Commission Report, *op. cit.* at 46–47.

41 Shaw Commission Transcript and Exhibits, *op. cit.* at 333, para. 8504.

42 Shaw Commission Report, *op. cit.* at 159–61.

43 Shaw Commission *In Camera* Transcript, *op. cit.* at 1 (Rutenberg testimony).

44 *Id.* at 36.

45 *Id.* at 37.

46 *Id.* at 45. Rutenberg also offered in his *in camera* testimony a surprising and still unrealized solution for the problems between Arabs and Jews: "As time goes on intermarriage between Arabs and Jews will come, perhaps that is going too far at the moment, but I think it will happen and there will be one nation in this country." Id. at 17.

47 *Id.* at 15.

48 *Id.* at 14.

49 *Id.* at 39.

50 Shaw Transcript and Exhibits, *op. cit.* at 602, paras. 15,113–14.

51 *Id.* at 615–16, paras. 15,490–93.

52 *Id.* at 628, para. 15,853.

53 *Id.* at 643, paras. 16,314–17.

54 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (28 November 1929).

55 *Id.* Chancellor was highly critical of the testimony of Solomon Horowitz, describing him as a "strange little man" who was "cringing" and "terrified" during the riots, but who during his testimony "talks as if he were Napoleon – tells the Commission how he would have fired at the crowds & all the splendid things he would have done. I do not think he has made a favourable impression on the Commission." *Id.*, letter from Chancellor to his son Christopher (17 December 1929).

56 Sacher met with Chancellor several days before his testimony and admitted "the Jews now realise that the Commission of Inquiry is not going at all as they expected. They have not proved any of the wild charges they made against the government …" Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (12 December 1929). Sacher had also written two weeks earlier to Weizmann that "the British here – with very few exceptions – hate us, feel themselves on trial and bitterly resent our attitude. Their counsel runs his case against us not against the Arabs …" Weizmann Archives 22–1333, Letter from Sacher to Weizmann (30 November 1929). A few weeks later Preedy would attack Sacher during cross-examination with more hostility than any other witness during the entire trial.

57 Shaw Transcript and Exhibits, *op. cit.* at 785, para. 19,785.

58 *See* Ch. 2, text accompanying nn. 88–89; *see also* Shaw Transcript and Exhibits, *op. cit.* at 774, paras. 19,584–85 (Sacher testifies on direct examination that his 27 May 1929 letter to the High Commissioner set forth his "legal position" and his

"legal opinion" regarding Jewish rights to the Wall and pavement).

59 Shaw Transcript and Exhibits, *op. cit.* at 801, paras. 20,027–33.

60 *Id.* at 823.

61 N. and H. Bentwich, *op. cit.* at 139.

62 Shaw Transcript and Exhibits, *op. cit.* at 784, para. 19,782.

63 *Id.* at 814, paras. 20,369–82.

64 *Id.* at 815, para. 20,421.

65 *Id.* at 815, para. 20,422.

66 *Id.* at 822, para. 20,589.

67 *Id.* at 821–22, paras. 20,573–608.

68 *Id.* at 825, paras. 20,670–71.

69 *Id.* at 827, para. 20,712.

70 *Id.* at 791, paras. 19,906–11.

71 CO 733/178/3, Chancellor to Shuckburgh, 29 December 1929.

72 Chancellor Papers, *op. cit.*, Box 16/4, Letter from Shuckburgh to Chancellor (2 January 1930).

73 Esco Foundation for Palestine, *op. cit.* at 632. In a handwritten draft letter to Henry Birchenough (in reply to a letter from Birchenough dated 15 December 1929), Chancellor noted the Balfour, Lloyd George and Smuts letter "has caused some excitement among the Arabs. Rumours are current among them that the Jews fear that the Report of the [Shaw] Commission of Inquiry may not be favourable to them & that in order to evade the consequences of it they have got [Lord] Reading to move the Government to appoint another Commission with a wider terms of reference." Chancellor continued, "the Jews are the worst because they cannot see things from any point of view other than their own," and then went even further, adding, "I have in the course of my experiences here during the past year become convinced that the Balfour Declaration was a colossal blunder which may yet cost the Empire dear & that the Zionist policy as given effect to under the Mandate involved grave injustice to the Arab population of Palestine & I have been feeling of late that for that reason I should not be able to stay on here unless the policy is fundamentally changed." Chancellor Papers, *op. cit.*, Box 12/7.

74 Bentwich (1932), *op. cit.* at 192.

75 Shaw Transcript and Exhibits, *op. cit.* at 903.

76 *Id*. at 903–04.

77 *Id*. at 904–06.

78 N. and H. Bentwich, *op. cit.* at 139.

79 Shaw Transcript and Exhibits, *op. cit.* at 906.

80 *New York Times*, 25 December 1929 at 14.

81 F.H. Kisch, *Palestine Diary* (AMS Press, New York, 1938) at 291.

82 Shaw Transcript and Exhibits, *op. cit.* at 908, 912.

83 *Id.* at 914.

84 *Id.* at 917–20.

85 Chancellor Papers, *op. cit.*, Box 16/4, Letter from Shuckburgh to Chancellor (24 January 1930).

86 Shaw Transcript and Exhibits, *op. cit.* at 943.

87 *Id.* at 948.

88 CO 733/176/10, Extract from Letter from Chancellor to Shuckburgh (3 January 1930).

89 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (12 December 0129).

90 Bentwich (1932), *op. cit.* at 195.

91 Shaw Commission Report, *op. cit.* at 158–61. The Commission evidently had not been made aware of documents in Chancellor's own files, some of which indicated the violence may have been premediated. For example, on 12 September 1929, P.G. Peake, the Officer Commanding the Arab Legion, wrote a dispatch stating the violence had been "indirectly premediated." *See* Despatch No. ALC/12/86 from Lt. Col. F.G. Peake to The British Resident, Amman (12 September 1929), Chancellor Papers, *op. cit.*, Box 11/4.

92 Shaw Commission Report, *op. cit.* at 149, 158.

93 *Id.* at 150, 163–64.

94 *Id.* at 155, 164. Kisch foresaw this outcome as early as mid-September after a long conversation with the Daily Mail correspondent in Jerusalem, whose husband was a senior judge in the Palestine Government. Kisch wrote later that day, "[t]he conversation confirmed my view that the English here will do their utmost to place responsibility for the rioting on the Jews because of the youthful procession to the *Kotel* on *Tishe B'Av*." Kisch Diary Note, 15 September 1929, C.Z.A. F38\1247-3.

95 Shaw Commission Report, *op. cit.* at 163–65.

96 *Id.* at 165.

97 *Id.* at 166.

98 M. Cohen, *Britain's Moment in Palestine: Retrospect and Perspectives, 1917–48* at 220 (Routledge, 2014) (Shaw Commission acted "in defiance of its Terms of Reference").

99 Shaw Commission Report, *op. cit.* at 161, 165.

00 *Id.* at 162, 166.
01 *Id.* at 172.
02 *Id.* at 180.
03 Sicker, *op. cit.* at 85.
04 Esco Foundation for Palestine, *op. cit.* at 629, quoting from P. Hanna, *British Policy in Palestine* at 100 (American Council on Public Affairs, 1942); *see also* Kolinsky, *op. cit.* at 74 ("When the report was published at the end of March 1930 it provided satisfaction to the [Palestine] Administration and to the Arab leaders … ")
05 Chancellor Papers, *op. cit.*, Box 19/10., Official Communique No. 10 (20 May 1930) (British Government states "the conversations which have taken place in London between Members of the Government and the Palestine Arab delegation are now at an end … It was pointed out to the Delegation that the sweeping constitutional changes demanded by them were wholly un-acceptable since they would have rendered it impossible for His Majesty's Government to carry out their obligations under the Mandate. It was made clear that no proposals could be considered which were incompatible with the requirements of the Mandate").
06 N. Reynold, *Britain's Unfulfilled Mandate for Palestine* at 131 (Langham, 2014).
07 Jeffries, *op. cit.* at 617.
08 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 196–97, Letter No. 184 (Letter from Weizmann to Felix Warburg, 16 January 1930).
09 Weizmann Archives 2–1911, draft Letter from Weizmann to Louis Namier, June 1930.
10 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 248, Letter No. 222 (Letter from Weizmann to Ethel Snowden, 16 March 1930).
11 *Id.* at 251.
12 *Id.* at 259, Letter No. 236 (Letter from Weizmann to Prime Minister MacDonald, 1 April 1930).
13 *Id.* at 256–57, Letter No. 233 (Letter from Weizmann to Charles Prestwich Scott, 31 March 1930).
14 *Id.* at 266–68, Letter No. 248 (Letter from Weizmann to Editor, Manchester Guardian, 11 April 1930).
15 *Id.* at 286, Letter No. 272 (Letter from Weizmann to Felix Warburg, 15 May 1930).
16 *Id.* at 322–23, Letter No. 302 (Letter from Weizmann to Malcom MacDonald, 27 May 1930) ("I cannot imagine that an action officially endorsing the full [Shaw Commission] Report could possibly be taken with his [Prime Minister MacDonald's] consent. But if there is even the remotest possibility of this perhaps happening without his knowledge, I feel in duty bound to tell you what action such a declaration would force on me. I should be constrained immediately to declare that in these circumstances I cannot possibly carry on our work and that I have to call a Congress and resign").
17 *Id.*
18 *Id.* at 348, Letter No. 328 (Letter from Weizmann to Felix Warburg, 26 June 1930).
19 *Id.*
20 L. Stein, *Memorandum on the "Report of the Commission on the Palestine Disturbances of 1929"* (hereafter "Stein Memorandum"), The Jewish Agency for Palestine, May 1930. Weizmann asked Merriman to help Stein with the legal arguments in the Memorandum. Merriman agreed, but said he would do so only on a "private and anonymous" basis, as he could not criticize the Shaw Report publicly. *See Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 269, Letter 250 (Letter from Weizmann to Sir Boyd Merriman, 11 April 1930); *id.* at 277, Letter 263 (Letter from Weizmann to Sir Boyd Merriman, 6 May 1930) and Editor's n.1 to Letter 263.
21 Stein Memorandum, *op. cit.* at 7.
22 *Id.* at 10.
23 *Id.* at 31.
24 *Id.* at 36.
25 *Id.* at 31–50.
26 Horace Samuel, *Beneath the Whitewash, A Critical Analysis of the Report of the Commission on the Palestine Disturbances of August, 1929* at 48 (1930). The author Virginia Woolf and her husband, Leonard Woolf, published Samuels' analysis in pamphlet form through their publishing house, the Hogarth Press.
27 *Id.* at 3.
28 League of Nations, Permanent Mandates Commission, *Seventeenth (Extraordinary) Session of the Commission (Geneva, June 3–21, 1930*, hereafter "PMC Seventeenth Session"), Report to the Council of the League of Nations on the Work of the Session, Official No. C.355.M.147.1930.VI.
29 Weizmann complained bitterly in a letter to Warburg about the British Government's selection of Luke and Lloyd as its representatives to the PMC meeting. "I don't often get excited about Government action, as I am used to disappointments in this respect, but I think the appointment of these two men is a studied insult." *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 288, Letter No. 272 (Letter from Weizmann to Felix Warburg, 15 May 1930). Luke knew how Weizmann felt about him, writing "Jews furious at my being sent to G[eneva]." Luke Diary, *op. cit.* (2 June 1930).
30 *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 334, Letter No. 315 (Letter from Weizmann to Warburg, 17 June 1930).
31 PMC Seventeenth Session, *op. cit.*, Minutes of Third Meeting, 4 June 1930 at 21.
32 *Id.*

33 *Id.* at 23.
34 *Id.* at 26.
35 *Id.* at 35–43, quote appears at 38.
36 *Id.* at 38.
37 *Id.* at 41. Van Rees was the only PMC Member Weizmann did *not* meet with prior to the PMC's consideration of the Shaw Commission Report; indeed, Van Rees refused Weizmann's request for a meeting. *Weizmann Letters and Papers*, *op. cit.*, Vol. XIV, Series A at 334, Letter No. 315 (Letter from Weizmann to Warburg, 17 June 1930) and editor's n.6 to Letter No. 315. Weizmann's meetings with the other PMC members and his lobbying in Geneva against the Shaw Report angered Shiels, who met with Weizmann prior to the PMC's first meeting. Shiels scolded Weizmann, saying Zionist propaganda was harmful to the British Government. Weizmann replied that their "conversation reminded me painfully of similar talks which I used to have in the olden days with Russian officials, that after pogroms they usually reproached the Jews for having brought it about through their particular behavior." *Id.* at 327–28, Letter No. 309 (Letter from Weizmann to Lewis Namier, 4 June 1930).
38 PMC Seventeenth Session, *op. cit.*, Minutes of Third Meeting, 4 June 1930 at 81–82.
39 PMC Seventeenth Session, *op. cit.*, Report to the Council of the League of Nations on the Work of the Session, Official No. C.355.M.147.1930.VI at 4.
40 PMC Seventeenth Session, *op. cit.*, Comments by the Mandatory Power (Letter dated 2 August 1930), Official No. C.355.M.147.1930.VI at 14.
41 As Weizmann eventually admitted in a draft June 1936 letter to Louis Namier, "our first mistake was to indict the Palestine Administration and make the Shaw Commission at least as much a trial against them as the Arabs … [o]ur next mistake was briefing an ex-Solicitor General [Merriman] … in the long run Boyd Merriman was of very little help to us." Weizmann Archives 2–1911.
42 *See* text accompanying n.172, *supra*.
43 *See* text accompanying n.114, *supra*.
44 Ofer, *op. cit.* at 352, quoting letter from Lloyd to O.G.R. Williams (5 November 1929).

4

THE LOFGREN COMMISSION

Introduction

The Lofgren Commission presided over the second trial between Arabs and Jews during the early years of the conflict, this time focusing solely on the legal rights and claims of the Muslims and Jews to the Wailing Wall and the pavement in front of the Wall. Once again, both sides were represented by counsel who gave opening statements and closing arguments, and cross-examined each other's witnesses under oath. Just as they did before the Shaw Commission, the Muslim and Jewish sides engaged in highly adversarial litigation for the next month before the Lofgren Commission. The trial featured detailed testimony regarding Ottoman-era Jewish rights of access to and prayer at the Wall. The Muslim lawyers and witnesses argued the Wall was exclusively Muslim property, meaning the Jews enjoyed merely a right of "visitation." The Commission urged the parties to settle their differences out of court, but those efforts failed. The Commission issued a verdict affirming Muslim ownership of the Wall, but permitting limited Jewish prayer practices. Neither side was happy with the outcome, but both seemed to accept it, and no further outbreaks of violence occurred at the Wall during the remainder of the British Mandate.

Background and formation

In October 1929, even before the Shaw Commission held its first session, High Commissioner Chancellor began urging the British Government to appoint as soon as possible an "authoritative body … commanding general confidence both in Palestine and abroad in respect of its composition and procedure" to adjudicate the rights and claims of the Jews and Muslims to the Wailing Wall and the surrounding area.[1]

The British Government therefore asked the Permanent Mandates Commission (PMC) on 18 November 1929 to authorize the formation of a "Holy Places" Special Commission pursuant to Article 14 of the Mandate, but limited to addressing only the disputes regarding the Wailing Wall. Four days later the PMC rejected the proposal as not consistent with the language of Article 14, which required the Special Commission to determine the rights and claims of *all* religious communities to *all* the Holy Places in Palestine, not just the rights of Muslims and Jews to the Wailing Wall.

The British Government thereafter revised its proposal, asking the League of Nations to approve the formation of a special commission that would focus initially on adjudicating Muslim and Jewish rights and claims to the Wailing Wall, deferring treatment of the remaining holy places for a later time. The British Government emphasized "the importance and urgency of this question … [and] that an early and final settlement of the question is imperative … from the point of view of future peace, good order and decorum in Palestine."[2]

On 20 December 1929, just as the Shaw Commission was nearing the end of its hearings, *The Times* published a letter from former Prime Ministers Arthur Balfour and David Lloyd George, and former South African Prime Minister Jan Smuts, all of whom had served in the War Cabinet when the Balfour Declaration was approved. The Letter urged the "appointment of an authoritative Commission to investigate the whole working of the Mandate … supplemented by a searching inquiry into the major questions of policy and administration."[3] While the British Government did not appoint such a Commission until 1936, the Letter added momentum to the need for appointing another commission to focus solely on adjudicating the Wailing Wall dispute.

The Shaw Commission itself also supported appointing a new commission to deal solely with the Wailing Wall question. The Shaw Commission's Secretary, T.I.K. Lloyd, wrote to the Colonial Office on 20 December 1929, noting the Commission had heard sufficient evidence to recommend the British Government

> take such steps as lie within their power to secure the early appointment under Article 14 of the Mandate for Palestine of an ad hoc commission to determine the rights and claims in connection with the Western or Wailing Wall in Jerusalem.[4]

Three days later Shuckburgh chaired a joint meeting of the Colonial Office and the Foreign Office to discuss the mechanics for setting up a special international commission to address the rights and claims of Muslims and Jews regarding the Wailing Wall. Shuckburgh said the members of the proposed Commission should, if possible, be "non-British Protestants."[5] Bushe, the Assistant Legal Advisor to the Colonial Office, added, "the present position was most unsatisfactory from a legal point of view, and he stressed the desirability of an early and final settlement of the question."

Weizmann also supported the proposal to form a special international commission to adjudicate the Wailing Wall dispute. On 23 December 1929, the last day the Shaw Commission heard witness testimony, Weizmann wrote:

> It is this vexed question of the Wailing Wall which has been one of the causes of the recent outbreak and so long as it is left an open sore in Palestine, there will be trouble. The Permanent Mandates Commission has refused to deal with it on the legal ground that that it has no right to take one Holy Place, detached from the whole problem of Christian and Moslem Holy Places. They said that only the Council [of the League of Nations] could give them instructions in this matter. The British Government therefore approached the Council. I hope very much that the Council will find it possible, in spite of formal difficulties, to instruct the Permanent Mandates Commission to deal with it.[6]

On 14 January 1930, after "long secret negotiation for the last two days,"[7] the Council of the League of Nations adopted a British-proposed Resolution[8] authorizing the appointment of a three-member commission, on condition that none of the members be British.[9] The Resolution also specified, in a nod to the inherently legal nature of the proposed special commission's work, that at least one of the Commissioners "be a person eminently qualified for the purpose by the judicial functions he has performed."[10] The British Foreign Secretary, Arthur Henderson, told the Council "the settlement of the Wailing Wall issue was essential if further outbreaks were to be prevented in Palestine."[11]

The Muslims initially opposed the formation of a special commission to render judgment on the relative rights of Muslims and Jews regarding the Wailing Wall. The Muslims claimed absolute ownership of the Wall and the pavement in front of the Wall, and thus objected to any legal proceeding that might find differently. The Muslims argued any such Commission would

lack jurisdiction over the Wailing Wall for two reasons: first, the Palestinian Arabs did not accept the Palestine Mandate as legitimate; and second, only a Muslim Court applying *Sharia* Law could adjudicate matters pertaining to the Wall and the pavement, both of which had been dedicated as *Wakfs* centuries earlier.[12]

The Supreme Moslem Council, therefore, filed an objection with the League of Nations in February 1930 to the formation of the special commission.[13] Nevertheless, the Muslims eventually decided to participate, albeit under protest.

One historian described the formation and composition of the special commission presented a "volatile issue" for the British, the Jews, and the Muslims:

> The Mufti, despite legal advantages and British backing, was reluctant to reach an agreement with the Jews unless Muslim ownership was recognized. He was willing to allow Jews to visit the Wall, but not as a matter of right. This had been his position during the 1928–29 controversy, and he did not budge from it for fear that if he were to admit any legal right to the Jews, it might be interpreted to the disadvantage of the Muslim community. The Jews, on the other hand, were reluctant to admit Muslim ownership because, no doubt, many eventually wanted to possess the Wall, despite their public denials. The Mufti claimed that the Wall was holy to Muslims. Yet no claims by him could obscure the fact that the Wall was much more important to Jews.[14]

The British Government consulted with the Arab and Jewish sides as it considered who to appoint to the special commission. The Mufti met with High Commissioner Chancellor and "expressed the hope that no French or Italians would be appointed to the Commission," as "[t]hese nations had interests in Palestine and would intrigue."[15] The Mufti also objected to French or Italian representation on the special commission because the "Jews would bribe" them.[16] The Mufti said he preferred commissioners from countries with no interests in Palestine, "such as Scandinavians."[17] The Colonial Office also noted potential Jewish objections to anyone from the Roman Catholic powers as potentially anti-Zionist.

The British ultimately acceded to the Mufti's wishes and appointed the former Swedish Foreign Minister and Minister of Justice, Eliel Lofgren, as Chair of the Commission. The British appointed two other Commissioners, Charles Barde, the Vice President of the Swiss Court of Appeal at Geneva and President of the Austro-Romanian Mixed Arbitration Tribunal, and C.J. Van Kempen, a member of the Dutch Parliament and formerly Governor of the East Coast of Sumatra in the Dutch East Indies.[18] The Council of the League approved the composition of the special commission on 15 May 1930.[19]

FIGURE 4.1 Eliel Lofgren (center), Charles Barde (front left), and C.J. Van Kempen (front right)[20]

The Lofgren Commission presided over what became the second of the three trial-type proceedings between Arabs and Jews during the early years of the conflict, this time focusing solely on the legal rights and claims of the Muslims and Jews to the Wailing Wall and the pavement in front of the Wall. Once again, both sides were represented by counsel who gave opening statements and closing arguments and cross-examined each other's witnesses, nearly all

of whom testified under oath.[21]

Counsel and other representation

Just as he did with the Shaw Commission, Weizmann once again attempted to intervene behind the scenes, but this time with less success. Weizmann wrote:

> [I]t was extremely difficult to obtain information of any kind about the workings and procedure of the Commission. It is Nobody's Child. The League said the nominations were made by the Colonial Office and it was for that office to deal with the matter; the Colonial Office, on the other hand, said that everything we were doing must be done with the sanction of the League. And so we were driven from pillar to post. This is why we could not give you any definite information.[22]

Weizmann had wanted Dr. Cyrus Adler, a non-lawyer and President of the Jewish Theological Seminary of America, to lead the Jewish side.[23] Adler ultimately was unable to travel to Palestine for health reasons and did not appear before the Commission in person.[24] However, Adler took the lead role in preparing a lengthy memorandum regarding the history of Jewish (and the lack of Muslim) worship at the Wall to serve as a trial brief for the Jewish side.[25]

The Jewish side selected three representatives to present its case to the Commission. Perhaps not surprisingly, the Jewish side did not engage any of the lawyers who had represented it before the Shaw Commission. Instead, the Jewish side named Dr. Mordechai Eliash, a Jerusalem lawyer and President of the Palestine Jewish Bar Association as lead counsel, along with two non-lawyers, David Yellin and Rabbi Moshe Blau, to present its case on behalf of a variety of lay and religious Jewish organizations.[26]

FIGURE 4.2 Dr. Mordechai Eliash

(Courtesy of Central Zionist Archives).

Dr. Eliash was one of the most prominent Palestinian Jewish lawyers during the Mandate period, and later served as Israel's first Ambassador to Great Britain. One historian offers a fascinating window into the everyday world of Dr. Eliash as a practicing lawyer in 1930s Jerusalem:

> Eliash was the epitome of the modern, suave Jew … he was a middle-aged man with delicate features, gold-rimmed glasses, and a groomed goatee, noted for his meticulous dress and his broad-brimmed hats. Born in Ukraine and Yeshivah educated, he exuded Eastern European *yiddishkeit* – that which, in Weizmann's eyes, constituted the essence of Jewishness. In Berlin and London, where he had acquired his legal education, he learned to coat this yiddishkeit with fine social manners. Thus Eliash was at once Westernized and rooted in tradition. His Jerusalem home was the center of high

> society. He entertained high British officials, members of the Arab aristocracy, and leaders of the *Yishuv*. An enthusiastic Zionist, he served as legal counsel to the aspiring institutions of self-rule of the *Yishuv* and was involved in its politics. [Footnote omitted.] He was known for his singing in the Yeshurun synagogue in Jerusalem, which he had helped establish … Eliash's office was located in the "Habashim" (Ethiopians) Street, a narrow road lined with stone houses … The place served Eliash as both an office and residence (distance was maintained, and the clerk was never invited into the residential quarters). The office had two rooms. One was reserved for the master, and the other functioned as a multipurpose room, accommodating "two typists, a Yemenite male secretary, a junior lawyer, the clerk, and clients waiting to see Eliash." [Footnote omitted.] Turkish, Arabic, Yiddish, Russian, and Hebrew filled the air, while Eliash met with his clients over tiny cups of Turkish coffee or steaming sweet tea, as was the custom of the day. Simon [Agranat, the future Chief Justice of the Israeli Supreme Court] remembered his clerkship as "akin to slavery"; for the sheer privilege of doing the clerkship and for little pay, a clerk was expected to run errands and perform various services for Eliash.[27]

The Muslim side selected its best and most famed lawyer, Auni Bey Abdul Hadi, to lead a team of 16 international Muslim lawyers and representatives on behalf of the Supreme Moslem Council.

Mohammed Ali Pasha (not the Prince Mohammed Ali Pasha who had offered several months earlier to sell the Wall to the Jews), the former Egyptian Minister of *Awqaf* (Religious Endowments)[28] served as one of the Muslim representatives and gave one of the closing arguments for the Muslim side. Ahmed Zaki Pasha, an Egyptian scholar, also gave a closing argument for the Muslim side.

FIGURE 4.3 Auni Bey Abdul Hadi at the London Conference, 1939

(Alamy Images).

The following table shows the key participants in the hearings before the Lofgren Commission:

TABLE 4.1 Lofgren Commission: key players

Commissioner/Counsel	*Affiliation*	*Client*

Eliel Lofgren, Chairman	Former Swedish Foreign Minister and Justice Minister	N/A
Charles Barde, Commissioner	Vice President, Swiss Court of Appeal; President of Austro-Romanian Mixed Arbitration Tribunal	N/A
C.J. Van Kempen, Commissioner	Dutch MP; former Colonial Governor	N/A
Dr. Mordechai Eliash	Jerusalem-based lawyer; President of the Palestine Jewish Bar Association	Jewish organizations
David Yellin	Jerusalem-based scholar	Jewish organizations
Rabbi Moshe Blau	Jerusalem-based rabbi	Jewish organizations
Cyrus Adler	President, Jewish Theological Seminary of America	Jewish organizations
Auni Bey Abdul Hadi	Lawyer and Palestinian nationalist; future leader of Istiqlal Party	Muslim organizations
Mohammed Ali Pasha	Former Egyptian Awaqf Minister	Muslim organizations
Ahmed Zaki Pasha	Egyptian scholar	Muslim organizations

The Mufti worked behind the scenes to persuade representatives from several Muslim countries to attend and testify at the Lofgren Commission hearings, and "therefore succeeded in drawing Muslims into the Western Wall and Palestine problems …"[29] Colonel Kisch of the Palestine Zionist Executive noted in his dairy, however, that some of the

> Arabs from abroad who are following the case … said that they came here expecting to find the Jews claiming possession of the *Buraq* and threatening encroachments into the *Haram* Area, and have been surprised to find nothing of the kind.[30]

Just as they did before the Shaw Commission, the Muslim and Jewish sides engaged in intensive and highly adversarial litigation for the next month before the Lofgren Commission. The hearings focused in detail on Jewish rights of access to and prayer at the Wall, including Jewish prayer practices at the Wall prior to the British conquest of Jerusalem and whether those practices had given rise to some form of legal right such as a servitude or easement; Jewish-funded repair work on the pavement during the late 19th century as evidence of a special Jewish relationship with the Wall; the extent to which Jews had customarily brought various appurtenances of prayer with them to the Wall, including benches, chairs, a screen, a table, an Ark, the Torah, and the *Shofar*; the significance of various Ottoman-era decrees and rulings; and the extent to which Muslim practices such as the *Zikr* ceremony, new construction atop the Wall, and the stationing of a *Muezzin* on the nearby rooftop interfered with those customary prayer practices.

Writing a short time after the Commission had concluded its work, Bentwich noted that just as with the Shaw Commission, during the proceedings before the Lofgren Commission "[a]gain the witnesses were marshalled by the two sides, again forensic pleading, mixed with violent political propaganda, was heard in the Court-room and published to the world, and the newspapers had the chance daily to arouse feeling and passion."[31]

Before the hearings began, Kisch met with Chancellor and gave him a preview of the case the Jews intended to argue before the Commission:

> We were primarily concerned with proving – as we were convinced we could prove – that the practice of Jewish worship at the last vestiges of the Temple was in force before the birth of Islam; that there is almost continuous evidence extending over many centuries establishing the practice of Jewish prayer at the *Kotel Maaravi* itself, while there is also evidence showing over a prolonged period this site was not regarded as a place holy to Mohamedans. On such a basis we would

> claim that the Commission should establish our right to pray at this site under conditions consistent with the dignity of worship, conditions which today were denied to us.[32]

Kisch also made clear to Chancellor the Jews were still willing to reach a financial settlement to resolve the dispute over the Wall:

> If money were required to carry through a solution involving the provision of other quarters for the Mugrabi occupants of the hutment area facing the Wall, and for compensation to the Wakf for exchanging property, I was in a position to assure him that such funds were still available.[33]

Opening session

The Commissioners visited the Wall and the surrounding area on Saturday, 21 June 1930. Kisch complained in his diary that "[a]t each place they were accompanied by the Mufti who seemed constantly to point towards the Jewish worshippers, evidently explaining matters in a sarcastic and unpleasant way."[34] Kisch also described how the Muslims, "for the first time to our knowledge," organized a small prayer service near the Wall in an attempt to show the Commissioners they regarded the Wall as a holy site.[35]

The Commission convened formally in Jerusalem on 23 June 1930 for its opening session. Prior to convening the first hearing, Lofgren requested from the British Government the 1929 Law Officers' opinion, as he had seen references to it in the Shaw Commission Report and wanted a copy. After some internal debate the Colonial Office provided the Law Officers' Opinion to Lofgren, on the condition he keep it confidential and not refer to or quote from it during the Commission's proceedings or in the Commission's report.[36]

At the Opening Session Lofgren described the Commission's task in decidedly legal terms:

> [O]ur Commission has been constituted by the British Government in full agreement with the Council of the League of Nations … what is expected of us is to make an impartial and, if possible, complete inquiry into the questions in connection with the so-called Wailing Wall, and, as a result of that inquiry, *to give a verdict exclusively based on our honest understanding of law and equity in the case … As the Commission has the duty, not only to investigate, but to give a verdict in the matter, it seems to be in consistency with justice and with the interests of the Parties to apply as far as possible the ordinary judicial methods …*[37]

The Commission therefore decided to conduct the proceeding as if it were a public trial in the tradition of the British legal system:

> As to the procedure to be adopted, it was decided with the consent of the Parties that as far as possible the ordinary judicial methods of the English courts were to be observed. Thus, the Counsel for the Parties were to call and examine witnesses, to procure and lay before the Commission relevant expert and documentary evidence, to cross-examine the witnesses called by the other Party and to plead in the case whenever they deemed it expedient.[38]

After a further discussion of procedure, David Yellin on behalf of the Jewish side made a brief introductory comment thanking the Commission and pledging all possible assistance. Yellin noted

> [t]he matter is of very great importance – it is a question of worship to the Lord, which for thousands of years has been restricted to this small place and we want to hope that this prayer and devotion will always be maintained.[39]

Auni Bey spoke next, seizing the initiative (just as Stoker had done at the outset of the Shaw Commission hearings) and aggressively laying out the Muslim Case. Auni Bey described the Commission's task as confined to "one important point … whether the Jews have any right other

than a mere passage to the pavement which exists in front of the Wall similarly with other foreign visitors that come to visit the place."[40]

Auni Bey noted all Muslims throughout the world had a stake in the proceeding, as the Wall and pavement were the absolute property of the Muslims. Accordingly, the Muslim world would not permit "anything that concerns the rights of Muslims in that respect and in such matters" to be decided by any non-Muslim, non-*Sharia* authority. Auni Bey added the Arabs of Palestine had rejected the British Mandate, but nevertheless would "render every possible assistance" to the Commission.[41] Auni Bey indicated the Muslim side would not submit a memorandum or any other documents in advance of any witness testimony, but would reserve the right to do so later.[42]

Dr. Eliash then spoke, noting that although Auni Bey had just outlined his case, the Jewish side would submit a Memorandum (the Adler Memorandum) laying out its case in advance of calling witnesses.

The Commission decided, with the agreement of the parties, that the Jewish side would be considered the plaintiff and would present its case first. The Commission designated the Muslim side as the defendant. Dr. Eliash reserved the right to present rebuttal evidence.[43]

The opening session then took a very interesting turn, when Lofgren commented regarding ownership of the Wall: "the Commission has to ascertain facts in order to judge the legal position. I make this observation especially with reference to the question of proprietorship of the Wailing Wall."[44] A short time later, Lofgren reiterated the Commission's interest in determining ownership of the Wall, noting, "[i]n the first place you have to make certain the title by precise statements about the proprietorship" of the Wall.[45]

Auni Bey agreed to submit documents establishing Muslim ownership of the Wall, but repeated his initial statement that "we are the absolute owners of the Wailing Wall and Jews have no right whatever except a mere passage through the pavement to the Wall."[46]

Yellin then interjected:

> The Jewish Counsel cannot accept the view expounded by Aouni Bey to the effect that the Arabs are the absolute owners of the Wall and all that surrounds the Wall, and that the Jews have nothing but the mere right of passage to this place … For centuries Jews have been worshipping at this place, and have been bringing chairs and other appurtenances there … Even rights of proprietorship need proof, and if they maintain that all the surrounding area is *Wakf* property, this too, will have to be supported by evidence.[47]

Dr. Eliash asked the Muslims, on the record near the conclusion of the opening session, to refrain from causing "intercommunal disputes and anxieties" during the Commission's presence in Jerusalem. Dr. Eliash specifically condemned recent Muslim efforts to change the *Status Quo*; for example, by effacing certain Hebrew inscriptions on the lower stones of the Wall. Jamal Effendi Husseini, one of the Muslim representatives, likewise criticized any Jewish prayer activity ("demonstrations") at the Wall inconsistent with the *Status Quo*. "You must be assured," Husseini said, addressing Dr. Elias, "that we care for the *Status Quo* much more than yourselves because we stick to the *Status Quo*."[48]

The Commission did not convene the next day, to allow the lawyers for both sides additional time to prepare their opening statements. Kisch used the break to take the Commissioners to the Jewish Quarter of the Old City to visit the *Hurvah* synagogue. During the visit Lofgren asked Kisch whether it might be possible for the Muslims and Jews to settle their differences regarding the Wall:

> The Chairman of the Commission questioned me as to the possibility of reaching a settlement by agreement, saying that although the Commission had the powers to decide, it was always preferable to agree between the two parties. I told M. Lofgren that we had at all times taken the line that we would welcome a settlement by agreement. If the Commission saw any possibility of the other side freely agreeing to a solution which would meet the very elementary claims put forward by us in regard to securing decent and dignified conditions of Jewish worship at the Wall, free from interference, we would readily respond to any invitation from the Commission to a round table conference. On the other hand, I expressed the view that the failure of such a conference might be very harmful.[49]

As will be seen, after the hearings ended, Kisch played a key role in an ultimately unsuccessful effort to reach a settlement with the Muslim side.

The trial

The substantive portion of the hearings began on 25 June 1930, with Dr. Eliash delivering the opening statement for the Jewish side. Auni Bey chose not to add to the remarks he had already made during the Commission's opening session.

Opening statements of counsel

Dr. Eliash noted first how the Mufti's acceptance of the November 1928 White Paper, including by implication the Jewish right of prayer at the Wall, contrasted dramatically with Auni Bey's argument at the Commission's opening session denying the Jews enjoyed anything other than a mere right of passage or visitation to the same extent as non-Jewish tourists.[50] Dr. Eliash noted the Shaw Commission had acknowledged "the Jews through the practice of centuries, have established a right of access to the Wall for the purposes of their devotions."[51]

Dr. Eliash then discussed the meaning of Articles 13 through 16 of the Mandate. Dr. Eliash argued, just as Harry Sacher had argued during his testimony before the Shaw Commission, that Article 13 (along with Articles 15 and 16) required the Mandatory power to do three things regarding the Holy Places: first, to preserve the existing rights of the various religious communities; second, to provide free access to the Holy Places; and third, to guarantee free exercise of worship.

Regarding the concept of "existing rights," Dr. Eliash emphasized the concept of the *Status Quo* meant *existing* rights rather than *pre*-existing rights.[52] Dr. Eliash, again reflecting Sacher's position, argued "the provisions for securing access to the Holy Places and securing freedom of worship are at least as important as those of preserving existing rights."[53]

Dr. Eliash then noted the Muslim side had made arguments based on (i) their claimed property rights to the Wall and the pavement; (ii) their rejection of any special right of the Jews to access and prayer at the Wall; and (iii) their fear that granting the Jews any such rights would lead to the eventual Jewish takeover of the entire *Haram al-Sharif*.[54] Dr. Eliash addressed each of these arguments.

Regarding Muslim property rights, Dr. Eliash challenged the Muslim side to produce evidence establishing their property rights to the Wall and the pavement. Dr. Eliash argued the custom of Jewish prayer at the Wall predated by hundreds of years the establishment of the *Wakfs* in the vicinity of the Wall, and thus "an important question arises as regards the *Wakf*, and its power to annul existing Jewish rights of prayer and access."[55]

Dr. Eliash turned next to Muslim fears about Jewish designs on the *Haram*, insisting such

fears were unfounded, as the Jews had repeatedly disavowed any such designs.[56] Dr. Eliash noted the Shaw Commission found certain Muslim leaders in Palestine had stoked those unfounded fears to ignite the 1928–29 *Buraq* campaign for political purposes, a campaign the Shaw Commission found had "passed out of the control of those who initiated it and played a part in the ultimate [August 1929] disaster."[57]

Dr. Eliash quoted Chief Rabbi Kook's testimony to the Shaw Commission that no Jews were allowed to set foot in the *Haram* area until the coming of the Messiah.[58] Dr. Eliash then asked:

> [I]s it because of that fear that an old fasting man must not be allowed to sit on a chair or bench on the most sacred day of his year? Is that a fear which justifies one great religion to try and crush another great religion? Would that for a moment be sufficient to justify a narrow interpretation of Article 13 of the Mandate?[59]

Dr. Eliash then discussed Jewish rights of access to the Wall and the pavement. Dr. Eliash rejected defining the *Status Quo* by reference to Ottoman law, noting the unreliability, corruption, and inconsistency of the Ottoman legal and governance systems. "[W]hat in Turkish times was the letter of the law and what was life were two different things … custom and law were different things in Turkish times."[60]

Dr. Eliash contrasted the evidence of the consistent Jewish practices at the Wall with examples of recent Muslim innovations intended to disrupt Jewish prayer, such as the *Zikr* ceremony, the stationing of a *Muezzin* on the roof of a home near the Wall, and the recent construction activity at the Wall, including the opening of the new door at the southern end of the pavement. "The time has come," argued Dr. Eliash, "when something should be done to ensure decent conditions of worship without humiliation, without interference and without interruption."[61]

Dr. Eliash then pressed the attack further, rejecting the Muslim claims that the Wall was an Islamic Holy Place. "We have not found any record of prayers conducted at any time by Moslems in this place," he argued.[62] But Dr. Eliash did not stop there, accusing the Muslims of repeatedly and grotesquely defiling the Wall:

> Evidence will be brought before you that time and again the Wall was desecrated by actually smearing human excreta on its stones. Filth and rubbish were always allowed by the Mughrabis to accumulate there, while time and again have Jewish individuals and organized communities paid for the sweeping and cleaning of the area in front of the Wall, and it will be shown to you that it was through Jewish intervention that a sewage drain was not laid close to the Wall, the Jewish community having subsequently paved the area in front of the Wall.[63]

Dr. Eliash concluded his opening statement by discussing ownership of the Wall. This involved a difficult strategic question for the Jewish side. The Jews could have argued the Wall (perhaps not the pavement, but certainly the Wall) rightly belonged to them as the last surviving remnant of King Solomon's Temple, notwithstanding the intervening Babylonian, Macedonian, Roman, Arab, Ottoman, and British conquests. The Jews had maintained their connection to the Wall for centuries and never waived their rights or title in a legal sense. The Jews had inscribed Hebrew writing into the lower courses of the Wall, cleaned the Wall when it was defiled, and paid to repair the pavement in front of the Wall, all without Muslim objection. Why not use the opportunity of the formation of an International Commission, vested with the authority of the international community through the League of Nations, to try to obtain a verdict of *ownership* for the Jewish people?

But the Jewish side made no effort to persuade the Commission it owned either the Wall or the pavement, perhaps for fear of provoking a backlash among the Palestinian and global Muslim

communities. Nevertheless, it was equally difficult for the Jews to admit Muslim ownership of the Wall.

The Adler Memorandum therefore argued the Wall could not be regarded as "property" in the ordinary sense, implying somewhat ambiguously that *neither* side owned it. Dr. Eliash continued in a slightly different vein:

> Now I come to the last point. The question of ownership of the Wall. That has been stated time after time in documents that the ownership of the Wall is vested in Moslem authority. *Let me say it quite openly and quite clearly that we have not come to discuss the question of ownership of that Wall.* We have come here to discuss the rights and claims of people to worship in a human and venerable way.[64]

While this statement seemed an outright concession of Muslim ownership, Dr. Eliash then took a different tack. He described the three sections of the Wall, comprised of the lower, Solomonic/Herodian layer, the middle (later Roman) layer, and the upper and more recent Arab/Muslim layer. Dr. Eliash argued that because the British Military and Civilian authorities had treated at least the two lower strata as ancient antiquities protected by the 1920 Antiquities Ordinance, ownership of those two lower strata "should be vested in the State."[65]

A few minutes later Dr. Eliash moved even further away from conceding Muslim ownership of the Wall, saying "if you claim ownership of the *Wakf* Abu Midian *you have to produce legal evidence*."[66] This provoked a caustic interruption from one of the Muslim representatives, Faiz el Khouri: "Dr. Eliash first said that he does not contest ownership, we have heard it with our own ears, and now he says he said nothing of the kind."[67]

Dr. Eliash responded with even more ambiguity:

> As regards the Wall itself, I merely made it clear that I have not come here to ask you to decide about the rights of ownership; we have come here to claim right of free worship in our favour; if it is claimed that rights of property are conflicting with the rights of the *Wakf*, then the rights of this *Wakf* must be fully proved, and if the other side claims ownership of the Wall itself it will be for them to satisfy you on this point.[68]

Kisch was extremely pleased with Dr. Eliash's opening statement, writing in his diary that Dr. Eliash "rose to great heights of eloquence in the course of his address, and maintained a high level throughout."[69] Kisch also recorded in his diary that two prominent Iraqi and Syrian visitors approached Haim Margaliot-Kalvarisky (a member of the *Brit Shalom* organization known for advocating a bi-national, Jewish/Arab state in Palestine), suggesting "an endeavor should be made to reach a settlement between the parties." But the initiative failed almost immediately, as the local Muslim leadership rejected it.[70]

The Adler Memorandum

Following the completion of his opening statement, Dr. Eliash submitted the Adler Memorandum to the Commission.

The Adler Memorandum addressed four key points for the Jewish side. First, Adler cited religious texts to establish the sacred character of the Wall in the Jewish religion. According to Adler, "throughout the ages and under all conditions the Jews regarded the site of the destroyed Temple as a Holy Place."[71]

Second, Adler cited a large number of historical texts and travelogues to prove Jews had worshiped at the Wall virtually without interruption for nearly two thousand years, since the

destruction of the last Temple. This worship took the form of both individual and organized congregational prayer with various appurtenances, plus benches for sitting and a "small screen or flat form of separation" to divide men from women.[72]

Third, Adler noted the Muslims had never until very recently objected to Jewish prayer at the Wall, and occasionally charged the Jews a small fee to approach the Wall.[73] According to Adler, the Muslims made no effort to keep the pavement clean or in a good state of repair, and in any event the Muslims never regarded the Wall as a sacred shrine:

> A succinct statement of the attitude of Islam as to the sanctity of the Wall or to its being called the sacred Burak up to within the last few years can be indicated by the fact that the Wall has never been used by Moslems for religious services or pilgrimage, that the lane in front of it has always been dirty, that the passages in Arabic literature early or late do not apply the term Burak to the Wall and that up to the past twenty years no claim was ever set up as to its sacredness on account of the Burak. Even in the official guide to the *Haram* published by the Supreme Moslem Council in 1924 no reference is made to the Wall as a Holy Place.[74]

Finally, Adler argued the Jews were not claiming any property rights to the Wall or the pavement, even though the Jews had paid to repair the pavement in 1895.[75] Adler, however, suggested the Wall was not Muslim "property" either, given its special character as a Holy Place:

> There has been a good deal of discussion about a new building erected on the top of the Wall and this new building was allowed by the British Government on the ground that they had no right to interfere since the Wall was the property of the Moslems; but it should be pointed out that the Wall was a Holy Place and a Holy Place cannot be called property in the ordinary and common sense. It cannot be demolished to make way for another construction, it cannot be sold, hence, even as property it is subject to special restrictions. One of these might obviously be that nothing shall be taken away from it and nothing shall be added to it, and to this extent we feel that the decision of the Palestine Government was wrong and should be reversed by your Commission.[76]

Adler concluded his Memorandum with a list of the Jewish demands, or "actions requested." The Jews, wrote Adler, wanted the Commission to recognize the Wall as sacred to the Jews; to recognize the Jewish rights of access to and prayer at the wall with dignity and in accord with Jewish ritual practices; to require the Mandatory power to maintain the pavement and access to the Wall in a clean and dignified condition; to close the newly created southern opening to the pavement; and finally, to clear away the Moghrabi dwellings and create a wider area in front of the Wall, with that area leased by the *Wakf* to the Mandatory Government, and with the Moghbrabi inhabitants relocated to new homes the Jews would purchase and lease to the *Wakf*.[77]

Although Adler was not a lawyer and cited no legal texts in his Memorandum, he summed up the Jewish position in legal terms, as follows:

> Your honorable body will observe that we are not speaking of demands; we are not speaking of rights; *we are trying to bring before you a cause which possibly in the tribunals of international law has no precedents*. We ask for no property rights; we do not ask to exclude others from participation in our worship if they wish; we simply ask for the continuation of a sacred custom which has been carried on by us without infringement on the religious rights of others. If there are no precedents for such a request, we pray that your honorable body decide upon the basis of common justice and common sense.[78]

Dr. Eliash apologized to the Commission for the Adler Memorandum's length, saying it was necessary to devote much attention to proving the Jews' established rights at the Wall

> in view of the astounding statements which were made by my friends on the other side, to the effect that the Jews have no rights at the Wailing Wall, and that it was by mere tolerance that a passage was allowed to them.[79]

Following an overnight adjournment, the Commission reconvened the next morning, and

Lofgren immediately announced the Commissioners had several comments and questions regarding the Adler Memorandum.

First, Lofgren raised the issue of ownership of the Wall, noting the Adler Memorandum made no claim of any Jewish property rights to the Wall, and almost seeming to express surprise the Jewish side had failed to asset any claim of ownership:

> It would therefore, with a view to limiting the points in dispute, be an advantage to be able to take on record that the Jewish side does not set up any actual claim to the Wall itself, none the less the Commission will be in need of documents which the Moslem party might possess in order to get informed as the formal property right and the legal nature of all the property now in question, that is to say, to the Wall itself, the pavement outside it and the dwellings opposite the Wall.[80]

One wonders whether the Commission would have been willing to entertain a Jewish claim of ownership, and if so how the outcome might have differed if the Jewish side had ventured to make such a claim.

In any event, Lofgren posed additional questions regarding the Adler Memorandum, asking Dr. Eliash to present evidence on the following points: first, what exactly did the Jewish side mean when it referred to "ritual prayer" at the Wall, including the differences between individual and congregational prayer, and the differences between congregational prayer at the Wall and congregational prayer in a synagogue; second, what specific appurtenances were necessary *for prayer*, as opposed to those which may be necessary for personal convenience; and third, whether services at the Wall were arranged informally or by the Head of the Jewish Community in Jerusalem.[81]

Dr. Eliash responded to Lofgren's comments and began with the ownership issue, once again introducing ambiguity. While acknowledging "no claim to any property right has been set up," Dr. Eliash reiterated the statement in the Adler Memorandum that "a Holy Place cannot be called property in the ordinary and common sense."[82] Dr. Eliash continued:

> You will see, Sir, that our attitude to the Sacred Wall is that it belongs to the categories of things that can only be considered as Holy Place, *res extra commercium*, or *res extra Divinum*. It is not something to which one can apply the term 'property.' As regards the question in whom actually the rights of property in this Wall is vested, this is a point which your Commission will have, among other things, to determine, if the other side claims such right, they will certainly have to prove it … [S]ome distinction is here made as to the various courses, and as to the property vested in the Turkish and now British authorities. As I have said before, we have not come to this Commission to claim any property rights on this Wall, but we do think that this will be one of the questions, in whom the property, in the limited sense outlined above, should actually be vested in the future.[83]

Regarding the Commission's other questions about Jewish ritual and prayer practices at the Wall, Dr. Eliash said he would produce witnesses in the coming days to testify on those matters.[84]

Conflicting witness testimony

The vast majority of the proceedings before the Commission consisted of the testimony and cross-examination of witnesses for both sides regarding Jewish rights of access to the Wall, Jewish and Muslim repairs to the pavement, Jewish prayer practices and appurtenances at the Wall, and the alleged Muslim lack of affinity for the Wall, including alleged Muslim defilement of the Wall. Both sides relied on lay and expert testimony regarding these and other issues. The testimony was in conflict on nearly every point.

Jewish right of access; sanctity of the wall to Jews

Both sides called witnesses to testify regarding traditional Jewish rights of access to the Wall and the pavement. One Muslim witness, Sheikh Ismail Effendi Hamaz of the *Sharia* Court of Appeal, testified at length as to whether the Jews had obtained a right of servitude under *Sharia* Law for the pavement and the Wall area. Sheikh Hamaz testified that passing along a *public* way would not be considered as giving rise to a servitude. Passage along a *private* way, such as the pavement in front of the Wall, could give rise to a servitude, but only if the property owner (in this case, the *Wakf*) had formally granted such a right to the Jews and registered it with the *Sharia* court.[85] Hamaz also noted *Sharia* law prohibited non-Muslims from practicing their religion on *Wakf* property.[86]

Another Muslim witness, Sheikh Tewfik et Tiby, the Chief Clerk of the *Sharia* Court at Tulkarem, testified regarding the meaning of the concept of a servitude under *Sharia* Law. Sheikh et Tibi said the term meant a "right of enjoyment; the term 'right of servitude' means the right of one person in the property of another person."[87] Sheikh et Tiby continued the theme on direct examination:

> *Q*: If a community believes that there is a sacred wall which such community used to visit for millions of years by passing through another person's property, would the present members of that community be entitled to claim the right of passage to visit that sacred Wall, if the owner of that property desires to prevent them from passing?
>
> *A*: The reply to this question is … it is not permissible at any rate.
>
> …
>
> *Q*: In your capacity as a judge of the Moslem *Sharia* Law, should the Jews lodge a case before you and establish that they *ab antiquo* have practiced a custom of passing through the Moghrabi Quarter to the Buraq, and point out that the Moslems prohibit them from passing thereto and ask you to prevent the Moslems who stand in their way, what decision would you give in this case?
>
> *A*: According to the Moslem law a right of passing cannot be granted; according to the Moslem *Sharia* law a servitude to pass can only be granted to a person by the owner of the private property.[88]

Dr. Eliash attempted to rebut this testimony by introducing documentary evidence and witness testimony demonstrating how Turkey, the former ruling Muslim power in Palestine, had long permitted the Jews rights of access to and prayer at the Wall.[89]

The Muslim witness Sheikh Ghuneim el Taftazani of the Sufist Sect in Egypt summarized the Muslim position while under cross-examination from Dr. Eliash:

> [T]he Jews used to approach the Wall and stand up in front of it. Then they claimed the right to visit it. Later on they expressed a desire of placing chairs and later on desks or tables and at last they expressed a desire of bringing to the Buraq the Scroll of the Law notwithstanding the fact that the Jewish Religious Law prohibits the removal of such Scroll of the Law from the Synagogue. Their case in my opinion resembles to the following instance: They resemble a person who shows himself to be weak and poor and when he is granted a gift he shows that he is a man of power. So that when the Jews have got rights such as the transport of chairs, tables and other things to the Buraq, then they would claim that they

have a Jewish synagogue inside of the Holy Mosque of *al-Aqsa*.[90]

Auni Bey also tried to raise doubts about the sanctity of the Wall to Jews by arguing King Herod, a Roman non-Jew, had actually built the Wall and not King Solomon. For example, Auni Bey asked Professor Boris Schatz, the Director of the Bezalel School of Arts and Crafts, whether it made a difference that King Herod, rather than a Jew, had constructed the Wall, but Schatz did not seem to care:

> *Q*: If it is established to you that this building has not been built by King Solomon but by King Herod, who was a non-Jew, would you consider it sacred as well?
>
> *A*: *What is the difference who built it?*[91]

Benches and chairs

Both sides called several witnesses to testify regarding the presence (or lack) of benches at the Wall before and after World War I. The Jewish witnesses testified benches had been placed at the Wall as early as the 1880s, and that after the war the Jews rented a small room from one of the Moghrabis to store the benches at night.[92]

The Jewish side also called witnesses to testify the 1911 Ottoman order banning Jews from bringing benches to the Wall was invalid because it had been issued by a local Ottoman official in Jerusalem, and not by the central government in Constantinople. In any event the, the Jewish side noted, the order had been rescinded and benches allowed again only a few months later.[93]

The Muslim side called witnesses who denied there were ever any benches at the Wall. For example, Hassan Ghuneim, a former police official who served under the Turkish regime, testified:

> *Q*: Can you tell the Commissioners whether you have seen benches or chairs at the Wailing Wall?
>
> *A*: No, I have not seen.
>
> *Q*: Not a single one?
>
> *A*: No.
>
> *Q*: Would you be surprised if you see pictures that have been taken 30 to 35 years ago showing that benches and chairs were placed there?
>
> *A*: That is not so. It is impossible.[94]

The Muslims also called a witness who denied the Ottoman authorities had rescinded the 1911 order banning benches.[95]

Screen

The presence or absence of a screen, which had provoked so much controversy on *Yom Kippur*

1928, was also the subject of considerable and conflicting testimony from both sides. A longtime British resident of Palestine, Richard Hughes, had a hazy recollection of the Jews using a screen to separate men from women, "but that seemed a new thing, it was not the usual thing before the War."[96] The Chief Rabbi of Jaffa, Ben Zion Uziel, testified a screen is required to partition men from women, and "the Service would not be exactly perfect without a screen." The Rabbi also admitted, however, that "I would not say the Service would be incomplete" in the absence of a screen.[97]

Another Jewish witness testified he recalled seeing a screen at the Wall, prompting Auni Bey to retort "[y]ou should know that there are 300,000,000 Moslems all over the world who oppose your placing a screen at the Wailing Wall."[98] The Jews also called Mendel Hacohen Pakover, who testified he directed a carpenter to build a screen thirty years earlier to be brought to the Wall regularly for the Sabbath and the Jewish holidays.[99] Other Jewish witnesses recalled seeing screens occasionally at the Wall.[100] The Muslim witnesses (including non-Muslim clerics) testified they had not seen screens at the Wall before World War I.[101]

Torah

The Muslims argued the Jews had not customarily brought the Torah to the Wall, given that services at the Wall were not the same as in a synagogue. The Muslims vigorously objected that allowing the Jews any right to bring the Torah to the Wall would constitute a step toward converting the Wall into a synagogue, leading to the eventual creation of a new Temple on the site of the *Haram*. The Jews, on the other hand, argued the Torah was an essential component of their religious services at the Wall, and they had customarily brought the Torah to the Wall without objection from the Ottomans.[102]

One Jewish witness, however, Rabbi Abraham Schorr, the Head of the Hassidic Religious Court of Jerusalem, seriously undermined the Jewish case when he admitted during Auni Bey's cross-examination that the Torah had been brought to the Wall only "about eight to ten years ago. It may be that this practice had taken place before," Rabbi Schorr recalled, "but I myself have not seen it."[103] Auni Bey repeatedly referred to this admission throughout the remainder of the hearings and during his closing argument.

Shofar

The debate over whether blowing the *Shofar* at the Wall comprised part of the customary Jewish prayer practices was also hotly contested. The Sephardi Beadle, Raphael ben Rahamim Meyuhas, testified "there were always worshippers there, and they used to bring the Scroll of the Law and they used to blow the *Shofar*."[104] Other Jewish witnesses were not as definitive, but still testified the *Shofar* would be blown at the Wall on *Rosh Hashanah* and *Yom Kippur*.[105]

Other appurtenances

Various Jewish witnesses testified about other appurtenances the Jews customarily brought to the Wall for prayer services, such as lamps, candles, a wash basin, prayer books, a small table for the

Torah, and other items.[106] The Muslims called one of their own representatives, Jamal Husseini of the Palestine Arab Executive, to testify "[i]n no one single case did I see any bench, chair, table or partition or awning there, or anything else …"[107]

Prayer v. devotion

The parties vigorously disputed whether the Jews had customarily engaged in actual "prayer" at the Wall. The Jewish side called many witnesses to describe their customary prayer practices at the Wall, supplementing the huge amount of historical evidence of Jewish prayer discussed in the Adler memorandum. Dr. Eliash also screened a short film for the Commission showing Jewish prayer at the Wall prior to World War I.[108] Dr. Eliash called Professor Boris Schatz to the witness stand to authenticate the film. Schatz described how a British Zionist named Murray Rosenberg made the film in approximately October 1911. Schatz testified he first saw the film exhibited a short time after it was made, and it matched the film shown to the Commission.[109]

The Muslim side spent considerable time arguing the Jews had never actually prayed at the Wall individually or in congregation, but instead merely made individual or group "devotional" visits to the Wall to lament and mourn the destruction of their lost civilization. Auni Bey, during his cross-examination of Rabbi Abraham Schorr, tried to force Rabbi Schorr to concede Jews do not "pray" at the Wall in the same sense they pray in a synagogue.[110]

The Muslim side also called to the stand Sheikh Ismail Effendi Hafez of the *Sharia* Court of Appeal to testify the permission granted the Jews to visit the Wall did not include the right to pray at the Wall:

> *Q*: The permission as I suggested now, was it given to individuals or to Communities irrespective of their creeds and nations to visit that place?
>
> *A*: I do not know of any permission being given to visit the *Buraq* whether it was given to a particular individual or a particular community, but I know that the Moslems in all Moslem countries permit members of other communities to visit their Mosques and places of worship and Charitable Institutions a mere visit in order to inspect such places or simply for having a look round such places of interest; I only hear that the Jews used to visit the *Buraq* similarly like other Members and that the individual Jews enjoy a certain privilege during their visit more than any Members of other communities that some of them while at the Buraq weep and utter words which it is said contain songs as a sign of mourning of their lost glory and their Kingdom; this is all that I hear as regards the privilege of the Jews to visit the *Buraq* …
>
> *Q*: Would it surprise you if the Jews hold a prayer at the Buraq and would the prayer of the Jews at the *Buraq* be contradictory to the rules of the *Sharia* Law?
>
> *A*: Yes, according to the *Sharia* Moslem Law, the Jews are prohibited to hold or perform any prayer at the *Buraq* … [111]

Pavement repairs

Dr Eliash called 70 year-old Joseph (Yossel) Giva Goldsmith to testify regarding the re-paving of the area in front of the Wall in 1895. Goldsmith had given similar testimony several months earlier, in a brief appearance before the Shaw Commission.[112] Goldsmith described to the Lofgren Commission how in the 1890s a sewage drain had been dug in the middle of the pavement area along the Wall. Two Rabbis protested to the Ottoman Mayor of Jerusalem, who ordered the work halted. The Jews then filed a petition seeking permission to re-pave the area in front of the Wall, which the Municipality granted. Goldmsith said he bought the paving stones in Bethlehem, and an Armenian whose name he could not recall performed the paving work.[113] One other Jewish witness corroborated Goldsmith's testimony.[114]

The Muslim side called several witnesses to rebut Goldsmith's testimony. Two Arab stone dressers, Salim Salameh Iskafi and Jirgis Baud Daou, both testified the Jews did not pave the area in front of the Wall and did not bring any paving stones from Bethlehem.[115] Auni Bey also obtained an admission from a Jewish lay witness that the pavement was "not sacred in the eyes of the Jews."[116]

Sanctity of the wall and pavement to Muslims

The Jewish side argued the concept of the *Buraq* as a holy place was relatively new in Islam, suggesting it may have been invented simply to create enhanced Moslem rights to interfere with Jewish prayer at the site. The Jewish side argued the Koran did not mention the Western Wall as the place where Mohamed had tethered his steed; indeed, the Koran says *nothing* about Mohamed tethering his steed anywhere.[117]

The Jewish side also argued, however, that even if there were a Muslim holy shrine in Jerusalem known as "*al Buraq*," and even if it were located somewhere in the vicinity of the *Haram*, its *exact* location was somewhere *other* than the Western Wall, as evidenced by the lack of *any* tradition of Muslim prayer or worship at the Wall itself. The Jewish side further argued the *Wakf* boundaries were not clearly demarcated in any of the *Sharia* Court documents the Muslim side offered into evidence. Adler argued in his memorandum that even Muslim scholars could not agree on the exact location of the *Buraq*, and *none* had placed it at the same spot as the Wailing Wall.

Auni Bey elicited testimony in response from Sheikh Ismail Effendi Hafez of the *Sharia* Court of Appeal. Effendi Hafez testified the Western Wall was, in fact, the *same* place where Mohamed had tethered his horse, because that was where the Muslims had dedicated the Moghrabi *Wakf* and established the *Zawiyah*. "[T]herefore," Effendi Hafez reasoned in circular fashion, "the Moslems have no doubt that the present place of the *Buraq* is the exact place of the *Buraq* … itself."[118]

Dr. Eliash also called witnesses to testify they had never seen Muslims praying at the Wall. For example, Chaim Solomon, the Vice Mayor of Jerusalem and a witness before the Shaw Commission, testified:

> *Q*: Did you ever hear of any part of the Moslem Community going for prayers before the Wailing Wall?
>
> *A*: I should like to say that not only have I never seen or heard of a Moslem or Moslems

> going there for the purpose of prayer, but also during my childhood I saw many times Moslems passing the pavement but I have never seen them display any feeling of veneration or sanctity towards the place.[119]

Auni Bey called many witnesses to testify the Wall was sacred to Moslems. Muzahim Amin Bey Bajaji, an Iraqi diplomat, testified Muslims regard the Wall as "very sacred."[120] Salah al Din Bey Osman Beyham, Vice President of the Supreme Moslem Council of Beirut, also testified the Wall was sacred to Muslims and that Jews had only prayed there for the past six or seven years.[121] Abdul Khayar Mozzakir, a resident of Egypt originally from Java, testified "we certainly regard it [the Buraq] as a Holy Place because the Holy *Buraq* is an integral part of the Holy *Haram*."[122]

Other Muslim witnesses described the various forms of *Wakf*, with some dedicated solely for religious purposes and others for charitable purposes. The Lofgren Commission summarized the testimony as follows:

> A *Wakf* is an object that – either itself or the whole of its revenue – has been definitely dedicated to serve some religious or charitable purpose. A person who makes the donation of the income of an object for *Wakf* purposes also loses the property rights to it. The first class of *Wakfs*, buildings or land consecrated for religious or charitable purposes, is divided into three categories: – (a) Mosques and places of worship, i.e., places reserved for the exercise of religion; (b) "*Zawiyahs*" and alike places consecrated to the reading of the *Qoran*, the study of the *Sharia* Law, and to the ceremony of the *Zikr*; and (c) places dedicated to serve as hospitals, hospices or to minister to some other charitable purposes of that kind. The second class comprises institutions or objects which, though they have not themselves been so dedicated, have had the income arising from them dedicated for all time to religious or charitable purposes. Thus, buildings, storehouses or land under cultivation may be constituted *Wakfs*; and when that has been done the revenue accruing from the said institution or object will be set aside to serve some such purpose as mentioned regarding the first class … As forming a part of the *Haram*, the Buraq belongs to a *Wakf* of the first category of the first class. The pavement in front of the Wall and the Moghrabi Quarter are *Wakfs* of the third category of the same class, because they have been dedicated by their proprietors to the use of the Moslem pilgrims. The *Sharia* Law lays it down that Jews cannot claim any rights whatsoever with regard to those objects.[123]

But not all of Auni Bey's witnesses testified as he had hoped. For example, Louis Heidet, a French Catholic resident of Jerusalem, admitted to Dr. Eliash on cross-examination that he did not remember ever seeing any Muslims praying at the Wall. Another witness for the Muslim side, the Catholic tour guide Antoine Lolas, admitted on cross-examination he used the term "*Buraq esh Sherif*" instead of the simpler "*Buraq*" because "tourists like big names, if I would call it just *Buraq* they would not pay any attention."[124]

Alleged defilement of the wall

As promised during his opening statement, Dr. Eliash called witnesses to testify about alleged Muslim desecration of the Wall. According to Zion Isaacharoff, the second Jewish witness to testify:

> *Q*: Now during the years that you used to visit the Wall, was the place kept in a clean condition?
>
> *A*: Before the War we used to see on occasions the place rather dirty, but we kept silent.
>
> *Q*: What sort of dirt did you see there before the War?

A: There was an Arab, who is still there. He lived in the very same place where the *Zawich* [*Zawiyah*] has been built; that Arab used to have a donkey which carried manure and water, and he used to drive his donkey with the manure through that place. The donkey was kept in that place which has recently been turned into a *Zawich* … that family had a lavatory attached to their house just close to the Wall and there were foul smells. The congregation kept further away to avoid this smell …

Q: Are you quite certain the Wailing Wall formed one wall of that lavatory?

A: The wall of the lavatory was about half a metre from the wall and not only a lavatory was there, but as the same family lived in the place and kept the donkey and the manure there at night, bad smells used to come from all this to the congregation.

Q: Do you know of any occasion when you have seen the stones of the Wall themselves dirty or besmirched with filth?

A: Yes, the first occasion was on the Day of the Feast of Tabernacles, about seven or eight years ago. I remember on the first day of Tabernacles very early in the morning at dawn, when we used to go to the very first service, we came over and found the third stone before the last besmirched with human filth. We cried and we did not know what to do. We had all come in our best clothes; we decided to take water and wash that stone of the filth and this was done. Only then could we begin our Service.

Chairman: How long ago was this?

A: About seven or eight years ago.[125]

Dr. Eliash returned to this issue during his cross-examination of Muzahim Auni Bey Bajaji, an Iraqi diplomat who testified on direct examination regarding the sanctity of the *Buraq* to the Muslims. Dr. Eliash asked Bajaji on cross-examination:

Q: Would you be surprised to hear that in this Wailing Wall area a lavatory was built just about [half] a metre from the Wall?

A: If I was a man of power I would execute the person who allowed this to be built.[126]

The Muslim side called a Christian Arab tour guide, Hanna Daoud Yasmini to refute the allegations that the Muslims had defiled the Wall. Yasmini offered the following as his version of the truth:

Q: Whenever you used to visit the *Buraq* did you used to see at times the pavement leading to the *Buraq* clean or dirty?

A: I want to speak the truth and trust that neither party will get angry with me … I and others used to see a Jew, probably insane, who used to go to the *Buraq* in order to weep there and always noticed his clothes were always full of excreta and we were always sorry for him. One other thing which the tourists did not like and which was unpleasant to them was this. All Jewish women used to smell snuff and whenever they smelled it they used to

sneeze and after that whatever slime came out from their nose they used to take it out with their fingers and smear it on the Wall which was very unpleasant to the tourists.[127]

Dr. Eliash challenged Yasmini during cross-examination, but Yasmini held firm to his story:

Q: You told us a very curious thing that I have heard for the first time in my life. You saw there a Jew whose clothes were full of excreta. Are you sure about that?

A: Yes. I can produce 20 people who could prove that this evidence is true and who always felt sorry for him as he was always there.

Q: When was that?

A: Even now he goes there. I have already said that he must be sick or something.

Q: Was he ever seen by a policeman or any other official?

A: Possibly yes, possibly no.

Q: I have been there about 200 times for the last ten years and I have not seen such a man there.

A: It is possible that you have not seen him but if you like I could show him to you. If you like we can go there once together in order to show him to you, but only I hope that you will be there.[128]

Controversy during the hearings

As had occurred during the Shaw Commission hearings, the hearings before the Lofgren Commission featured occasional tense moments between the opposing lawyers, between lawyers and witnesses, and between the Commission itself and the parties.

For example, Chairman Lofgren insisted during the hearings the parties focus on the legal issues involving the Wall and avoid embroiling the Commission in political issues. Lofgren therefore took offense at what he viewed as intimidation tactics by the Muslim side. Two instances in particular stood out during the hearings. The first occurred during the testimony of Mirza Bey Rafi Mahdi Rafia Mushki, an Egyptian of Persian descent:

Q: What would be the duty of every Moslem in your opinion if this question is realized, that is to say the question that the Jews hold prayer at the Buraq as they hold it at the synagogue?

Dr. Eliash: Is this a threat to the Commission.

Auni Bey: I think it is my duty, my sacred duty to inform the Honourable Commission and tell them, by the witness, who has taken an oath, what the Moslems think of the Buraq.

Dr. Eliash: But in this way you are putting it into the mouth of the witness to threaten the Commission, that is what you are doing.[129]

The second and more serious incident occurred five days later, during Auni Bey's direct examination of Jamal Effendi Husseini, a member of the Palestine Arab Executive:

> *Q*: According to the best of your knowledge and belief how in your opinion Moslems could explain the attitude of the Government if the Government on the one hand recognizes the right of worship of the Moslems over the Wall and pavement, and on the other hand the Government permitting the Jews to bring certain appurtenances to the *Buraq*?
>
> *Chairman*: I think we should rule out this question altogether because once more it touches the attitude of the Government and this we should not speak of. I beg to observe just for explaining the attitude I have myself taken up with the consent of my colleagues … This Commission has the duty to inquire into the question of the rights and claims at the Wailing Wall … I must say that it is a pity that a high and powerful official body in this country, the Arab Executive, in this case should have come to a decision as proclaiming a general strike against the Government as a protest against these [October 1929 High Commissioner's] instructions. I make no comments, but for the present I would like to say that the mentioning of these facts would not in any way impose upon this Commission; we will take our decision on what we find to be the legal position in this matter, without any reference to any sort of direct or indirect threats … I had to say this, because threats will not influence the decision of this Commission.
>
> *Auni Bey*: It was not my intention to influence the Commission by threats or likewise. I only wanted to give information on our position.
>
> *Chairman*: We quite appreciate your giving us information, but there are certain questions, which go beyond mere giving of information.[130]

As noted, the hearings featured frequent courtroom clashes between opposing counsel[131] and between witnesses and counsel. For example, tempers (and racism) flared during Auni Bey's cross-examination of the Jewish witness Abram Jacob Brewer, a Jerusalem-based Professor of Geography:

> *Q*: In what month during 1912 did you visit the Wall.
>
> *A*: All the year round except the last months of summer which I spent in Europe.
>
> *Q*: The beadle who is always at the Buraq the whole year round came here and said that during the beginning of 1912 for three months the Jews did not sit there at all; are you a liar or not?
>
> *Dr. Eliash*: It is improper to put a question to this witness in this manner; there must be a limit to his remarks. He ought to know that.
>
> *A*: I shall not answer unless my honour will be defended; I am an Academician from Vienna and I will not allow a levantine to talk to me in such a way. I am a member of various Scientific Societies.
>
> *Chairman*: You are not allowed to put such questions. I rule out the question.[132]

There were even arguments over whether some of the Jewish witnesses who spoke both Hebrew and Arabic should be required to testify only in Arabic;[133] whether the Jewish stenographer was altering the transcript to help the Jewish side;[134] and whether the Arabic interpreter was changing the translations of the testimony of Muslim witnesses to help the Muslim side.[135]

The hearings ended on a somewhat upbeat note when the last witness to testify, a former Ottoman Turkish official named Riza Tewfik Pasha, appealed for peace in response to a question from Commissioner Barde regarding the meaning of one of the Ottoman decrees:

> *M. Barde*: Do you think that the Wailing Wall could be included in the holy places dependent upon the Chief Rabbinate?
>
> *A*: According to the text I do not suppose. The Wailing Wall is precisely the question at issue. I am perhaps the only Mohammedan in the world who is indebted to both Jews and Arabs. In this matter I am perfectly impartial … My only hope is that as there was a time when Arabs and Jews lived together in harmony learning one from the other when they have done miraculous things, so will the time come when harmony and peace will prevail between them and I wish to see these times returned and peace and harmony restored.
>
> *M. Barde*: I thank you for what you have just said and I can only tell you that it is precisely the wish of the Commission as well.[136]

Closing arguments

The Commission heard closing arguments for three days from a total of six different advocates, three per side. As the designated plaintiff in the proceedings the Jewish side argued first. The Commission permitted Dr. Eliash to make a rebuttal argument following the closing arguments of the Muslim side. Two of the three Muslim advocates delivered their closing arguments in French.

Dr. Eliash closing argument

Dr. Eliash's closing argument was far more effective than the closing argument Sir Boyd Merriman had made to the Shaw Commission. His overall strategy was to portray the Muslim side as unreasonable and overreaching in its rejection of the undisputed evidence of longstanding Jewish access to the pavement and prayer at the Wall:

> This attempt to strike at the very foundation of a thing which was accepted during generations as an established thing, places us in a somewhat different position from that which we have opened our case. If I may put it that way, by these arguments we have been driven to the wall. It may sound paradoxical, but one can say that this attempt to drive us from the Wall has driven us to the wall. What at the beginning seemed to us the mere fear of a ghost – the fear on the part of our Arab friends lest certain action, the use of appurtenances, might lead to ownership – has now become the fear of an obsession: afraid of appurtenances lest they might lead to ownership, afraid of prayer because it means appurtenances, afraid of access because it means prayer.[137]

Dr. Eliash contrasted this with the Jewish position regarding ownership of the Wall:

> I have stated that the Jews have not come before this Commission to claim any right of ownership of the Wall itself. I

> have underlined it time and again that the sacredness of the Wall, the very reverence with which we pronounce its name, the sanctity with which we treat it, prevent us from using the term ownership … You will remember that Sheikh Ismail Hafiz told us also that in things divine ownership is either vested in God or nobody … The only matter which interests us in the question of ownership is that the Wall should not be changed, that the Wall should not be altered, that its appearance should not change, that it should not be treated as a human object over which ownership can be exercised like over other matters which are matters of human belongings … that assurance of unchangeability and inviolability is all that we have to claim with regard to the question of ownership.[138]

But Dr. Eliash then seemed to hedge his position a bit, challenging the notion adopted in the 1929 Opinion of the Law Officers (one of whom, it is to be recalled, was then-Solicitor General Sir Boyd Merriman) that the Muslim building activity at the Wall was permissible so long as it did not offend customary Jewish prayer practices:

> The contention that the change must be so ghastly a change as to shock anybody who comes to look at it, the contention that one can measure by some scientific instrument the fineness of religious feeling to decide which change does cause a feeling of irreverence, and whether or not the putting of some cement bricks or of a stone structure on the top of the Wall sacred to a Faith and to a people is contrary to the religious feelings of that people – this contention, I submit, should not be allowed to stand. *And so long as that principle is adopted and accepted, we are not claiming any right of ownership in the Wall itself as included in the Haram area* … If the specific meaning of the term ownership as I described it is accepted and understood, I need not discuss this subject any longer.[139]

A few moments later, Dr. Eliash hedged a bit further on the issue of ownership, arguing *neither* Jews nor Muslims owned the Wall:

> I should like to deal here with one suggestion that has been thrown out by the other side time and again. They say that we do not use certain terms, we do not use certain words, but we use the equivalent of these words without using the word itself. It has been suggested by the other side that whilst we disclaim ownership, yet we claim some specific relationship which, although we do not describe it as ownership, amounts to ownership. Now this is a very subtle way of attacking another man's position. It is very difficult to deal with. I think that further than what I have already said, one can hardly ask one to say. I think that going further than saying that the ancient relics of the Jewish people, the thing which they believe has been preserved by divine Providence to last for generations as a reminder and an encouragement, as a sacred spot to which they can always come and find their unity with their Maker – *to go further than saying that they do not claim ownership in the thing, in that sacred thing, is impossible for Jews … on the question of ownership we, whilst disclaiming it for ourselves, say that this is a thing that cannot be owned*.[140]

Dr. Eliash then discussed the legal impact of the establishment of *Wakfs* in the vicinity of the Wall and the pavement, arguing the creation of *Wakfs* did not legally divest the pre-existing, centuries long Jewish rights of access to and prayer at the Wall.[141] Dr. Eliash next discussed the various witness testimony regarding the sacredness of the Wall to Jews, noting

> [i]t is of no importance at all what the other people thought they did, as to whether it struck them as if they were lamenting or reading the book of Jeremiah. It is what the Jews actually did there for centuries that counts.[142]

Dr. Eliash then discussed the customary Jewish practices at the Wall regarding benches, a screen, and bringing the Torah for services, reviewing the witness testimony supporting the Jewish position on all three points.[143] Dr. Eliash offered something of a compromise suggestion regarding benches, indicating the Jews would be willing to agree in writing "that the seating accommodation which has been provided for the Jews could not possibly create any right of ownership against the *Wakf*."[144]

Dr. Eliash also addressed the Muslim connection to the Wall, reiterating the argument he had made during his examination of various witnesses that while the *Buraq* was indeed a Muslim Sacred shrine, it was *not* located at the same place as the Wailing Wall, but somewhere else along the curtilage of the *Haram*.[145]

Before concluding his argument, Dr. Eliash made a direct appeal to Auni Bey and the other Muslim representatives for peace and mutual tolerance:

> [T]here is nothing to be feared, I warn and beg my friends on the other side not to play with this motive of religious bigotry. I am appealing to them to drop their motive which is entirely new; the suggestion that all tolerance has gone from our Moslem friends, the suggestion that they would really feel in their heart of hearts that if the Jews should pray to the one God in whom both nations and both faiths believe, that the very allowing of Jews to pray there as they have been doing for eighteen centuries would be doing sin and evil and therefore they cannot do it, is a suggestion above which they have got very quickly to rise …[146]

Dr. Eliash concluded by restating the Jewish demands under Articles 13 and 15 of the Mandate: first, that the Jews be allowed free access to the Wall; and second, that they be allowed free exercise of worship at the Wall, without interruption or interference, meaning "truly free access."[147] Accordingly, Dr. Eliash argued, the *Zikr* ceremony should not be permitted, as it was intended solely to disrupt Jewish worship. Moreover, ingress and egress to and from the Wall should be maintained in a clean and dignified condition.[148]

Dr. Eliash ended his closing argument by noting the Commission's task was unprecedented in international law:

> [I]f our claim is one which cannot be supported by an article from any book or by quoting an earlier case or precedent, then we can only say that the task which has been laid on your shoulders must be discharged in broad principles of justice and common sense. If no precedent can be found, one should remember that there was only one city of Jerusalem, only one Temple site of the Jews, only one people that has gone through the persecution of ages and has been for centuries craving to come back to this place, to this austere Wall which reminds it of its past greatness. It is unique and no precedents can be found to guide you, but the broad human principles which encompass and rule all human things will rule this thing as well. And in that religious spirit in which this case has been presented to you, you should find an answer to the 300,000,000 Moslems with whom you have been threatened during these proceedings. You should be able to say: We are not taking anything away from you; we are not going against your own noble tradition; we are not giving the ownership of anything to another faith; we are trying to find for you and for them a way which should be in consonance, in keeping with your great religion and with their great religion.[149]

Rabbi Blau and David Yellin closing arguments

Blau and Yellin also gave closing arguments for the Jewish side, with Rabbi Blau focusing on the sacredness of the Wall to Jews and Yellin focusing on the lack of Muslim regard for the Wall as sacred.[150] Yellin ended his closing argument with the following appeal to the Commission:

> The League of Nations is the supreme and most ideal institution to which this generation was able to attain after the world conflagration. Over twenty-five centuries ago our great seers, Isaiah and Micah, prophesied from the heights of this city and of the Temple whose Wall has been the subject of all our proceedings here, that a day would come when the God of Zion "shall judge between nations and decide between many people, and they shall beat their swords into ploughshares" (Isaiah 2:4). The League of Nations is the beginning of the realization of this prophecy. In your hands has been entrusted that great mission, to judge between nations and decide between peoples … If you have been privileged to be chosen for this task, we are confident that it has been entrusted to righteous men who are absolutely free from any bias, to men who are motivated only by the ideal of peace and truth.[151]

Ahmed Zaki Pasha closing argument

Zaki delivered the first closing argument for the Muslim side. Zaki gave the bulk of his closing argument in French, reading from a lengthy memorandum copied directly into the transcript of proceedings. Zaki began his argument in English, saying he represented all three hundred million

Muslims from throughout the world, who had decided to "maintain the established rights over our holy shrines."[152] Zaki then repeated the same reservation of rights Auni Bey had made at the Commission's opening session, arguing the Muslims opposed the British Mandate and the creation of a national home for the Jews, and that only a Muslim "competent authority" could "give a verdict in the question of … Moslem Holy Places."[153]

In his French statement Zaki provided the Muslim view regarding the history of the Wall and the sacred character of the Wall to the Muslims, and criticized Jewish designs on the Wall and their desire to expropriate the Moghrabi Quarter.[154] Zaki then summarized in English what he had said in French, adding the following rejection of any Jewish claims or rights at the Wall:

> What the Jews perform at the Wall when they weep and touch the stones and kiss them is not in any sense of the word 'Prayer' according to holy Commandments … Nobody can take or acquire the property of another person by force. The Arabs are here for thirteen centuries, so do not turn against us and do not show ingratitude … [I]f your temple has been destroyed certainly it is not our fault. We Moslems came to the country six and a half centuries after its complete destruction. We have conquered the country and are therefore the masters of the country … Since the Crusaders conquered the country you have been in the diaspora all over the world and I cannot understand what you have to claim now.[155]

Mohamed Ali Pasha closing argument

Ali Pasha immediately accused the Zionists of harboring designs on the *Haram*, raising the same themes the Mufti had sounded in his testimony before the Shaw Commission:

> This Zionism has as one of its fundamental aims to take possession of the Mosque of Omar and its whole area in order to construct on that site a Jewish temple as was the case thousands of years ago in the times of King Solomon. This is their ambition that cannot escape the attention of the Arabs or non Arabs after it has been declared from the top of their pulpits and published in their literature, newspapers and illustrations. They still continue to diffuse this propaganda and exert efforts with governments in order to get possession of the temple area (Mosque of Omar) from the Moslems who regard it as their first *Kibla* and the third of their most important holy places.[156]

Ali Pasha then addressed the Jewish argument that the freedom of access and free exercise of worship language in the Mandate provided more extensive rights than had existed under Turkish rule:

> [T]his interpretation to the articles 13 and 14 of the Mandate is wrong for they know that the preservation of the *status quo* should be the basis in such contentions and that the free exercise of religious duties is preserved for each community in its places fixed for every community as mosques, churches and synagogues. The mandate cannot assume that it can create to people new rights and new sanctuaries not belonging to them before.[157]

Ali Pasha then reiterated both the Wall and the pavement were sacred to Muslims, arguing

> [t]he sanctity of the pavement is derived from the fact that it is the place where the Burak of the Prophet ascended at the end of his celestial journey on which he passed to the same place in the wall of the mosque of Omar where he tied his Burak.[158]

Ali Pasha also slammed the claim of Jewish religious affinity for the Wall as the Jewish side's "weakest point."

Ali Pasha next focused on the Muslim claim regarding *Sharia* law as the appropriate framework for governing the dispute regarding the Wall. At the time the Wall and the pavement were dedicated as a Muslim *Wakf*, Jews were "not existent in Palestine and consequently did not possess the right of access."[159] Once the property was dedicated as *Wakf*, it took on the character

of a charitable trust and became the property of *Allah*. Such property may no longer be used for general public purposes. Ali Pasha continued:

> It is therefore, impossible that the Islamic *Sharia* law should accept that the wall of the mosque should be participated with the Jews as they desire, or that they should have or that any of them should have any right in this property or its benefit or any claim of it because it is part of the mosque the sanctity of which cannot be touched and cannot be used for anything that contradicts it. If it is prohibited for individuals even they may be Moslems to be sharers in the property of the Mosque it is evident that this holding in common should be prohibited to Jews as being a different community desiring to uphold rituals of another religion. The aim that the Jews are after is to have two different religions contesting on one property possessed by one of them which aim is legally impossible of realization.[160]

These principles of *Sharia* law, according to Ali Pasha, also rendered irrelevant any Jewish claim that they had acquired prescriptive rights of access and prayer by virtue of their customary practices during Ottoman times. “Furthermore,” he argued,

> *wakf* in the eyes of *Sharia* law is not abolished by lapse of time and consequently if a person lays his hands on *wakf* property during a long or a short period of time during which he admits that it is common property he is legally obliged to give it back.[161]

Ali Pasha summarized this portion of his argument as follows:

> If this is the *Sharia* law in cases of usurped *wakf* and as the Jews themselves admit in this case of the existence of the *wakf* and they do not possess or possess anything in it as a property in any time and whereas they only now desire (during occupation) to demand from the Moslems the non-existent right in it which is the right of servitude *ab antiquo* and that they desire to have this right on the *wakf* property of Abu Midian for the purpose of drawing benefit on the wall of the mosque of Omar in the way of conducting their prayers therein and making therefrom an actual synagogue and where it has been proven that the Jews come to that place as mere visitors as members of other communities and as this *wakf* is still in the possession and under the control of the *Mutawalli* of that *wakf* the Jewish demand is both illegal and unreasonable.[162]

From there Ali Pasha focused on Jewish rights of access under the Ottoman regime. He attacked the accuracy of the Jewish claim regarding the rescission of the 1911 order banning Jews from bringing benches to the Wall. He emphasized Rabbi Schorr’s admission that the Torah had only been brought to the Wall in very recent years. And he again denied the Jews had established any legal right of servitude at the Wall.[163]

Ali Pasha concluded:

> It is unreasonable to say that it should not be understood would [sic] accept to have Jews establish for themselves the right to worship in the place which is a place for Moslem prayers. A decision of this sort is enough to ignite a conflagration of trouble between the different communities a state of things which no pacifist would allow to pass. If things are such that the Jews or all other communities will have only to enjoy mere visits which no matter how long it is continued it cannot establish for them any rights.[164]

Auni Bey Abdul Hadi closing argument

Auni Bey delivered his closing argument in French. He began by challenging Jewish religious affinity for the Wall, suggesting it was merely a place for curiosity seekers which the Zionists were using for propaganda purposes.[165]

Auni Bey then cataloged the testimony of various witnesses rebutting the Jewish claims regarding the appurtenances they had customarily brought to the Wall during Turkish times. For example, he noted that one of the Jewish side’s own witnesses, Richard Hughes, “*n’y avait jamais vu de siege ou autre meuble depuis 1890*.”[166] Auni Bey rejected the photographs the Jews

submitted showing benches in the early 1900s as not proving anything, especially given the testimony of various witnesses (including several non-Muslims) who said they had never seen benches or chairs at the Wall.[167]

Auni Bey then repeated the Muslim position that the Zionist aim was to take possession of the *Haram* and rebuild the Temple. He refused to accept the contrary statements from the Jews, noting the Muslims would still oppose the Jewish presence at the Wall even if they believed the Jewish denials of any designs on the *Haram*:

> *Nous demandons au defenseur des Sionistes de nous permettre de lui repondre immediatement et de lui affirmer une fois de plus, que toutes ces declaration et promesses officielles ne changent en rien et n'ebranlent pas d'un point notre conviction et notre maniere de voir. Mais il ne faut pas supposer un seul instant que nos apprehensions actuelles ont pour unique cause la crainte des visees Sionistes sur le Haram-esh-Sharif. Si ces visees memes etaient inexistantes, l'opposition contre l'invasion de Burak restera inchangebale.*[168]

Auni Bey then noted Arab disappointment that the British had not fulfilled their wartime promises of independence, and quoted from the portion of the Shaw Commission report acknowledging the Arab state of mind regarding the McMahon-Hussein correspondence.[169]

Auni Bey returned to the main focus of his argument, claiming the Jews had failed to establish the Wall was sacred to them as a religious shrine and had failed to establish any pre-existing rights of access or prayer. He reiterated Ali Pasha's argument that the Jewish side had failed to prove the 1911 order banning benches had been rescinded.[170] He noted the Mandatory Government forced the Jews to remove the screen they had placed at the Wall in 1928, leading to the issuance of the White Paper. He noted the Muslims simply wanted to defend their property, and accused the Zionists of disrespecting those legitimate Muslim interests.[171]

Auni Bey next repeated his accusation against the Jews of resorting to subterfuge to distract the Commission from their true aim, which was to convert the *Burak* into a synagogue.[172] He reminded the Commission of the Jewish demonstration at the Wall in August 1929, when the Jews chanted "the Wall is Ours."[173] Auni Bey then noted the witness testimony raising doubts regarding whether and how often the Jews had brought the Torah and other appurtenances of prayer with them to the Wall.[174] He implored the Commission to reject the Jewish demands:

> *Ou votre assemblee, se rendant un compte exact de la verite, de la legalite et de la justice, deboutera les juifs de leur illegale demande, ou bien agissant a l'inverse, elle leur reconnaitre des droits qu'ils n'ont jamais eus precedement.*[175]

Auni Bey concluded his closing argument by asking the Commission to reject the "inane" Jewish demands:

> *Je suis persuade, Messieurs, que vous etes bien rendu compte, durant tout le mois que nous avons su le plaisair et l'honneur de vous avoir parmi nous, de l'inanite des demandes Juives, que les Juifs n'ent aucun droit ou meme un semblant de droit au Burak, et enfin, qu'aucun de leurs pretentions ne saurait etre admise ou meme prise en minime consideration.*[176]

Dr. Eliash rebuttal argument

Dr. Eliash received permission to make brief rebuttal comments immediately following Auni Bey's closing argument. Dr. Eliash reiterated the Jews harbored no designs on the *Haram*, and would be willing to so guarantee in writing. He lamented the attacks the Arab advocates had made on the Jewish desire to pray at the Wall:

> But to counteract Zionist propaganda, as you call it, by an attack on the right of religious people to pray at their Holy Place, or to have free access to it, and to base this attack on religious motives, is to use religious motives unfairly and improperly. You cannot ask the League of Nations to turn back the wheel of history, and not to allow the continuation of an age long practice because you now allege that it is contrary to the Moslem religion.[177]

Closing statement of Chairman Lofgren

Following the closing arguments of both sides, Chairman Lofgren made a brief statement:

> [L]et me declare at this moment, as I have had the reason to do at the opening and in the course of our proceedings: real peace cannot be founded but on the principles of justice, its fruits cannot ripen but in the atmosphere of due appreciation of one another's interests – interests which often appear to be opposed to each other, although in reality they can be served in common. It is our duty as Commissioners of the League of Nations to base our verdict on what to our best belief is *right*. We will thereby be guided by such principles of Justice as are found applicable to this very particular case from its different aspects … However intricate this present case may be, as involving questions of conflicting religious sentiment and traditions, the hearing of evidence which has taken place in this hall should have been useful by its ascertaining facts – and facts if rightly understood and frankly told, used to have a reassuring effect on agitated minds.[178]

Chairman Lofgren also expressed hope the parties might be able to "arrive at a friendly settlement in the spirit of mutual understanding and respect," without a verdict from the Commission.[179] Lofgren said the Commission would therefore allow the parties six weeks (until 1 September 1930) to attempt to meet and confer and submit proposals to the Commission to settle the matter. In the meantime, the High Commissioner's 1 October 1929 instructions were to remain in effect, and "no innovations should be made or actions taken on behalf of the parties of a nature to alter the present conditions at the Wall."[180]

Settlement negotiations

During and after the hearings the Commissioners attempted to mediate the dispute, holding several meetings with the Muslim and Jewish sides, both jointly and separately.[181] Those efforts were not successful, but following the Commission's departure from Palestine the Mandatory Government continued the mediation effort.[182]

Spenser Davis, the Treasurer of Palestine and Officer Administering the Government during the temporary absence of both Chancellor and Luke, engaged with both the Jewish and Muslim sides in "a sustained effort to bring about a settlement of the Wall trouble."[183] Davis later wrote he agreed "to intervene as mediator but in no sense as arbitrator."[184]

Davis first tried to convince the Mufti to settle the case, but the Mufti objected on legal grounds:

> [T]he Jews did not hold any document conferring a legal right and that any document which took the form of an agreement between Moslems and Jews would confer a legal right by grant by the Moslems of a character which could not be granted in respect of Moslem *Wakf* property owing to the provisions of the Moslem religious law.[185]

Kisch noted in his diary for 15 August 1930 that Davis told him "his hopes of reaching a settlement as to the Western Wall have fallen to zero," because the Mufti had submitted counterproposals which were "entirely unacceptable." Kisch noted, however, that Auni Bey had called Kalvarisky of the *Brit Shalom* organization later that day, expressing hope the parties could soon reach a settlement. Kisch recorded his own reaction in his diary with one word: "Tactics!"[186]

The following day, Palestine Attorney General Norman Bentwich tried to convince Kisch to accept a settlement formula under which the Arabs would accept the Jewish right of access to the Wall, but without mentioning the word "prayer." Kisch rejected the proposal, explaining the reasons in his diary entry:

> I refused to consider this suggestion, saying that two things were essential if the matter was to be removed from the field of future controversy and collision:
>
> 1. that the Moslems should recognize unreservedly the Jewish right of access at the Wall at all times for purposes of prayer without interference or molestation, and
> 2. that the necessary steps should be taken to prevent physical interference or molestation in a manner likely to provoke a conflict.
>
> Only after these two points are fully assured can we be justified in making the far-reaching concessions that are asked of us. Provided that they are assured, I am ready to do my best to put through the concessions necessary to secure agreement, although fully aware that those of us who may conclude such an agreement will become the target of abuse and criticism from many quarters. Bentwich eventually agreed that some such phrase as "access *for their devotions*" will have to be included in any agreement.[187]

Bentwich thereafter prepared a written settlement proposal under which the Jews, Muslims, and the Government of Palestine would each issue written Declarations. Two versions of the draft Jewish Declaration were prepared, each disclaiming ownership of the Wall, the pavement and the adjacent *Wakf* properties, and renouncing any intention to convert the area in front of the Wall into a synagogue. The two drafts differed slightly regarding the appurtenances the Jews would be allowed to bring to the Wall, but both drafts substantially limited the permissible appurtenances.[188]

The draft Muslim Declaration stated the Muslims would not question or oppose free access of the Jews to the Wall, and that in consideration of the Jewish undertakings the Muslims would not disrupt or interfere with Jewish prayer when they engaged in construction or repair work on the Wall and the surrounding area.[189]

Bentwich also prepared two draft Declarations for the Government of Palestine. Both drafts recognized Muslim ownership of the Wall and pavement, and the concurrent Jewish right of access "whether in groups or individually as of old, but without any of the appurtenances of a synagogue." Both drafts also required the Muslims to obtain the Government's permission before undertaking any "alterations, additions or repairs to the Wall."[190]

Bentwich met with the Jewish side on 19 August to present the draft Declarations and discuss the possibility of a settlement. Kisch described the meeting as "long and painful."[191] The Jewish side insisted that day and in separate discussions with Bentwich and Davis the following day that at least the Government Declaration needed to recognize the Jewish right of access to the Wall "for prayer." Davis agreed, but said he "had little hope of its acceptance by the Moslems."[192] Davis' comment may have been in part a reaction to news that the Supreme Moslem Council, led by the Mufti, terminated Auni Bey's appointment as its legal counsel that same day, 19 August 1930, signaling the Moslems were intent on pursuing an even harder line than they had during the hearings.[193]

The negotiations over the wording of the three Declarations continued over the next few days as the Commission's 1 September deadline for reaching a settlement drew nearer. The key sticking point involved the Jewish insistence on the word "prayer" and the equally firm Muslim insistence on the word "visit," with Spencer and Bentwich struggling to reach a compromise

with the word “devotions,” or possibly using the Hebrew word for “prayer” (*Tefilah*) only in the Jewish Declaration.

Various drafts and revisions were exchanged, but without much progress. On 1 September Kisch recorded in his diary he had received “confirmation of what I had already heard from two independent sources, that it is the Mufti, and the Mufti alone, who is opposing a reasonable settlement of the Western Wall question.”[194]

Nevertheless, the negotiations continued for several more days. Kisch noted in his diary on 5 September he had spent the last three days in “continuous negotiations; it seems like a nightmare and I feel as if my brain had been crushed under the weight of the Western Wall.”[195] On 9 September Bentwich told Kisch that Davis saw “no possibility of the Moslems agreeing to our essential conditions about the Wailing Wall.”[196] Nevertheless, on 10 September Davis directed the Chief Secretary to send the draft declarations to both the Muslims and Jews.[197]

On 12 September Kisch wrote to Davis rejecting the draft, as it did not contain a “clear and unequivocal” commitment by the Moslems to guarantee “free access of the Jews to the Wall and their presence there individually or in groups for purposes of their devotions.”[198] On 14 September the Muslims also rejected the draft, writing to Davis they would not agree to any “express or implied recognition of *any* Jewish right of access to the Wall for purposes of devotion since such recognition is forbidden by Moslem religious law.” The Muslims also objected to the draft because it did not adequately recognize Muslim ownership of the Wall.[199]

The negotiations dragged into October, still without a settlement.[200] On 5 October Chancellor, Luke, and Davis met with a Muslim delegation led by the Mufti. The Mufti said he would rather suffer an unfavorable verdict imposed on the Muslims than agree to a settlement contrary to his convictions. In reply to a statement from Chancellor urging him to seize the chance to appear statesmanlike and agree to a negotiated settlement, the Mufti said “he was not a statesman but a man of religion.”[201]

Chancellor wrote to his son about the 5 October meeting with the Muslim delegation. Chancellor contrasted the Mufti’s refusal to settle with the concessions the Jews had made:

> We sat and talked for two hours; I was able to persuade them all to agree except the Mufti, who apparently does not want a settlement at all, & wishes to keep the Wailing Wall question as an open sore to be able to use it as a means of stirring up trouble whenever he thinks fit to do so. The Jews have behaved well about the negotiations, & have made concessions to the Moslem point of view which I should never have expected them to make. They have disclaimed ownership in the Wall and have consented to restrictions in the use of appurtenances of worship at the Wall – one of the things which until recently they have refused to concede. They have in fact conceded almost every point that the Moslems had been pressing for during the past year. The Mufti says that under the *Sharia* (Moslem Law) the Moslems have no power to grant unbelievers rights to pray on *Wakf* property.[202]

On 10 October Davis informed Luke the Mufti did not want to settle the dispute, as “[i]t is nevertheless apparent that in keeping alive the Wailing Wall controversy the [Mufti] retains politically in his hands a weapon that may be employed at his will.”[203] Chancellor formally notified the Colonial Office on 11 October the negotiations had reached an impasse and failed to produce a settlement.[204]

As Bentwich noted only a few months later:

> The Jews, now recognizing that peace without victory was preferable to victory without peace, were prepared to resign a large part of their claim concerning the appurtenances of worship at the Wall, provided they could carry on public prayer without interference. The negotiations ebbed and flowed for nearly two months, but in the end an acceptable formula could not be found, and the question had to be left for the decision of the Commission.[205]

The Lofgren Commission Report, verdict, and reactions

The Lofgren Commission released its Report and verdict to the Mandatory Government at the end of 1930. Lofgren delivered the Report to the British Legation in Stockholm.[206]

The report and verdict

The Report contained an historical summary, a review of the Parties' claims and the evidence they submitted, and an analysis and formal judicial verdict as to those claims. The Commission did not specify which law it applied, but referenced *Sharia* law, Ottoman law, and the text of the Mandate in its ruling.

The verdict largely favored the Muslim side, although neither side was happy with the outcome. The verdict limited Jewish rights to the Wall and pavement solely to those longstanding practices prevailing under Ottoman rule. Lofgren himself admitted in a 9 December 1930 discussion with H.W. Kennard, a British diplomat based in Stockholm, that "the Moslem claims which had been more exaggerated than those of the Jews, had received as favourable consideration as possible."[207]

The Commission first rendered judgment regarding the ownership of the Wall and the pavement:

> [T]he ownership of the Wall, as well as the possession of it and those parts of its surroundings that are here in question, accrues to the Moslems. The Wall itself as being an integral part of the *Haram-esh-Sharif* area is Moslem property … the Pavement in front of the Wall, where the Jews perform their devotions, is also Moslem property.[208]

The Commission also determined the area encompassing the pavement was designated a *Wakf* in approximately 1193 A.D. Approximately 127 years later Abu Midian had designated the dwellings comprising the Moghrabi Quarter as *Wakf*. The Commission accepted the testimony of the Muslim witnesses that the Wall itself was part of a *Wakf* dedicated for religious purposes.[209] The Commission also found the pavement to be of the same category as the Moghrabi *Wakf*, because "from the Moslem point of view the Pavement is chiefly looked upon as a passage existing for the benefit of the [Moroccan] inhabitants."[210]

The Commission concluded, however, that the pavement was *not* sacred to the Moslems, because the pavement itself did not bear any direct connection to the Muslim belief regarding the place where Mohamed had tethered his steed.[211]

As to the Wall, the Commission found it was indeed sacred to the Muslims because it bore a closer physical relationship to the Moslem beliefs regarding Mohamed's celestial journey with his steed. But the Commission made clear this finding did not preclude the sanctity of the Wall to the Jews, and it found the Wall was sacred to the Jews as well.[212]

Moreover, the Commission found the Wall was used *solely* by the Jews as a religious site. Therefore, the Commission held "in support of the claim of the Jews to free access to the place, there does exist a practice constituting a right *ab antiquo*."[213] The Commission then defined that right not as a servitude, but instead:

> [A]s a right sui generis, the basis of which is an ancient custom that has arisen under the protection of one of those 'tolerances' that are wont to serve as origins for what comes to be legally valid customs. Even if no special statute can be adduced in support of the fact, yet it can hardly be denied that in Palestine established rights and prevalent usage, more especially with regard to religious matters, have come very generally to recognize the principle that one party may have a

> limited right in the property of another.[214]

The Commission found the various Ottoman decrees the Muslim side had submitted actually supported this view, as those decrees all *acknowledged* the longstanding practice of the Jews to visit the Wall for prayer, even as those decrees prevented the Jews from expanding their rights by bringing chairs, benches, and other appurtenances.[215]

The Commission therefore found the Wall was "a religious site, sacred to the Jews."[216] But the Commission, well aware of the Muslim sensitivity regarding the term "prayer," held only that the Jews had the right to access the Wall "for certain *devotional* purposes."[217]

The Commission next determined exactly what that right entailed. The Commission considered and largely rejected the Jewish argument (first advanced by Harry Sacher, as discussed in Chapter 3) that Jewish rights of free exercise of worship under Articles 13, 15 and 16 of the Mandate were broader than pre-existing practices during Ottoman rule:

> As regards the terms of the Mandate it is true that in Articles 13, 15 and 16 the principle of religious liberty is proclaimed and that Article 13 especially provides for 'free exercise of worship' for all concerned. But from this general rule the conclusion cannot be reasonably drawn that the partisans of any special confession should have the right to exercise their worship in all places without any consideration to the rights of others. If that were so then the whole structure of the *status quo* in the Holy Places and other religious sites would break down.[218]

The Commission therefore concluded the "established custom," which it defined as "longstanding usage," provided the proper basis for defining Jewish rights at the Wall.[219] This meant, according to the Commission, that "no sanction should be accorded the bringing of any object to the place other than those that were not objected to prior to the War but were tolerated as being established by time-honoured custom."[220]

On that basis the Commission, largely following the Mandatory Government's October 1929 provisional Instructions, banned the Jews from placing on the pavement in front of the Wall any benches, chairs or tents for the convenience of the worshippers or otherwise; any screens or curtains either for the purpose of separating men from women or for any other purpose; and any carpets or mattings except on *Rosh Hashana* and *Yom Kippur*.[221]

The Commission, however, also ruled the Jews *would* be allowed to bring to the Wall a cabinet or ark containing the Torah and a stand or table to place the Torah for reading on *Rosh Hashana* and *Yom Kippur*, on other special holy days when the Torah would usually be brought to the Wall, and for special services at other times, but only when proclaimed by the Chief Rabbis of Jerusalem and only upon prior notice to the Mandatory authorities.[222] The Commission also ruled the Torah could not be brought to the Wall on "ordinary Sabbaths" because there was insufficient evidence showing a practice of sufficiently long standing in that regard.[223]

The Commission quickly listed the remaining elements of its verdict. It permitted the Jews to bring to the Wall a stand containing ritual lamps, a portable wash basin and water container on a stand, and a stand containing prayer books during the Sabbath. The Commission, however, banned the Jews from blowing the *Shofar* at the Wall at any time, *including Rosh Hashana and Yom Kippur*.[224]

The Commission also imposed certain limitations on the Muslims, banning the *Zikr* ceremony during the usual hours of Jewish worship, banning the driving of animals along the pavement at certain hours, requiring the new door at the southern end of the pavement be closed on the

Jewish Sabbath and Holy Days, and ordering the Muslims to refrain from building activity on or near the Wall that would encroach the pavement area, inhibit Jewish access to the Wall, "or involve any disturbance to the Jews that is avoidable during their devotional visits to the place near the Wall."[225]

The Commission further banned political speeches and demonstrations at the Wall, banned anyone from making engravings on the Wall, required the Muslims to keep the pavement clean, and granted sole authority to the Palestine Government for making repairs at the Wall, after consultation with Muslim and Jewish religious leaders.[226]

Finally, the Commission made clear that in granting certain rights to the Jews, "the provisions of this present Verdict … shall under no circumstances be considered as, or have the effect of, establishing for them any sort of proprietary right to the Wall or to the adjacent Pavement."[227]

The Commission concluded its Report by expressing regret the parties were unable to settle their differences without a verdict "which is more or less forced upon them."[228] The Commission ended its report with an expression of hope for peace:

> In regard to the particular case that the Commission has been appointed to inquire into, this lofty principle cannot be put into practice, unless the adherents of the differing creeds are prepared, in observance of the rules set forth above, to show each other due consideration – as regards the one Party in the exercise of their incontestable rights of ownership and possession, and as regards the other in the performance of their religious services on a ground which does not belong to them by right of possession. The Commission ventures to entertain the hope that, having regard to the actual position of affairs and of what is dependent thereupon, both Moslems and Jews will accept and respect the Commission's Verdict with that earnest desire to attain mutual understanding that is so important a pre-requisite both for the furtherance of the common interest of the Parties in Palestine and for ensuring a peaceable development in the World at large.[229]

Reactions to the verdict

Neither side was happy with the verdict, but their reactions were fairly muted. High Commissioner Chancellor cabled the Colonial Secretary, Lord Passfield, several days following the publication of the Report:

> Majority of Jewish community have received report of Wailing Wall Commission quietly but extreme orthodox Party and revisionists are displeased with it. Moslems are dissatisfied with Report especially with regard to prohibition of *Zikr*, obligation to consult Rabbinical Council before repairs to Wall are undertaken and reference to *Haram* area in connection with prohibition to construct or demolish buildings near the Wailing Wall. No incident occurred in Mosque on Friday [12 June] or at Wailing Wall on Saturday in connection with the Report … So far, *Fellaheen* who are now occupied in reaping their crops, have taken little interest in Report and it is not unlikely that they will make demonstrations against it until they are aroused by religious leaders who are now starting to organize campaign(s) of propaganda against it.[230]

The Times characterized the Report as a victory for the Muslims and urged them to accept the Commission's verdict.[231] Nevertheless, the Muslims sent a telegram to the Colonial Office several days later protesting the verdict, proclaiming "Verdict Wailing Wall Commission converting Holy *Burak* open air synagogue granting Jews unprecedented concessions obvious trespass Moslem rights *violating Sharia Law* … "[232]

The Jewish side took a different approach, saying publicly the Commission's findings "do not satisfy completely the Jewish aspirations, and there is therefore no reason to rejoice."[233] Nevertheless, the Jews acknowledged that "[s]ince the verdict … does not allow of any appeal, the Jewish side accepts it, although the prohibition of the use of the Scrolls of the Law at the Wall on the Sabbath is very disappointing."[234]

Kisch reviewed an advance copy of the Report with Dr. Eliash on 7 June 1931. Kisch viewed the Report as "balanced," although he criticized the Commission's verdict regarding Muslim ownership of the Wall as "absurd to suggest that this Wall can be owned as someone owns a villa on Mt. Carmel."[235] But "[t]aken all in all," Kisch wrote, "the Report is to be welcomed as constituting a ruling from an entirely neutral body representing the highest international authority."[236]

As Bentwich recalled:

> The Jews, though disappointed at certain of the specific conclusions of the Commission touching the ritual appurtenances to be used by them at the Wall, accepted the report as a vindication of their essential claim to use the Wall for prayer without hindrance. The Moslems on the other hand, although their claim of ownership had been fully upheld, protested against the award, and denied that the Commission had any competence to interfere with a Moslem holy place.[237]

Aftermath

The Colonial Office prepared an Order-In-Council to implement and enforce the findings of the Lofgren Commission Report.[238] The British Government finalized the Order-In-Council on 19 May 1931, but did not publish it until it could be released simultaneously with the Report on 8 June 1931.[239]

The Order codified the Lofgren Commission's verdict and restored jurisdiction to the district court of Palestine to hear cases involving violations of the Order, with authority to impose punishment of up to six months in prison. It also vested exclusive jurisdiction in the Supreme Court of Palestine, sitting as the High Court of Justice, to "make mandatory orders or orders by way of injunction or otherwise as may be necessary to secure the observance of the provisions contained in Schedules I and II of this Order …"[240]

The only party permitted to petition the High Court would be the Attorney General of Palestine on behalf of the Mandatory Government, a step intended to prevent the Jewish and Muslim sides from initiating further litigation. The High Commissioner was granted authority to issue regulations implementing the various provisions of the Order.[241]

The substantive provisions of the Order were set forth in two Schedules. The Schedules adopted the Lofgren Commission's findings regarding Muslim ownership of the Wall and the pavement. The Schedules repeated the verdict granting the Jews free access to the Wall for the purpose of devotions, subject to the same limitations the Lofgren Commission had imposed on the Jews regarding appurtenances. The Schedules also incorporated the Lofgren Commission's restrictions on Muslim activity deemed disruptive to Jewish prayer at the Wall.[242]

On 11 October 1931 the Supreme Moslem Council filed a formal protest with the High Commissioner against both the Order-in-Council and the findings of the Lofgren Commission, reiterating once again the Muslim position that the Lofgren Commission was "illegal … and incompetent to determine questions relating to Moslem sacred places and *Wakfs*, the Commission itself is unconstitutional and its verdict, in the opinion of all the Moslems, is not binding."[243]

The first big test of the new Order-in-Council occurred during the *Tisha b'Av* observances beginning at sundown on 22 July 1931, six weeks after the issuance of the Lofgren verdict and the Order. The Jews asked for permission to carry candles to the Wall to assist in reading their prayers, as the lighting was poor. The Mandatory Government refused the request, as "the use of

candles or tapers at the Wall had not previously been permitted and … no exception could be made."[244]

The Chief Rabbinate submitted a formal protest to the Deputy District Commissioner, but no action was taken. When the observances began after sundown on 22 July, the worshippers read their prayers without candles or extra lighting, but no incidents were reported. The next day "[e]xceptionally large crowds visited the Wall," but the Moghrabis and the Jewish worshippers avoided each other and no incidents were reported. The Acting Deputy District Commissioner seemed to breathe a sigh of relief when he reported "[n]o instances of Moslem provocation took place and the whole of the proceedings passed off in an exceptionally orderly manner."[245]

One interesting legal outcome of the Lofgren Commission verdict and the subsequent Order-in- Council involved a case many years later, when the Palestine Government filed criminal charges against a juvenile defendant for blowing the *Shofar* at the Wall, in violation of section 5(B) of Schedule 1 of the 1931 Order-in-Council. The District Court, however, acquitted the defendant, ruling

> the prosecution has not proved its case … if there is an offence, it is an essential condition of it that the accused must be a Jew *and the prosecution has not proved that this boy is a Jew*.[246]

The High Commissioner notified the Colonial Office of the district court's ruling, expressing concern it gave rise to "practical inconvenience" in distinguishing Jewish from non-Jewish defendants, and suggesting an amendment to the Order-In-Council to ban *everyone* (not just Jews) from blowing the *Shofar*, and, to show even-handedness, to ban *everyone* (not just Muslims) from performing the *Zikr* ceremony. The Foreign Office took a more realistic view and opposed amending the Order- in-Council, noting somewhat bemusedly that "though it may be inconvenient to adduce evidence to show that a person is a Jew or a Moslem, the difficulties of proof should not in most cases be insuperable."[247]

In another subsequent case, various groups of Jews seemed deliberately to violate the Order-in- Council during *Yom Kippur* on 21 September 1942, when "two very faint toots which sounded as though they came from a *Shofar* were heard," and on the *Simchat Torah* celebration on 3 October 1942, when two groups of Jews sang, danced, and clapped their hands during prayer services at the Wall. The Jews also sang their national song (*Hatikvah*, today Israel's national anthem) during the *Simchat Torah* services, an act deemed an "unlawful manifestation" by the same British Official, E. Keith-Roach, who had ordered the forcible removal of the screen from the Wall area during the 1928 *Yom Kippur* incident.[248]

The High Commissioner reported these incidents to the Colonial Secretary, noting the Arabs had reacted with "suitable restraint."[249]

Assessment

The Lofgren Commission Report and Verdict seemed to fulfill the British desire for a "final settlement" of the Wailing Wall dispute. Neither side was happy with the outcome, but both seemed to accept it. Despite occasional subsequent disputes involving the Wall, the Lofgren Report and verdict achieved, "with surprising ease,"[250] a measure of stability for the Wailing Wall and the surrounding area. Both sides were given the opportunity to present their cases to three neutral judges from countries with no religious or political stake in the outcome. Peace, for

the time being, had been restored to the Wall. One observer, writing in 1959, hailed the Lofgren Commission, saying the Wailing Wall "was never afterwards to be a serious cause of trouble."[251] Another more recent assessment asked whether "the commission's outcome as a court verdict solve[d] the problem in an effective way," and concluded "the answer is yes."[252]

The Lofgren Commission's modest success could be viewed as an example for how the law might play a role in helping resolve other discreet issues in the conflict today. On closer inspection, however, the real lesson of the Lofgren Commission involves the way in which the parties used the law to advance their *political* goals and objectives. In many respects, the Lofgren Commission hearings implicated core Jewish and Arab political interests even more than had the Shaw Commission. Whereas the Shaw Commission was supposed to have focused on assigning responsibility for the August 1929 riots, but instead strayed into "major policy" issues, the Lofgren Commission focused by design exclusively on a single major policy issue – the rights and claims of Jews and Muslims to the Wall, the single most important religious/political symbol in the dispute.

To that extent, the Lofgren proceedings can also be viewed as a trial pitting Zionism against Arab nationalism. The Jewish side skillfully and effectively used the trial to legitimize not just certain Jewish rights to pray at the Wall, but by implication the Jewish right to reconstitute their National Home in Palestine. The Jews, having learned from the bitter experience of the Shaw Commission, presented a far more careful and sophisticated case to the Lofgren Commission. The Jews also demonstrated a greater degree of flexibility and willingness to compromise in pursuit of their ultimate vision of a Jewish National Home in Palestine. Both during the hearings, when Dr. Eliash conceded the Jews were not claiming ownership of the Wall, and after the hearings in the settlement negotiations, the Jews demonstrated a willingness to try to find common ground, something they had not done during the Shaw Commission hearings. Ironically, however, the Jewish willingness to take more reasonable positions than the Arabs, and the Jewish willingness to compromise, did not produce a better verdict from the Commission, at least not from the Jewish standpoint.

The Mufti, on the other hand, evinced no interest in settling anything, preferring instead to use the courtroom and the legal process as a platform for asserting absolutist, zero-sum positions intended to keep the Wall dispute alive and as a rallying cry to galvanize Palestinian Arab anti-Zionist and anti-Jewish sentiment. Auni Bey's opening statement telegraphed the Palestinian strategy, insisting the Wall belonged to the *Wakf*, that only the *Sharia* Courts had jurisdiction, and that the Jews were entitled only to visit the Wall, but not to pray.

The Muslim position, in many respects, amounted to an absolute denial of *any* Jewish rights at the Wall, and by implication *any* Jewish rights in Palestine itself. And although the Muslim side arguably waived its jurisdictional objection by participating in the trial, the Muslim side refused to negotiate, refused to make concessions, and refused to consider any outcome other than complete victory on every point it argued. Despite, or perhaps because of this strategy, the Muslim side achieved a largely favorable outcome, as the Commission's verdict acknowledged *Wakf* ownership of the Wall and the pavement, rejected the Jewish claim to expansive rights of worship, and banned the Jews from blowing the *Shofar* at the Wall.

In many respects the legal-political dynamic in the Lofgren trial resembles the dynamic in the conflict today, with the Palestinian Authority consistently demanding *full* Israeli withdrawal to the 1967 lines, *full* rights of return for all Palestinian refugees *and* their descendants, and *all* of

East Jerusalem as the capital of the Palestinian state. Yasir Arafat's rejection of the January 2000 Camp David proposals and Mahmoud Abbas' rejection of the 2008 Olmert proposals represent the same all-or-nothing approach the Mufti took during the 1920s and 1930s.

Ultimately the Mufti's strategy failed to prevent the establishment of a Jewish State. Thus far, the modern-day Palestinian strategy has only helped prevent the establishment of a Palestinian State.

The British, who remained largely on the sidelines during the Lofgren hearings, intervening only afterward to try to broker a settlement, began to realize the dim prospects of using the law as a means of resolving or even managing the conflict. The failed settlement negotiations left the British exasperated with the Mufti's continued all-or-nothing approach to the conflict, leaving the British to face either more Arab irredentism and violence, or try some other, more radical means of addressing the conflict.

As we shall see in Chapter 5, at first the British attempted to appease Arab sentiment by restricting Jewish immigration and land acquisition. Not long after, the approach shifted to a short-lived plan to partition the country into separate Jewish and Arab states, and finally the British reverted, on the eve of the Holocaust, to virtually shutting the doors of Palestine to Jewish immigration.

The Lofgren Commission, therefore, must stand as a cautionary tale regarding the limited utility of the law as a platform for resolving the Arab–Jewish conflict, despite the otherwise modestly successful short-term reduction of tensions at the Wall.

Notes

1 CO 733/163/5, Telegram Nos. 252 (15 October 1929) and 264 (19 October 1929) from the High Commissioner to the Secretary of State for the Colonies.

2 CO 733/177/2, Draft Memorandum for Foreign Secretary Arthur Henderson prepared by the Colonial Office (undated, describing November 1929 decision of Permanent Mandates Commission to reject British proposal for creating Article 14 special commission focused solely on the Wailing Wall and not other Holy Places in Palestine); *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XIV at 178, editor's note to Letter 165 (Letter from Weizmann to Emile Vandervelde, 23 December 1929).

3 *The Times*, 20 December 1929 at 15.

4 CO 733/177/2, Letter from T.I.K. Lloyd (Shaw Commission Secretary) to Undersecretary of State for the Colonies (20 December 1929); Lofgren Commission Report, *op. cit.* at 3. The Lofgren Commission was appointed to render a verdict on Britain's responsibilities under Articles 13, 15 and 16 of the Mandate regarding rights of access and worship at the Wall. *The Times*, 14 January 1930 at 13; *see also* Lofgren Commission Report, *op. cit.* at 34. One of the key concerns for the British Government was ensuring the findings of the Lofgren Commission would be final and non-appealable. CO 733/195/4, (N.L. Mayle minute, 3 February 1931). The British therefore succeeded in pressing the Council of the League of Nations to treat the Lofgren Commission as performing exactly the same functions as an Article 14 Special Commission, limited to adjudicating the rights and claims of the Muslims and Jews to the Wailing Wall and the pavement in front of the Wall. *The Times*, 15 January 1930 at 13.

5 CO 733/177/2, *Note of the Proceedings of an Interdepartmental Conference held at the Colonial Office* (23 December 1929).

6 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XIV at 178–79, Letter 165 (Letter from Weizmann to Emile Vandervelde, 23 December 1929).

7 *New York Times*, 15 January 1930 at 9; *see also* Permanent Mandates Commission, Minutes of the Eighteenth Session held at Geneva at 12 (first meeting, 18 June 1930).

8 CO 733/179/4, C.41.1930.VI, British Proposal to League of Nations (12 January 1930).

9 *Id.*, C.70.1930.VI, Resolution Adopted by the Council of the League of Nations (14 January 1930).

10 Lofgren Commission Report, *op. cit.* at 3–4.

11 *New York Times*, 15 January 1930 at 9.

12 CO 733/179/5, Letter from Supreme Moslem Council to Secretary General, League of Nations (17 February 1930).

13 PMC Seventeenth Session, *op. cit.* at 129; *see also* Lofgren Commission Report, *op. cit.* at 33–34 (discussing letter from the

Supreme Moslem Council to the President of the League of Nations dated 17 February 1930, protesting the formation of the Wailing Wall Commission. The Lofgren Commission noted that while the Palestinian Arabs had repudiated the Mandate, the Palestinian Arabs nevertheless relied on Article 13 to argue the international community had disclaimed jurisdiction over purely Muslim sacred shrines).

14 P. Mattar, *The Mufti of Jerusalem: Haj Amin al Husseini and the Palestinian National Movement* at 54 (1988).

15 CO 733/179/4, enclosure to note from Shuckburgh to Rendell (21 March 1930).

16 *Id.*

17 *Id.*

18 Representatives of the Colonial Office and Foreign Office met on 26 March 1930 to discuss nine candidates for the Commission. They narrowed the list down to three: Eliel Lofgren of Sweden, Charles Barde of Switzerland, and L.C. Westenek of Holland. CO 733/179/3 (N. Mayle minute, 26 March 1930). Shuckburgh added his agreement to the three names, noting the importance of complying with the condition of the League of Nations that at least one member should possess judicial experience. *Id.* (Shuckburgh minute, 26 March 1930). Thereafter the British Foreign Office directed the British Embassy in Stockholm to check Lofgren's background, reputation and religion, "for if he is a Jew or a Roman Catholic it would disqualify him." CO 733/179/5, Letter E 1526/101/65 from Foreign Office, Eastern Department to Chancery, British Legation, Stockholm (29 March 1930). Two days later, the British Embassy in Stockholm reported back that Lofgren was a Lutheran. *Id.*, Letter E 1756/101/65 from British Legation, Stockholm to Foreign Office, Eastern Department (1 April 1930), and then followed up one week later with another letter reporting Lofgren was an atheist. *Id.*, Letter E 1867/101/65 from British Legation, Stockholm to Foreign Office, Eastern Department (8 April 1930). The Foreign Office then contacted Lofgren and asked him to serve as Chair of the Commission, and Lofgren accepted. *Id.*, Letter from Lofgren to the Undersecretary of State for Foreign Affairs (12 April 1930).

19 CO 733/179/5, Telegram No. 42 from H.H. Consul (Geneva, 15 May 1930) reporting the Council of the League had approved the nominations for the Wailing Wall Commission, with "the Persian delegate abstaining." Lofgren Commission Report, *op. cit.* at 4. The Persian Delegate, Mohammed Ali Khan Foroughi, told the other members of the Council he "had not time to study the question nor to consult with anyone regarding it," and that he did not want his abstention to be interpreted "as acceptance of the resolution on his own behalf or on that of his co-religionists." CO 733/179/4, League of Nations, 58th Session of the Council, Provisional Minutes (14 January 1930). Westenek was unable to serve due to other time commitments (CO 733/179/3, Mayle minute, 7 April 1930). The British Government then asked another Dutch candidate, Mr. Van Oordt to serve, but he also declined. *Id.*, Mayle minute 24 April 1930. The British then asked Van Kempen to serve. *Id.*, Mayle minute 26 April 1930.

20 Library of Congress, Matson Photograph Collection, www.loc.gov/pictures/item/mpc2004004983/PP/, accessed 4 September 2019.

21 The Commission originally declined to require witnesses to testify under oath, but after the Arab side objected a compromise was reached under which witnesses were sworn before a local Magistrate. *See* Lofgren Commission Transcript, *op. cit.* at 77–78. The Muslim side also objected when certain Jewish religious witnesses testified on affirmation rather than under oath, but the Commission accepted such testimony as permissible under the law of Palestine. *See, e.g., id.* at 104–05. By the end of the second week of hearings the Commission's position had evolved to require "witness[es] to take the oath or solemn affirmation; if not then the Commission is at liberty to decide as to the value of the contents of the evidence." *Id.* at 434.

22 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XIV at 346, Letter No. 328 (Letter from Weizmann to Felix Warburg, 26 June 1930).

23 *Id.* at 192, Letter No. 183 (Telegram from Weizmann to Warburg, 16 January 1930).

24 Lofgren Commission Transcript, *op. cit.* at 26.

25 C. Adler et al., *Memorandum on the Western Wall Submitted to the Special Commission of the League of Nations on Behalf of the Rabbinate, the Jewish Agency for Palestine, the Jewish Community of Palestine, and the Central Agudath Israel of Palestine*, June 1930 (hereafter "Adler Memorandum"). The final version of Adler's Memorandum as submitted to the Lofgren Commission contained edits and additional input from various Jerusalem-based experts. Adler Memorandum at 3. A full copy of the Adler Memorandum can be viewed at the Weizmann Archives in Rehovot, file no. 31-265L. Adler selfishly wanted his original memorandum presented to the Lofgren Commission without edits or additions, but the Palestine Zionist Executive refused to agree to his demands. *See* Telegram from Kisch to Weizmann, Weizmann Archives 11–1399 (June 1930).

26 *Id.* at 5. Kisch recorded in his diary two separate meetings on 17 June of the various Jewish groups to decide on their joint representation before the Commission, noting his "deep satisfaction" that the meetings produced "remarkable" unanimity. Kisch, *op. cit.* at 312–13; *see also* Weizmann Archives, Rehovot 29-265L (Letter from Kisch to Jewish Agency, London, 19 June 1930).

27 P. Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press, 1997) at 48–49. Eliash testified very briefly as a witness for the Jewish side during the Shaw Commission trial, denying the Mufti's claims that postcards depicting various photos of the Old City of Jerusalem constituted evidence of Jewish designs on the Temple Mount. Shaw Transcript and Exhibits, *op. cit.* at 840–41, paras. 21,035–054. For further background on Eliash, *see* A. Likhovski, *Law and Identity in Mandate Palestine* at 154–55 (University of North Carolina Press, 2006).

Eliash succumbed to a heart attack at age 57 while serving as Israel's first Ambassador to the United Kingdom. *New York Times*, 12 March 1950 at 92.

28 Lofgren Commission Transcript, *op. cit.* at 341.
29 Mattar, *op. cit.* at 57.
30 Kisch, *op. cit.* at 318.
31 Bentwich (1932), *op. cit.* at 204.
32 Kisch, *op. cit.* at 311 (diary entry for 17 June 1930).
33 Kisch Diary Note for 17 June 1930, C.Z.A. F38\1247-9 at 41–42.
34 Kisch, *op. cit.* at 315.
35 *Id.*
36 CO 733/179/5, Letter from Chief Clerk, Law Officers Department to H.G. Bushe (19 June 1930).
37 Lofgren Commission Transcript, *op. cit.* at 4–6 (emphasis added). The Lofgren Commission chose not to print or publish the transcript, indicating in a footnote at page 5 of its Report that "a copy can be seen in the Colonial Office Library." That one copy of the transcript eventually ended up in the Foley Special Collections unit of the Maughan Library at Kings College, London, where it remains today. A small portion of the transcript, containing only Dr. Eliash's 17 July 1930 closing argument, can be found at the Central Zionist Archives in Jerusalem, C.Z.A. A417\531.
38 Lofgren Commission Report, *op. cit.* at 6.
39 Lofgren Commission Transcript, *op. cit.* at 7.
40 *Id.* at 8.
41 *Id.* at 9–10. Later in the hearings one of Auni Bey's colleagues for the Muslim side, Mohamed Ali Pasha, reiterated the Muslims were participating in the proceedings subject to two reservations: first, they rejected the British Mandate and the terms of the Mandate; and second, they claimed only *Sharia* law could govern the status of the Muslim sacred places, and "[o]ther bodies can have no jurisdiction whatever on these places." *Id.* at 1114.
42 *Id.* at 12–13.
43 *Id.* at 14–15.
44 *Id.* at 16.
45 *Id.* at 18.
46 *Id.*
47 *Id.* at 19.
48 *Id.* at 19–21.
49 Kisch, *op. cit.* at 317.
50 Lofgren Commission Transcript, *op. cit.* at 27–30.
51 *Id.* at 31, quoting from Shaw Commission Report, *op. cit.* at 28.
52 Lofgren Commission Transcript, *op. cit.* at 33–35, quoting Lord Lugard's statement at the Permanent Mandates Commission, 15th Session at 200.
53 Lofgren Commission Transcript, *op. cit.* at 35.
54 *Id.* at 36.
55 *Id.* at 37.
56 *Id.* at 38–40.
57 *Id.* at 44, quoting Shaw Commission Report, *op. cit.* at 74.
58 Lofgren Commission Transcript, *op. cit.* at 40–43.
59 *Id.* at 44.
60 *Id.* at 48–50.
61 *Id.* at 53.
62 *Id.* at 55.
63 *Id.* at 53–54.
64 *Id.* at 55 [emphasis added].
65 *Id.* at 57. The next day Dr. Eliash argued the Wall likewise had been the property of the Turkish state during Ottoman times. *Id.* at 65.
66 *Id.* at 59 [emphasis added].
67 *Id.*
68 *Id.* at 60.
69 Kisch, *op.cit.* at 317.
70 *Id.* at 317–18.
71 Adler Memorandum, *op. cit.* at 75.
72 *Id.* at 75–76.
73 *Id.* at 76.
74 *Id.* at 68–69.
75 *Id.* at 80, 85.
76 *Id.* at 80–81.

77 *Id.* at 83–87.
78 *Id.* at 85–86.
79 Lofgren Commission Transcript, *op. cit.* at 26–27.
80 *Id.* at 63.
81 *Id.* at 63–64.
82 *Id.* at 64.
83 *Id.* at 65–66.
84 *Id.* at 66.
85 *Id.* at 778–83.
86 *Id.* at 717.
87 *Id.* at 857.
88 *Id.* at 858–59.
89 *See, e.g. id.* at 343 (cross-examination of Muzahim Amin Bey Bajaji).
90 *Id.* at 503.
91 *Id.* at 253 [emphasis added].
92 *Id.* at 107–11, 127–30 (testimony of Zion Issacharoff); *see also id.* at 154–58 (testimony of Richard Hughes); *id.* at 336 (testimony of Mordechai Goldberg, "all along the back wall there were benches").
93 *Id.* at 268, 298 (testimony of Raphael ben Rahamin Meyuhas, the Sephardi Beadle). Dr. Eliash also introduced a copy of a January 1912 article from the Hebrew language newspaper *Ha'herut* reporting on the abolition of the 1911 order banning benches, and a similar article to the same effect from the 2 February 1912 edition of the Ottoman newspaper *Aurore*. Lofgren Commission Transcript, *op. cit.* at 312–15.
94 *Id.* at 558; *see also id.* at 590 (testimony of Mohamed Kamel Aintabi – never saw a bench at the Wall); id. at 695 (testimony of Mikhail Hieronimos – never saw benches or chairs at the Wall).
95 *Id.* at 587 (testimony of Mohamed Kamel Aintabi).
96 *Id.* at 156 (testimony of Richard Hughes).
97 *Id.* at 224.
98 *Id.* at 240.
99 *Id.* at 398–403.
00 *See, e.g., id.* at 335 (testimony of Mordecai Goldberg).
01 *See, e.g., id.* at 610 (testimony of Leopold Draissaire – "surely" no screens prior to World War I).
02 *Id.* at 263 (testimony of Raphael ben Rahamin Meyuhas); *see also id.* at 110–12 (testimony of Zion Issacharoff); *id.* at 209–16 (testimony of Chief Rabbi Ben Zion Uziel of Jaffa); *id.* at 187 (testimony of Rabbi Abraham Schorr). Rabbi Schorr testified that Jewish law prohibited carrying Torah scrolls from one synagogue to another, but for the past eight to ten years the Torah had been brought to the Wall. Auni Bey tried to characterize this as a Jewish admission that bringing the Torah to the Wall was an "innovation" in violation of the *Status Quo*, but as Meyuhas later explained the prohibition on moving the Torah applied only on the Sabbath, "but as to New Year and the Day of Atonement the practice has always been" to bring the Torah to the Wall. *Id.* at 289.
03 *Id.* at 187.
04 *Id.* at 262.
05 *See, e.g. id.* at 113 (Issacharoff); *id.* at 201, 216 (Rabbi Uziel states "the blowing of the *Shofar* on the Day of Atonement is the conclusion of the Service and it is essential," but later admits he had not actually seen the *Shofar* at the Wall but had heard it blown from the area of the Wall).
06 *See id.* at 109 (Isaacharoff – prayer books); *id.* at 161 (Hughes – recalled prayer books but no other objects); *id.* at 201 (Rabbi Uziel – phylacteries, prayer shawls and other appurtenances necessary); *id.* at 265–66 (Meyuhas – Ark, Torah Scroll, table, water for washing, lantern, candles).
07 *Id.* at 746.
08 *Id.* at 190–91, 225. The film can be accessed and viewed at www.youtube.com/watch?v=T0zpbDGjHAE, accessed 29 August 2019. The footage showing the Wailing Wall begins at 18:58.
09 *Id.* at 247–50.
10 *Id.* at 175; *see also id.* at 625–62 (testimony of Mordecai Lebanon regarding whether Ottoman permission for Jewish religious visits to Holy Places included the Wailing Wall).
11 *Id.* at 723–24; *see also id.* at 748 (testimony of Jamal Husseini, "I believe to the best of my knowledge that I never had the impression that the Jews actually pray at the Wailing Wall"); *id.* at 507 (testimony of Sheikh Mohamed al Ghuneim el Taftazani, "I have already told you that the Jews do not pray at that place"); *id.* at 742 (testimony of Sheikh Ismail Effendi Hafaz, "I do not admit that the Jews held any prayer [at the Wall].").
12 Shaw Transcript and Exhibits, *op. cit.* at 856.
13 *Id.* at 68–102.
14 *Id.* at 236, 247 (testimony of Eliahu Mordecai Eisenstein).
15 *Id.* at 548 (Iskafi); *Id.* at 567 (Daou).
16 *Id.* at 258 (testimony of Boris Schatz).

17 Adler memorandum, *op. cit.* at 68–75.
18 Lofgren Commission Transcript, *op. cit.* at 719–20.
19 *Id.* at 148–49; *see* Ch. 3, n.112 regarding Solomon's testimony before the Shaw Commission; *see also id.* at 156 (testimony of Richard Hughes); *id.* at 253 (testimony of Boris Schatz); *id.* at 309 (testimony of Charlotte Hussay, "I never saw Moslems there. Till the last two years I never heard the Moslems speak about it at all … I never heard the word 'Burak' or 'Buraq' even until two years ago.").
20 *Id.* at 342.
21 *Id.* at 359, 363.
22 *Id.* at 677; *see also id.* at 487 (testimony of Sheikh Mohamed al Ghuneim el Taftazani, "the Wall, forming a part of the Mosque of Aqsa, is thus holy because the Mosque of *Aqsa* is also holy"); *id.* at 714 (testimony of Sheikh Ismail Effendi Hafaz, "such wall forms an integral part of the mosque").
23 Lofgren Commission Report, *op. cit.* at 22–23.
24 Lofgren Commission Transcript, *op. cit.* at 672.
25 *Id.* at 114–15 (testimony of Zion Isaacharoff); *see also id.* at 458 (testimony of Abraham Jacob Brewer, during Passover 1922 "the southern end of the Wall for a few metres was besmirched with human excreta.").
26 *Id.* at 354.
27 *Id.* at 524–25.
28 *Id.* at 539.
29 *Id.* at 515.
30 *Id.* at 760–62. The media highlighted this exchange in its reporting on that day's session of the hearings. The *Jewish Daily Bulletin*, for example, ran a front-page headline declaring "Wall Commission's Chairman, Warning on Politics, Says That Threats Will Not Influence It" (*Jewish Daily Bulletin*, 17 July 1930 at 1).
31 *See, e.g., id.* at 93, 110, 118, 128, 514, 536, 550, 563, 685.
32 *Id.* at 466–67; *see also id.* at 469–70 (same witness, still under cross-examination, exclaims "he treats me as if I were a criminal and I shall not go on in this manner; I refuse to answer"); *id.* at 131 (cross-examination of Zion Isaacharoff, "I am here under an affirmation to tell the truth but if you want to torture me it is a different matter."); *id.* at 853 (Auni Bey accuses Keith-Roach of Jewish bias).
33 *Id.* at 81, 86–87, 109–10. The Chairman ruled "it will be best if the witnesses speak the language which they prefer and in which they can explain themselves best," *id.* at 109.
34 *Id.* at 246.
35 *Id.* at 553. Just as had occurred during the Shaw Commission hearings, the interpreter reacted angrily when the accuracy of his translation was challenged, and he demanded the Jewish side apologize.
36 Lofgren Commission Transcript, *op. cit.* at 895–96.
37 *Id.* at 903–04.
38 *Id.* at 905–06.
39 *Id.* at 907 [emphasis added].
40 *Id.* at 908–09 [emphasis added].
41 *Id.* at 919–20.
42 *Id.* at 928.
43 *Id.* at 934–59.
44 *Id.* at 948.
45 *Id.* at 965.
46 *Id.* at 959–60.
47 *Id.* at 968.
48 *Id.* at 969–70.
49 *Id.* at 971–72.
50 *Id.* at 973–1006.
51 *Id.* at 1005–06.
52 *Id.* at 1008.
53 *Id.*
54 *Id.* at 1009–1106.
55 *Id.* at 1112–13.
56 *Id.* at 1116.
57 *Id.* at 1121.
58 *Id.* at 1123.
59 *Id.* at 1129.
60 *Id.* at 1131–32.
61 *Id.* at 1132.
62 *Id.* at 1132–33.
63 *Id.* at 1136–39.

64 *Id.* at 1139–40.
65 *Id.* at 1141–42; *see also id.* at 1153 ("*les juifs n'avaient jamais emis la moindre pretention sur le Burak avant l'occupation, et ce n'est qu'apres la guerre qu'ils ont eu l'illusion que la Declaration Balfour avait approche le jour de la reconstruction du Temple et du recouvrement de leur ancienne gloire*.") ("the Jews never had the slightest pretense toward the *Burak* before the occupation, and it was not until after the war that they had the illusion that the Balfour Declaration had brought nearer the day of the rebuilding of the Temple and the recovery of their former glory.").
66 *Id.* at 1142 ("had never seen a chair or other furniture since 1890").
67 *Id.* at 1142–44.
68 *Id.* at 1145 ("We ask the Zionist defender to allow us to answer him immediately and to assert once again that all these official declarations and promises do not change anything and do not shake our conviction and our way of seeing. But we must not assume for a moment that our current apprehensions are solely due to the fear of the Zionist target on the *Haram-esh-Sharif*. If these targets were nonexistent, the opposition against the *Burak* invasion would remain unchanged.").
69 *Id.* at 1145–46.
70 *Id.* at 1150–52.
71 *Id*. at 1155.
72 *Id.* at 1156.
73 *Id.* at 1162.
74 *Id.* at 1163–67.
75 *Id.* at 1163 ("Or the Commission, realizing an exact account of the truth, the legality and the justice, will debase the Jews of their illegal request, or acting in reverse, grant them unprecedented rights.").
76 *Id.* at 1170–71 ("I am persuaded, gentlemen, that you have been well aware, throughout the month that we have known the pleasure and the honor of having you among us, of the futility of the Jewish demands, that the Jews have no right or even a semblance of right to the *Burak*, and finally, that none of their claims can be admitted or even taken into consideration.").
77 *Id.* at 1175.
78 *Id.* at 1177.
79 *Id.* at 1178.
80 *Id.*
81 Lofgren Commission Report, *op. cit.* at 7; "Arabs Won't Yield on Wailing Wall," *see also New York Times*, 19 July 1930 at 6 ("a five-hour secret meeting between members of the Wailing Wall Commission and Jewish and Moslem representatives broke down today through refusal of the Moslems to concede the Jews more than the mere right to visit the Wall.").
82 *Id.*
83 Bentwich (1932), *op. cit.* at 205; Kisch, *op. cit.* at 325 (describing in his diary a meeting in London with Sir Davis on 4 August 1930, and noting Sir Davis "while acting as High Commissioner … is making a great personal effort – with the knowledge and approval of the [Lofgren] Commission – to bring about an agreed settlement on the question of the Western Wall.").
84 CO 733/179/7, *Memorandum on Discussions with the Parties with a view to voluntary settlement of the Wailing (Western) Wall Dispute* at 3 (10 October 1930, hereafter "*Memorandum on Discussions*").
85 *Id.*
86 Kisch, *op. cit.* at 328.
87 *Id.* High Commissioner Chancellor's files contain an undated, unsigned draft settlement agreement under which the Jews would acknowledge Muslim ownership of the Wall and *Haram* area in exchange for the Muslims not "object[ing] to or interfer[ing] with the Jews' having free access to the pavement in front of the Wall for the purpose of exercising religious worship and devotions in the form and on the conditions customary at the Wall … to be determined by the Wailing Wall Commission in its forthcoming report." Any disputes would have been submitted either to the Wailing Wall Commission or a panel of three arbitrators. Chancellor Papers, *op. cit.*, Box 12/7.
88 Papers of Norman Bentwich, St. Antony's College, Oxford, Middle East Centre Archive, GB 165–0025, File 2/3 (Palestine); *see also* CO 733/179/7 for copies of the draft memoranda to be endorsed and exchanged between the parties dated 10 September 1930, and the Jewish and Muslim letters rejecting the draft memoranda (dated 12 and 14 September 1930, respectively).
89 *Id.* (Bentwich papers and CO 733/179/7).
90 *Id.*
91 Kisch, *op. cit*. at 331.
92 *Id.* at 332.
93 *Id.* at 330.
94 *Id.* at 338.
95 *Id.* at 338–39.
96 *Id.* at 339.
97 CO 733/179/7, *Memorandum on Discussions*, *op. cit.* at 4.
98 *Id.* at 6.
99 *Id.* at 7.

00 *See, e.g.* CO 733/179/7, letter from Kisch to Officer Administering the Government of Palestine (8 September 1930) (stating Jewish willingness to negotiate was "without prejudice and will not constitute a waiver of any Jewish rights or an admission of any Moslem rights in the event of a complete agreement not being reached"); *id.*, letter from Kisch to Chief Secretary, Government of Palestine (17 October 1930) (discussing ongoing attempts to settle the dispute and insisting if negotiations fail, the Commission be informed solely of the fact of the negotiations and not be informed of the specific concessions the Jewish side had offered); *id.*, Letter from Supreme Moslem Council to Chief Secretary, Government of Palestine (15 October 1930) (rejecting any settlement under which Jews would have any right of access to the Wall "for purposes of their devotions" as "completely inconsistent with the principles of Shar'ia law and prejudicial to Moslem rights …").

01 CO 733/179/7, Notes of Interview with High Commissioner at 4 (5 October 1930). The notes reflect one of the Muslim delegates at the meeting, Amin Bey Abdul Hadi, "expressed definite disagreement with the Mufti's view. He was entirely in favour of accepting the settlement." *Id.* This may explain why the Mufti decided to fire Auni Bey as his lawyer.

02 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (5 October 1930). Chancellor met with Kisch the same day (5 Oct.) and thanked him for the "conciliatory attitude the Jews had taken up in regard to the Wailing Wall negotiations & the generous concessions they had made …") *Id.*

03 CO 733/179/7, Note from Davis to Luke (10 October 1930).

04 CO 733/179/7, Despatch (Confidential) No. 3723/30 from High Commissioner for Palestine to Secretary of State for the Colonies (11 October 1930).

05 Papers of Norman Bentwich, St. Antony's College, Oxford, Middle East Centre Archive, GB 165–0025, File 1 (Correspondence).

06 CO 733/179/9, Letter from Lofgren to H.W. Kennard, British Legation Stockholm (9 December 1930).

07 *Id.*, despatch E 6745/101/65 from Kennard to Foreign Office (10 December 1930).

08 Lofgren Commission Report, *op. cit.* at 39–40.

09 *Id.* at 40.

10 *Id.* at 41.

11 *Id.*

12 *Id.* at 42.

13 *Id.* at 43.

14 *Id.* at 44.

15 *Id.* at 45.

16 *Id.* at 46.

17 *Id.*

18 *Id.* at 47.

19 *Id.*

20 *Id.* at 53.

21 *Id.* at 53, 56.

22 *Id.* at 54.

23 *Id.* at 55.

24 *Id.* at 56.

25 *Id.* at 57.

26 *Id.* at 59.

27 *Id.*

28 *Id.* at 60.

29 *Id.* at 60–61.

30 CO 733/195/5, Paraphrase Telegram No. 157 from High Commissioner to the Secretary of State for the Colonies (16 June 1931).

31 *The Times*, 9 July 1931 at 15 ("But before the Moslems oppose the verdict, they may usefully reflect that whatever their views as to the competence of the Commission they have in essentials won their case").

32 CO 733/195/5, Telegram from President Secretary Wahide Elkahidi Matial Mogannam to the Secretary of State for the Colonies (22 June 1931).

33 *Jewish Daily Bulletin*, 10 June 1931 at 1.

34 *Id.*

35 Kisch, *op. cit.* at 424.

36 *Id.* at 425.

37 Bentwich (1932), *op. cit.* at 210.

38 CO 733/195/6, Memorandum by the Acting Attorney General on the Draft Palestine (Western or Wailing Wall) Order-in-Council at 1 (21 April 1931).

39 CO 733/195/5, Shuckburgh to Sir Samuel Wilson, Undersecretary of State for the Colonies (3 June 1931).

40 Order-in-Council, para. 4(2) (19 May 1931).

41 *Id.*, paras. 2–4.

42 *Id.*, Schedules I and II.

43 CO 733/195/7, Letter from Supreme Moslem Council to High Commissioner at 2 (11 October 1931); *see also id.*, Letter from Supreme Moslem Council to High Commissioner (25 June 1931). Both letters argue the Muslims had never consented to the Lofgren Commission's jurisdiction to decide any issues regarding the Wailing Wall, which is governed solely by *Shari'a* law and subject only to the jurisdiction of the Muslim courts; *see also id.*, Letter from the Palestine Arab Liberal Party (Haifa) to J. Aafour, Secretary (Haifa) (15 June 1931).

44 CO 733/195/4, Despatch No. 732 from High Commissioner Chancellor to Secretary of State for the Colonies Lord Passfield (1 August 1931), enclosing Memorandum from G. Sulman, Acting Deputy District Commissioner to Chief Secretary (24 July 1931).

45 *Id.*

46 *Attorney General v. Karaewany*, Criminal Case No. 192/46, District Court of Jerusalem (Judgment of Acquittal, 18 Nov. 1946).

47 CO 733/47/2.

48 CO 733/282/2, Memorandum from E. Keith-Roach, District Commissioner to the Chief Secretary (9 November 1942).

49 *Id.*, Despatch (Secret) No. SF/277/242 from the High Commissioner to the Secretary of State for the Colonies (23 December 1942).

50 Townshend, *op. cit.* at 41.

51 J. Marlowe, *The Seat of Pilate: An Account of The Palestine Mandate* at 115 (Cresset Press, 1959).

52 Reiter (2017), *op. cit.* at 17.

5

THE PEEL COMMISSION

Introduction

Despite the Lofgren Commission's modest achievement in reducing Arab–Jewish tensions regarding the Wailing Wall, the overall conflict raged on during the early and mid-1930s, with sporadic violence increasing. Disturbances broke out again in 1933. The Arab Revolt began in 1936 and would last the next three years. Shortly after the 1936 outbreak, the British Government decided to appoint yet another Commission, this time a Royal Commission, the most important and prestigious such body recognized by the British Government, to attempt to resolve the seemingly irreconcilable conflict between two peoples claiming the same land as their own.

Once again the parties resorted to legal arguments in their third courtroom-style confrontation in less than a decade. Although the Royal Commission did not allow the parties to use outside lawyers or to cross-examine each other's witnesses, the parties used and expanded upon many of the same arguments they had tested before the Shaw and Lofgren Commissions, refining their legal claims against each other in new and different ways. Thus, the Royal Commission can be viewed as the third "trial" between the Arabs and Jews of Palestine during the early years of the conflict. As Lord Peel himself remarked not long after the Commission had completed its work, "as Chairman of a Commission of that kind, one sits to some extent in a judicial capacity. One pronounces an opinion after examining the evidence."[1]

The hearings before the Royal Commission featured testimony both in public[2] and in secret *in camera* sessions[3] from the leading British, Arab and Zionist figures of the day, including Winston Churchill, David Lloyd George, Chaim Weizmann, David Ben-Gurion, the Mufti Haj Amin al-Husseini, and Auni Bey Abdul Hadi. All three parties – British, Arabs, and Jews – seemed to sense this would be the most important of the three "trials" between them since 1929. The Shaw and Lofgren Commissions both represented major milestones, but the Royal Commission, with its very broad Terms of Reference, its prestige and its resources, promised to become a landmark in the early legal history of the conflict.

Adding to the drama was the long shadow of the Third Reich. Nazi persecution of the German Jewish population had ramped up significantly in the months following the September 1935 enactment of the Nuremberg Laws. The plight of European Jewry, and the possibility of losing the option of relative safety in Palestine if immigration were restricted, loomed large during the proceedings before the Royal Commission.

The Royal Commission heard testimony in Jerusalem and London from November 1936 through early May 1937 on an enormous array of issues, including the McMahon-Hussein correspondence and the legitimacy of the Balfour Declaration and the Mandate. The Royal Commission also heard testimony regarding whether, as of 1936–37, the mission of establishing

a Jewish National Home in Palestine had been completed, and if so, what the resulting implications would be for further Jewish immigration/land acquisition, Jewish–Arab relations, and whether a full-blown Jewish State might arise at some future point.

Most significantly, the Royal Commission became the first official body to float the idea of what it internally called the "clean cut," and externally the "partition plan," or the "two-state solution" in today's parlance. Commissioner Coupland asked Weizmann for his reaction to the idea during a secret, *in camera* session, setting in motion a chain of events that continues to dominate the Israeli-Palestinian dynamic today.

The Commission's massive Report, published on 7 July 1937, with its recommendation to divide Palestine into separate Arab and Jewish states while keeping Jerusalem and a small strip of land from Jerusalem to the Mediterranean under permanent British control, represented the most important development in Palestine policy since the British conquest 20 years earlier.

The Hope Simpson report and the Passfield White Paper

But we return first to 1930, an extraordinarily busy year in Palestine's legal history. The Shaw Commission released its report at the end of March, and the Lofgren Commission conducted its hearings in June/July. In addition, on the heels of the Shaw Commission Report, the British Government sent "a highly qualified investigator,"[4] Sir John Hope Simpson, to undertake a more detailed analysis of the "major policy issues" such as land settlement, immigration, and economic development the Shaw Commission had addressed when it strayed far beyond its Terms of Reference.

The British originally told Weizmann they intended to send General Smuts to conduct the Palestine analysis.[5] Weizmann expressed great disappointment that Hope Simpson had been selected instead, suspecting the British had directed Hope Simpson to rubber-stamp the Shaw Commission Report as a prelude to making concessions to the Arabs on Jewish immigration and land acquisition.[6]

Hope Simpson's report indeed criticized various aspects of Zionist activity in Palestine as detrimental to the local Arab population. One of the Report's key findings was that Jewish land purchase and settlement practices, including Jewish Agency-imposed requirements to employ solely Jewish labor, were unfairly displacing local Arab farmers, especially in the agricultural valley of Esdraelon southeast of Haifa. According to Hope Simpson:

> [T]he result of the purchase of land in Palestine by the Jewish National Fund has been that land has been extraterritorialised. It ceases to be land from which the Arab can gain any advantage either now or at any time in the future. Not only can he never hope to lease or to cultivate it, but, by the stringent provisions of the lease of the Jewish National Fund, he is deprived for ever from employment on that land. Nor can anyone help him by purchasing the land and restoring it to common use. The land is in mortmain and inalienable. It is for this reason that Arabs discount the professions of friendship and good will on the part of the Zionists in view of the policy which the Zionist Organisation deliberately adopted.[7]

Following the completion of Hope Simpson's work,[8] the British Government simultaneously issued on 21 October 1930 both Hope Simpson's report and yet another White Paper (known as the "Passfield White Paper"), significantly revising its Palestine policy.[9] The Passfield White Paper began by acknowledging the "acute controversy" and "considerable misunderstanding" the Shaw Commission Report had sparked.[10] It noted the "unhappy events of the past year and the deplorable conditions which have resulted from them."[11] It called on both Arabs and Jews to

stop their press agitation, "in which the true facts of the situation have become obscured and distorted."[12]

The Passfield White Paper declared Britain would implement the strict terms of the Mandate, involving "a double undertaking … to the Jewish people on the one hand and to the non-Jewish population of Palestine on the other hand."[13] The Passfield White Paper treated these two obligations as of "equal weight," meaning one could not be subordinated to the other.[14]

The Passfield White Paper claimed it had based its approach on longstanding British policy, noting the Churchill White Paper of 1922 provided "the foundations upon which future British policy in Palestine must be built up."[15] Three specific aspects of the Churchill White Paper were emphasized and quoted: first, the term "Jewish National Home" did not mean

> the imposition of a Jewish nationality upon the inhabitants of Palestine as a whole, but the further development of the existing Jewish community, with the assistance of Jews in other parts of the world, in order that it may become a centre in which the Jewish people as a whole may take, on grounds of religion and race, an interest and a pride[16]

Second, Jewish immigration to Palestine should not exceed the "economic absorptive capacity" of the country (a principle originally espoused in the 1922 Churchill White Paper[17]); and third, the Jewish Agency, which the Mandate designated as the official representative of the Jewish people, nevertheless bore no responsibility for the general administration of the country.[18]

The Passfield White Paper then discussed the three "intimately interrelated" issues Hope Simpson had addressed in his Report: land, immigration, and unemployment. Regarding land, the Passfield White Paper noted the amount of cultivable land in Palestine was "considerably less than hitherto had been estimated," meaning "there remains no margin of land available for agricultural settlement by new immigrants."[19] Moreover, the Jewish practice of employing only Jewish workers on Jewish farms could not be squared with Article 6 of the Mandate, requiring Britain to facilitate Jewish immigration and "close settlement" by Jews on the land, but only to the extent "the rights *and position* of other sections of the population are not prejudiced."[20] Therefore, the White Paper stated future land transfers (meaning Jewish purchases of land) would require prior approval from the Mandatory Government.[21]

Finally, regarding immigration, the Passfield White Paper criticized the role of the Jewish Agency and the General Federation of Jewish Labor (*Histadrut*) for not doing enough to help the Mandatory Government maintain strict enforcement of immigration policy. Therefore, the Passfield White Paper declared the Palestine Government would become the "deciding authority in all matters of policy relating to immigration, especially having regard to its close relation to unemployment and land development policy."[22] Moreover, given the extent of both Arab and Jewish unemployment in Palestine, the Passfield White Paper questioned the extent to which the current economic absorptive capacity of the country could sustain new immigration, and determined that Jewish immigration should be reduced or, if necessary, suspended until the unemployed portions of the non-Jewish population were able to find work.[23]

The Passfield White Paper concluded with an appeal to both Jews and Arabs to cooperate with the Mandatory Government, noting:

> [T]he general development of the country shall be carried out in such a way that the interests of the Arabs and Jews may each receive adequate consideration, with the object of developing prosperity throughout the country under conditions which will give no grounds for charges of partiality upon the one side or upon the other, but will permit of the Arab and Jewish communities developing in harmony and contentment.[24]

Reaction to the Passfield White Paper

The Zionists reacted bitterly to the Hope Simpson Report and the Passfield White Paper. Weizmann immediately resigned as President of the Jewish Agency and the Zionist Organization (after threatening to resign several months earlier in response to the Shaw Report), lambasting the White Paper as "a profound change [in British policy] … sterilizing the hopes of the Jewish people in regard to the National Home in Palestine."[25]

Kisch wrote in his diary, "[t]he blow has come and it is more severe than any of us anticipated … the whole document breathes prejudice against the Jew."[26] Kisch also described how "[t]he Arab leaders are jubilant at the [Passfield White Paper] which goes far beyond their expectations. Arab officials are addressing to their Jewish colleagues words of ironic sympathy or such phrases as '*Chalas Eretz-Israel.*'"[27]

Two days later three leading Conservative politicians, Stanley Baldwin, Austen Chamberlain and Leo Amery published a letter to *The Times* criticizing the Passfield White Paper and Prime Minister Ramsay MacDonald for "appear[ing] now to have abandoned" the policy of even-handedness between Arabs and Jews in Palestine.[28] The letter continued:

> Without giving either Jewish or Arab opinion an opportunity to express itself or allowing the voice of Parliament to be heard, they have laid down a policy of so definitely negative a character that it appears to us to conflict not only with the insistence of the Council of the League of Nations that it would be contrary to the intention of the Mandate if the Jewish National Home were crystallized at the present stage of development, but with the whole spirit of the Balfour Declaration and of the statements made by successive Governments in the last 12 years.[29]

Labor Party politicians, including former Shaw Commission member Harry Snell, also objected to the Passfield White Paper.[30] Lord Hailsham, the former Lord Chancellor, and Sir John Simon, the future Lord Chancellor, also wrote to *The Times*, arguing the White Paper conflicted with Britain's *legal* obligations under the Mandate to establish a National Home for the Jews and facilitate close settlement of the Jews on the land of Palestine. Thus, they argued, the British Government should seek an advisory opinion from the Permanent International Court of Justice regarding its legal obligations under the Mandate before implementing the Passfield White Paper:

> This country cannot afford to allow any suggestion to rest on its good faith or on its determination to carry out to the full its international obligations. If, therefore, the terms of the White Paper are the deliberate and considered announcement of Government policy, we would suggest that *immediate steps should be taken to induce the Council of the League of Nations to obtain from the Hague Court an advisory opinion on the questions involved*, and that the British Government should not enforce those paragraphs [of the Passfield White Paper] which are challenged unless and until that Court has pronounced in their favour.[31]

The British Government did not pursue that suggestion.

Leonard Stein, the Jewish Agency lawyer who had written the pamphlet in May 1930 criticizing the Shaw Commission Report, wrote another pamphlet in November 1930 attacking the Passfield White Paper as "the latest stage in what the Jewish Agency cannot but regard as a continuous whittling down of the Balfour Declaration as originally framed."[32] Stein made many detailed legal arguments regarding the proper interpretation of the Mandate in that pamphlet, which he later incorporated into the Jewish Agency Memorandum submitted to the Peel Commission, discussed below.

The MacDonald letter

Faced with mounting opposition to the Passfield White Paper, Prime Minster MacDonald sent a letter to Weizmann on 13 February 1931 seeking to defuse the controversy. The letter did not retract the Passfield White Paper, but sought to provide "the authoritative interpretation of the White Paper."[33] MacDonald's letter reaffirmed Britain's commitment to carry out the terms of the Mandate in full. It "disavowed" any "injurious allegations against the Jewish people and Jewish Labour organization."[34]

Regarding immigration and land policy, the MacDonald letter said:

> The effect of the policy of immigration and settlement on the economic position of the non-Jewish community cannot be excluded from consideration. But the words are not to be read as implying that existing economic conditions in Palestine should be crystallised. On the contrary, the obligation to facilitate Jewish immigration and to encourage close settlement by Jews on the land, remains a positive obligation of the Mandate, and it can be fulfilled without prejudice to the rights and position of other sections of the population of Palestine.[35]

The letter then backed away from the Passfield White Paper's seeming intolerance of further Jewish land acquisition and immigration, promising yet another study to identify additional lands available for Jewish settlement. The letter further said the Government would attempt wherever consistent with the overall policy of the Mandate to permit private land transfers.[36] It also made clear immigration could continue, but under government control and subject to the economic absorptive capacity of the country.[37]

The MacDonald letter concluded with the following plea:

> His Majesty's Government desire to say finally, as they have repeatedly and unequivocally affirmed, that the obligations imposed upon the Mandatory, by its acceptance of the Mandate, are solemn international obligations, from which there is not now, nor has there been at any time, an intention to depart. To the tasks imposed by the Mandate His Majesty's Government have set their hand, and they will not withdraw it. But if their efforts are to be successful there is need for co-operation, confidence, readiness on all sides to appreciate the difficulties and complexities of the problem, and, above all, there must be a full and unqualified recognition that no solution can be satisfactory or permanent which is not based upon justice, both to the Jewish people and to the non-Jewish communities of Palestine.[38]

Weizmann issued a statement in response to the MacDonald letter, cautiously praising it as re-establishing the basis for cooperation between the Zionists and Britain. Weizmann said, "[a] basis for cooperation having been restored, confidence in the economic future of Palestine should revive, and with redoubled endeavor world Jewry should resume its economic work in Palestine."[39] Weizmann, who had continued overseeing the Jewish Agency and the Zionist Organisation since his October letter of resignation pending the appointment of a successor, decided to remain in his position.

While the MacDonald letter helped reduce British-Zionist tensions, it inflamed the Arabs, who quickly labeled it the "Black Letter."[40] Auni Bey sent a scathing note to Chancellor, accusing the British Government of "violating the undertakings with which they bound themselves in the [Passfield] White Paper before its ink on paper was dry."[41]

In hindsight, according to one history of the period, the Passfield White Paper and the MacDonald letter sowed the seeds of the rancor, discord, and violence that became the hallmark of 1930s Palestine and have endured ever since:

> The White Paper of 1930 may be looked upon as containing the germs of the repudiation of the Jewish national home policy; and the refusal of the Government to withdraw it may, after all, have had a more fundamental cause than the desire to save face. In any case, regarded as a whole, the series of events beginning with the Wailing Wall disturbances, marked

> a triumph for the policies of the Mufti; the MacDonald Letter was merely a temporary setback. From the Administration's manner of handling the situation in its entirety, the Arab leaders could not but have recognized that there were strong forces in the British government which were more than ready to justify the Arab opposition to the Jewish claims. They could have concluded that their case had been advanced by the use of violence and the strategy of intransigence, and that another try at terror might be successful.[42]

1933 disturbances

After a period of relative calm between 1930 and early 1933, tensions again began to build. The rise of Hitler caused the Zionists to press the British to increase the pace of Jewish immigration and hasten the building of the Jewish National Home in Palestine. In March 1933 the Arab Executive published a manifesto urging resistance and non-cooperation with the Mandatory Government, which the Arabs accused of helping the Jews drive Arabs out of Palestine. By October, the tensions between the Jewish desire to increase the pace of immigration and the Arab demands to halt it altogether gave rise to violence. An Arab demonstration on 13 October 1933 in Jerusalem turned into a violent clash with the police. Two weeks later riots broke out in Jaffa, followed quickly by disturbances in Nablus and Haifa, and then again in Jerusalem on 28–29 October. Altogether 26 rioters were killed and nearly 200 injured. One policeman was killed and nearly 60 injured.[43]

1936 disturbances; outbreak of the Arab Revolt

On 15 April 1936 two Jews were murdered on the road from Tulkarem to Nablus. Jewish demonstrations followed in Tel Aviv in connection with the funeral of one of the murdered Jews. Arab rioters in Jaffa killed three Jews in response to false rumors of Arab deaths. The violence continued into May and June, with the Arabs increasingly targeting British policemen for attacks. At the end of July the British Government announced the formation of the Royal Commission, but the disturbances continued until early October. The Royal Commission was appointed in early August, but due to the tenuous security situation in Palestine it postponed its arrival in Jerusalem until 11 November 1937.[44]

The Peel Commission: appointment and Terms of Reference

On 18 May 1936 the Colonial Secretary, James Henry Thomas, advised the House of Commons "the Government have decided, after order has been restored, to appoint a Royal Commission to inquire into the causes of the unrest and the alleged grievances on either side."[45]

A Royal Commission is the most prestigious investigative body in the British system:

> [I]t is the highest form of inquiry known in the British Empire. It is of its nature impartial, independent and uncontrolled by the Government of the day; its duty is to report on the questions committed to it in any sense that may seem to be just and right. Its responsibilities are vast, and only a body of men of eminence of those who, at much personal sacrifice, have accepted service … could fittingly be called upon to discharge them.[46]

Weizmann, seemingly fearful of a reprise of the disappointing outcome of the Shaw Commission, wanted to block the formation of a Royal Commission, cabling Lord Melchett on 3 May, "such Commission misfortune as it necessarily leads revision policy in favour concessions to rioters and I would oppose it. This must be prevented; quick action essential."[47] On 19 May, the day after the Government announced the decision to form the Commission, Weizmann met

with Lord Plymouth, asking if he would agree to meet Weizmann again before the Commission's Terms of Reference had been finalized.[48]

Several days later Weizmann cabled the Jewish Agency office in Jerusalem, directing them to inform the High Commissioner in Palestine, Sir Arthur Wauchope, of his "grave concern" about the potential formation of a Royal Commission, and that he would be "compelled to oppose it."[49] But once the Colonial Secretary made the announcement to the House of Commons that a Royal Commission would be formed, Weizmann beat a tactical retreat:

> Generally, my impression is that the only purpose that can be served by the Royal Commission (if and when appointed) is to slow down the tempo of our development work and immigration, and that this is really what the Government is after. But we feel, here, that since the Government appears to be determined on a Royal Commission, it would be bad tactics on our part to oppose it publicly (thereby implying we had something to hide!), and that the best thing would be for us to make it clear that, provided always that the terms of reference of the Commission do not cut at the roots of the Mandate, we shall be prepared to do our part when the Commission gets to work.[50]

By mid-May the Colonial Office and Wauchope were conferring over how to draft the Terms of Reference and whom to appoint to the Commission. The Colonial Office noted High Commissioner Wauchope's observations regarding the composition of the Commission:

> [I]t will be his [Wauchope's] first task to make the Arabs see that the Commission will be of great help to them, so much so that they will not embark on civil disobedience and worse courses; and that his chief help will be in the composition of the Commission. The Chairman, he says, should be a man of prestige equal to Lord Willingdon or Sir Samuel Hoare and he wonders whether Lord Halifax is quite out of the question.[51]

By 29 May the Colonial Office had settled on a near-final draft of the Terms of Reference.[52] On 19 June the new Colonial Secretary, William Ormsby-Gore, told the House "the sole aim of His Majesty's Government is to obtain an objective and non-partisan report, to enable them to do justice to all sections of the Palestine population."[53] Ormsby-Gore said the members of the Royal Commission would all be Christians domiciled in the United Kingdom, and

> that I shall submit no name for service on such a Royal Commission of anyone who has been or is in any way connected with Palestine, or has any known pre-conceived views, or has ever taken part in Jewish or Arab affairs.[54]

Ormsby-Gore also informed Parliament the Mandatory Government had detained 81 Arab leaders on suspicion of inciting the ongoing disturbances, including "a most prominent Arab leader who is interned in the Sarafand Concentration Camp, Auni Bey Abdul Hadi, one of the wealthiest and most prominent barristers in Palestine."[55]

On 30 June 1936 Weizmann and David Ben-Gurion met with Ormsby-Gore and Arthur Charles (Cosmo) Parkinson of the Colonial Office. Weizmann wrote to Ormsby-Gore the next day, identifying two issues of "exceptional gravity" they had discussed during the meeting. First, Weizmann expressed alarm at Ormsby-Gore's comment that Jewish immigration would no longer be governed solely by the principle of economic absorptive capacity, but instead political considerations would also be taken into account. Weizmann left no doubt how he felt about this potential change in policy:

> I feel it to be my duty, both to the Jewish people and to the Mandatory Government, to state at once, and as clearly as possible, that in my view such a policy strikes at the very root of the Mandate and the National Home … it reverses the practices of the Mandatory Administration during the last seventeen years. It threatens to destroy the foundations on which we undertook, and have carried on, our work in Palestine … I cannot believe that this is to be the settled policy of His Majesty's Government. Such a policy would artificially hold up the development of Palestine, or hand over to non-Jewish immigrants from neighbouring countries the fruits of our labour withheld from ourselves. And this would be done

> at a time when the plight of the Jews in Germany and Eastern Europe have become desperate beyond description.[56]

The second issue Weizmann raised involved Ormsby-Gore's statement that Jewish immigration might be suspended pending completion of the Royal Commission's work. Weizmann criticized this as "a retreat in the face of organized terrorism."[57] Nevertheless, over the next few days Weizmann focused on building a case to prove to the Commission that Palestine had sufficient economic capacity to absorb another 80,000 Jewish agricultural families.[58]

In the meantime, Ormsby-Gore had written privately to Wauchope about the appropriate composition of the Commission:

> I fully realise the importance of selecting men of prestige whose names will carry weight. I want to keep off the Commission all Members of Parliament. I would like to have one lawyer on the Commission, preferably not as the Chairman, in a membership office, and above all, I think they must be people who have had no previous association with Palestine, and no past either in the Jewish or Moslem side.[59]

Interestingly, *The Times* reported a variety of women's organizations had sent a letter to Ormsby-Gore in July 1936 lobbying for the appointment of at least one woman to the Royal Commission.[60] None, however, were appointed. *The Times* later criticized those MPs supporting the demand of the women's groups, noting they "would hardly have pleaded for the inclusion of a woman in the Commission if they had understood how anti-feminist is the temper of the Moslems of Palestine."[61]

On 7 August 1936 King Edward VIII (who would abdicate the throne only four months later, after Sir Boyd Merriman, the lawyer for the Jewish side before the Shaw Commission and now the presiding judge of the divorce court in London, granted a final divorce decree to Wallis Simpson[62]) issued Royal Warrants appointing a Commission with the following Terms of Reference:

> [T]o ascertain the underlying causes of the disturbances which broke out in Palestine in the middle of April; to enquire into the manner in which the Mandate for Palestine is being implemented in relation to Our obligations as Mandatory towards the Arabs and Jews respectively; and to ascertain whether, upon a proper construction of the terms of the Mandate, either the Arabs or the Jews have any legitimate grievances upon account of the way in which the Mandate has been, or is being implemented; and if the Commission is satisfied that any such grievances are well founded, to make recommendations for their removal and for the prevention of their recurrence.[63]

By permitting the Arabs and Jews to raise grievances regarding the implementation of the Mandate, the Terms of Reference effectively rendered the Mandatory Government a party to the proceedings, just as it had been before the Shaw Commission.

The Royal Warrants appointed six members to the Commission: William Robert Wellesley, the Earl Peel, was named Chair of the Commission. Sir Horace Rumbold was appointed Vice-Chair. The remaining four Commissioners were Sir Laurie Hammond, Sir William Carter, Sir Harold Morris, and Professor Reginald Coupland.[64] *The Times* hailed the appointments when they were made public on 29 July 1936:

> Mr. Ormsby-Gore has certainly chosen … a strong and well-balanced body. Its Chairman, Lord Peel, who has served the State in many high offices, is admirably qualified by experience and temperament for that post. In Sir Horace Rumbold he has a first-class second in command … Sir Laurie Hammond has been a successful Governor of Assam; Sir Morris Carter's service in East Africa has made him a recognized authority on questions of land settlement; while no one is better qualified to study and to report upon any Imperial problem than Professor Coupland. And one of the most interesting appointments is that of Sir Harold Morris, whose work as President of the Industrial Court during the last ten years has made him an expert in conciliation – which is something needed in Palestine to-day.[65]

Reaction in the House of Commons was mixed. On 29 July 1936 Ormsby-Gore announced the composition of the Commission and read the Terms of Reference on the floor of the House.[66] The following exchange between Ormsby-Gore and MP Colonel (Later Lord) Josiah Wedgewood provides one example of the politics and emotions surrounding the composition of the Royal Commission:

> Colonel WEDGWOOD: May I ask the right hon. Gentleman what are the grounds for this humiliating and almost insulting exclusion of Members of this House from the Royal Commission; whether there is any precedent for the exclusion of Members of this honourable House from a Royal Commission; and, further, why is the House of Lords contributing as chairman one whose record and convictions are so strikingly pro-Moslem?
>
> Mr. ORMSBY-GORE: I resent very strongly the suggestion that any member of this commission is either pro-Jewish or pro-Arab, or anti-Jewish or anti-Arab. Lord Peel has served the State in many offices, and because he happens in the course of a long public career of undoubted impartiality to have served once in the India Office, it is a most unfair suggestion to be made by the right hon. and gallant Gentleman. With regard to the representation of Members of Parliament, I did think it most desirable that it should not be suspected either by Arabs or Jews that there was any political aspect in the matter of a commission of this kind. There are many precedents in the case of commissions of this kind in this delicate work for not including Members of Parliament, because if one includes Members of Parliament one has to include representatives of all parties, and that would make the commission unduly large.[67]

In the meantime, Weizmann continued his efforts behind the scenes to ensure the Jewish side would be ready to present the strongest possible case to the Royal Commission. On 14 October 1936, less than one month before the hearings began, Weizmann wrote to Moshe Shertok, the Head of the Jewish Agency's Political Department and future Israeli Prime Minister:

> It will not be easy for members of the Commission who are thinking in terms of India or South Africa or even Kenya to understand or to agree that a puny country like Palestine can go on absorbing vast numbers of newcomers without inflicting permanent injury on the non-Jewish population. We shall have to be ready to face a strong grilling and a very searching inquiry into the economic side of our work and all our data must be subjected by us to very careful and very critical scrutiny before we produce them … I cannot sufficiently emphasize and insist on the importance of having the data sifted, selected, examined and re-examined so as to make them waterproof; their accuracy must not be open to challenge![68]

Weizmann also tasked the Jewish Agency's legal advisor, Leonard Stein (author of the pamphlets criticizing the Shaw Commission Report and the Passfield White Paper), with writing a comprehensive memorandum for submission to the Royal Commission before it commenced the hearings.[69] Weizmann transmitted the nearly 300-page Memorandum to the Royal Commission on 22 November 1936.[70] The Memorandum addressed, among other items, the McMahon-Hussein correspondence/Balfour Declaration and Wailing Wall issues, and will be discussed further below.

Procedure

David Ben-Gurion, on behalf of the Jewish Agency, wrote to the Colonial Office at the end of July 1936 asking several questions regarding the procedure the Royal Commission intended to follow, including whether the parties would be permitted to make written submissions as well as provide oral testimony; whether the Commission would hear testimony from London-based witnesses who were unable to travel to Palestine for the hearings; and whether the Commission would permit the participation of outside Counsel on behalf of the parties.[71] The Colonial Office responded to Ben-Gurion on 20 August, saying outside counsel would not be permitted to appear before the Commission.[72]

The Commissioners held a private meeting on 6 October 1936 to discuss the procedure for the hearings. They agreed to conduct both public and secret, *in camera* sessions and to examine witnesses under oath.[73] Lord Peel rejected Wauchope's advice to hold only one public session, followed solely by *in camera* hearings, noting "this course would create an atmosphere of secrecy and suspicion I am most anxious to avoid."[74] The Commission also reaffirmed it would not permit the parties to be represented by Counsel at the hearings.[75] The Commission eventually received a full array of judicial powers under a special ordinance enacted by the Palestine Government, including the power to subpoena documents and witnesses, and to compel witnesses to testify under oath.[76]

The following table shows the key participants in the hearings before the Peel Commission:

TABLE 5.1 Peel Commission: key players

Commissioner/Witness	*Affiliation*	*Public or Secret Testimony*
Lord Peel (William Robert Wellesley), Chairman	Former Secretary of State for India	N/A
Sir Horace Rumbold, Vice Chairman	British diplomat	N/A
Sir Laurie Hammond, Commissioner	Former Governor of Assam Province	N/A
Sir Morris Carter, Commissioner	Former Chairman, Kenya Land Commission	N/A
Sir Harold Morris, Commissioner	British Barrister	N/A
Reginald Coupland, Commissioner	Professor of Colonial History, University of Oxford	N/A
Winston Churchill	Former Colonial Secretary, Future Prime Minister	Secret
David Lloyd George	Former Prime Minister	Secret
Herbert Samuel	Former High Commissioner for Palestine	Secret
Chaim Weizmann	President, Jewish Agency and Zionist Organization	Both
David Ben-Gurion	Chairman of the Executive Committee, Jewish Agency	Both
Haj Amin Al-Husseini	Grand Mufti and President of Supreme Moslem Council	Public
Auni Bey Abdul Hadi	Lawyer and Palestinian nationalist; leader of Istiqlal Party	Public

Opening session

The Commission held its first session on 12 November 1936 in Jerusalem, after delaying its departure from England for three months due to the precarious security situation and ongoing outbreaks of violence in Palestine. The Arabs initially boycotted the proceedings, but ultimately decided in early January 1937 to participate, sending the Mufti, Auni Bey Abdul Hadi, Jamal Husseini, and other prominent Arabs to testify. The Arab side also made multiple written submissions to the Royal Commission.

After reading the Terms of Reference and explaining the nature and independence of the Royal Commission, Lord Peel discussed the procedure the Commission would follow. He first indicated the hearings would be held as much as possible in public, but acknowledged some testimony would best be given in private sessions. He said the Royal Commission would interpret the Terms of Reference "in a broad and comprehensive manner."[77]

The Commission heard live testimony from 60 witnesses at 30 public sessions in Palestine, and from 53 witnesses at 40 *in camera* sessions, also in Palestine. The Commission also received public testimony from two witnesses and *in camera* testimony from eight additional witnesses when it returned to London in early 1937.[79]

Just as the Shaw Commission had done, the Peel Commission heard extensive testimony regarding the McMahon-Hussein correspondence and the legal impact of the McMahon pledge on the subsequent Balfour Declaration and the Mandate. The Arabs argued, “McMahon’s pledge to Hussein included Palestine, therefore the Balfour Declaration and the Mandate were invalid.”[80]

Lord Peel expressed great interest in delving deeply into the McMahon-Hussein correspondence. He asked the Government to provide the correspondence to the Commission for their review, prompting an extensive internal debate between the Foreign and Colonial Offices. The British Cabinet ultimately approved the request and even permitted Lord Peel to quote portions of the correspondence in the Commission’s final report.[81]

FIGURE 5.1 Lord Peel (third from left) and other members of the Palestine Royal Commission in the garden of the King David Hotel in Jerusalem immediately following their first session, 12 November 1936

(Matson Photograph Collection, Library of Congress).[78]

Key testimony before the Peel Commission

Although the parties were not permitted to be represented by counsel or to cross-examine each other's witnesses, the hundreds of pages of transcripts reveal the six Commissioners subjected the witnesses to rigorous and sometimes adversarial questioning. In many respects, therefore, the

Peel hearings resembled a trial-type proceeding.

British testimony

Arthur Wauchope in camera testimony

The first witness to testify before the Peel Commission was Sir Arthur Wauchope, the current British High Commissioner for Palestine.[82] Wauchope testified *in camera*. He first noted the Arabs continued to view Palestine as part of southern Syria, believing Britain had promised in the McMahon-Hussein correspondence to "form an independent Arab State that included Palestine, but not necessarily that Palestine itself would be an independent state."[83] Professor Coupland explored the issue further:

> *Professor Coupland*: Is it your view that it [Palestine] is rather an artificial post war creation?
>
> *A*: It is certainly.
>
> *Q*: Palestine is part of Syria?
>
> *A*: And Arabs like to call it "Southern Syria."
>
> *Q*: Am I right in thinking there is no substantial difference between the Arabs on one side of the Jordan and the Arabs on the other?
>
> *A*: No substantial difference.[84]

Lord Peel pursued this line of questioning a few minutes later:

> *Chairman*: We have had a little talk about the McMahon letter. My question is hypothetical, but supposing it had been in our [terms of] reference to go into it, supposing we came to the conclusion and it was accepted by the Arabs that really there was no such promise and had they misunderstood it, or if there had been a promise, if it had been waived by persons who were capable and had the authority to waive it, would it make any real difference to the situation if the McMahon letter were out of the way?
>
> *A*: I do not think so.
>
> *Q*: You would still have the trouble of the domination of the Jews and that is the real practical problem which you have before you?
>
> *A*: Yes. The importance of the McMahon letter is this. If it were decided, if the British Government felt itself pledged to give an independent [Arab] state west of the Jordan, then it might be that His Majesty's Government would have to go a step further and say Jewish immigration must cease in that state.
>
> …

Q: But if it were dispelled, if the McMahon story was all dispelled, your other problems would still remain?

A: If it were dispelled it would, I think, have very little effect.

Q: One cannot ask the same question of the Balfour promise, because on that the nature of the administration of the country depends?

A: Yes.[85]

The Commissioners also spent considerable time discussing with Wauchope the meaning of various provisions of the Mandate, especially the following italicized language in Articles 2 and 6:

Article 2: The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as *will secure the establishment of the Jewish national home*, as laid down in the preamble, *and the development of self-governing institutions*, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Article 6: The Administration of Palestine, while ensuring that the rights *and position* of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

Regarding Article 2, Lord Peel referred to the Jewish Agency's "curious conclusion" that Britain's dual obligation – or, in the words of the Passfield White Paper, its "double duty" – meant (i) securing the establishment of a Jewish national home, and (ii) developing self-governing institutions. Lord Peel argued, and Wauchope agreed, this misread the language of Article 2. Instead, Lord Peel interpreted Article 2 as imposing on Britain two equal obligations to the Jews and Arabs: (i) securing the establishment of the Jewish national home in Palestine, while simultaneously (ii) safeguarding the civil and religious rights of all the inhabitants of Palestine (including Arabs), irrespective of race and religion.[86]

Regarding Article 6, Lord Peel said the word "position" troubled him, because any change in the relative population of Jews and Arabs could disrupt or damage the economic and/or political "position" of the Arabs in the country. The Commission discussed with Wauchope the impact of Jewish immigration on the Arab "position." Wauchope noted the Arab position had not seemed to suffer regarding their own national aspirations. While Palestinian Jews typically displayed the Zionist flag alongside the Union Jack at official functions and sang both *God Save the Queen* and *Hatikva*, "the Arabs have neither a flag nor an anthem of their own."[87]

This led to an interesting discussion between the Commissioners and Wauchope (which they would pursue with other witnesses) regarding whether the mission of establishing the Jewish national home had been completed. If so, then Britain could, at least in theory, declare it had fulfilled its first obligation under Article 2 (its obligation to the Jewish people), and therefore it was no longer bound under Article 6 to facilitate any additional Jewish immigration or land

acquisition/settlement.[88] But this would not necessarily mean the mandate should come to an end. As Wauchope noted at the end of his testimony:

> *Chairman*: Just one final question, the answer to which I am afraid is only too plain – if the Mandatory Power went away or suspended its operation, the state of chaos in this country would be terrible, or worse?
>
> *A*: Yes, there are Arabs who say, "Give us forty-eight hours."[89]

Winston Churchill in camera testimony

Winston Churchill was one of the last witnesses to testify before the Peel Commission, doing so on 12 March 1937. His testimony was strikingly candid and highly favorable to the Jewish side, although carefully couched in terms of Britain's national interest.

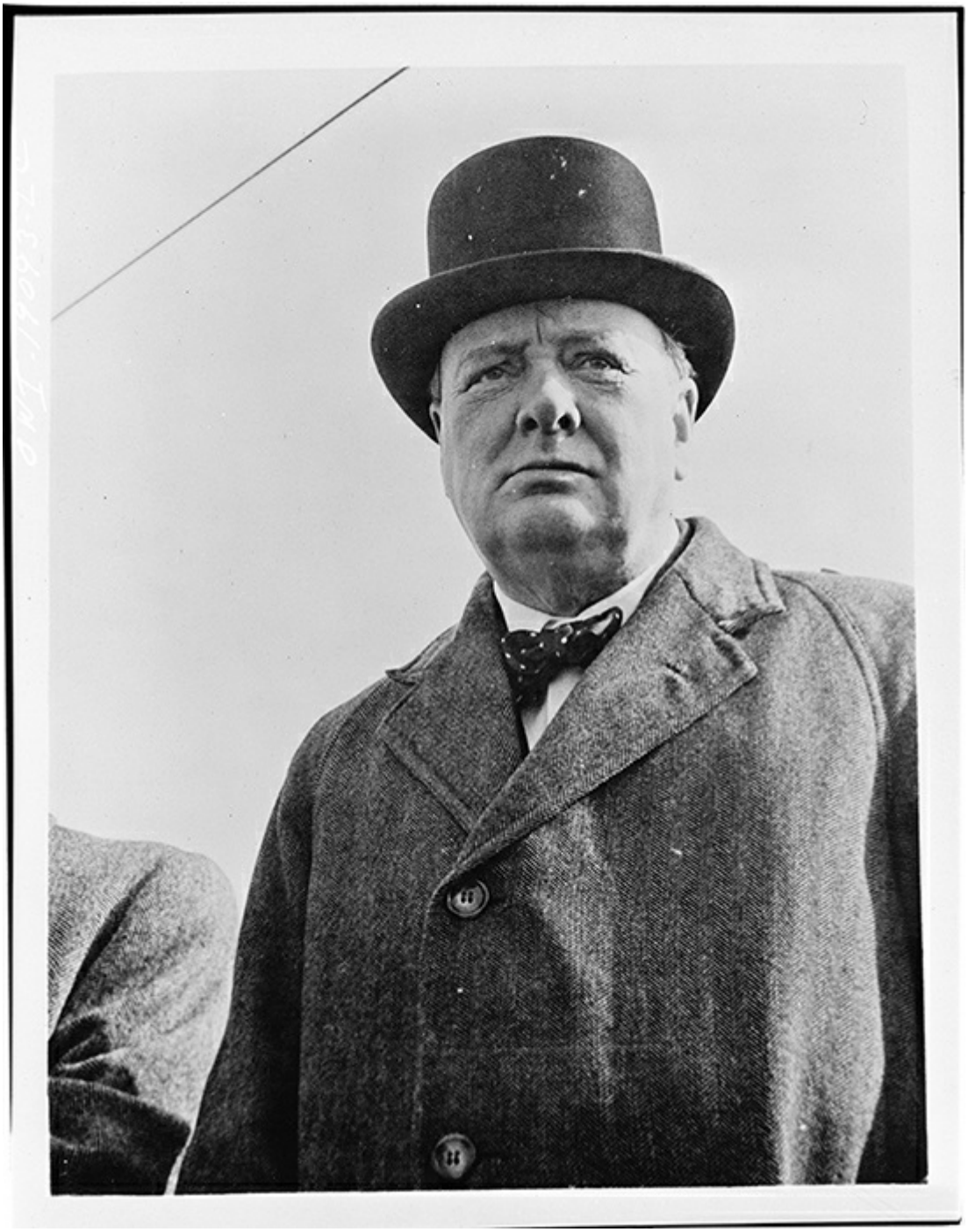


FIGURE 5.2 Sir Winston Churchill

(Library of Congress, Prints and Photographs Division).[90]

Churchill began by explaining the wartime strategic reasons for the British Government's issuance of the Balfour Declaration, and what that meant for Britain's obligation to the Jewish people:

> I insist upon loyalty and upon the good faith of England to the Jews, to which I attach the most enormous importance,

> because we gained great advantages in the War. We did not adopt Zionism certainly out of altruistic love of starting a Zionist colony: it was a matter of great importance to this country. It was a potent factor on public opinion in America and we are bound by honour, and I think upon the merits, to push this thing as far as we can …[91]

Churchill then questioned the Arab claim that they had risen up against the Turks in reliance on McMahon's pledge to Sherif Hussein. Churchill testified the Palestinian Arabs, unlike their Hedjazi brethren, did not join the uprising, and he used very strong and negative language against the Arabs in general:

> *Professor Coupland*: … [S]urely the moral assumption was that … you should not go on making it a creeping invasion and conquest of Palestine spread over half a century, which is a thing unheard of in history?
>
> *A*: It is not a creeping conquest.
>
> *Q*: If you are always hitting them on the head?
>
> *A*: These Arabs were a poor people, conquered, living under the Turks fairly well, but they hated the Turks … and then when the war came they became our enemies and they filled the armies against us and fired their rifles and shot our men.
>
> *Q*: Certainly?
>
> *A*: But our armies advanced and they were conquered. It is not a question of a slow creeping conquest. They were beaten and at our disposition … They were beaten out of the place. Not a dog could bark. And then we decided in the process of the conquest of these people to make certain pledges to the Jews …
>
> *Sir Harold Morris*: But what makes you think we conquered the Arabs? I thought they were our allies?
>
> *A*: The actual inhabitants, the Palestinian Arabs, were making their quota to the Turkish Army. The Arabs from the Hedjaz were our allies.
>
> *Q*: That may be, because they were compelled to by the Turk; but they came in and fought with us?
>
> *A*: Not the Palestinian Arab.
>
> …
>
> *Sir Horace Rumbold*: It would logically follow that as we conquered Palestine we can dispose of it as we like?
>
> *A*: In accordance with the pledges we gave in the process of conquest.
>
> *Q*: You conquer a nation: you have given certain pledges the result of which is that the indigenous population is subject to the invasion of a foreign race?
>
> *A*: A foreign race? Not at all. The people who had it before that indigenous population came in and inhabited it … I have a great regard for the Arabs, but at the same time you find that

where the Arab goes it is often desert.

Q: They created a good deal of civilization in Spain?

A: I am glad they were thrown out.[92]

When the Commissioners asked Churchill about the "double duty" issue, he did not mince words:

> In my opinion, all questions of self-government in Palestine are *subordinate* to the discharge of the Balfour Declaration – the idea of creating a National Home for the Jews and facing all the consequences which may ultimately in the slow passage of time result from that. *That is the prime and dominating pledge upon which Britain must act … in my opinion, the self-governing aspect, although important, is not superior but inferior to the prime obligation in the [Balfour] declaration …*[93]

In some ways Churchill came across at least as bullish on Zionism as Weizmann, especially regarding whether and when the Jewish national home in Palestine might someday mature into full-blown statehood. The following *in camera* exchanges between Lord Peel and Churchill, and between Lord Peel and Weizmann, are typical of Churchill's direct approach and Weizmann's caution about the issue of statehood.

We begin with Churchill:

> *Chairman*: Now we come to the meaning of the Jewish National Home … there are 400,000 Jews and a million Arabs and the fear is very intense on the part of the Arabs that the Jews coming in, if they come in at the same rate – and 60,000 came in the year 1935 – will, within a limited number of years, overtop the Arabs, and in that case, instead of being a Jewish Home, in Palestine, become a Jewish State … The point I am putting to you is – what is the conception you have formed yourself of the Jewish National Home?
>
> *Churchill*: The conception undoubtedly was that, if the absorptive capacity over a number of years and the breeding capacity over a number of years, all guided by the British Government, gave an increasing Jewish population, that population should not in any way be restricted from reaching a majority position. Certainly not. On the contrary, I think in the main that would be the spirit of the Balfour Declaration … we certainly committed ourselves to the idea that some day, somehow, far off in the future, subject to justice and economic convenience, there might well be a great Jewish State there, numbered by millions … We said there should be a Jewish Home in Palestine, but if more and more Jews gather to that Home and all is worked from age to age, from generation to generation, with justice and fair consideration to those displaced and so forth, certainly it was contemplated and intended that they might in the course of time become an overwhelmingly Jewish State.
>
> *Chairman*: Over the centuries?
>
> *Churchill*: Over the generations or the centuries. No one has ever said what is to be the rate at which it is to be done. The British Government is the judge and should keep the power to be the judge.[94]

Weizmann, for his part, took a far more circumspect approach when Lord Peel asked him about the prospect of Jewish statehood in Palestine:

Chairman: Could you try and assist me to make my mind quite clear on the subject? What is the difference between a Jewish National Home and a Jewish State? …

Weizmann: … We want a Jewish National Home in Palestine independently of whether the number of citizens in this National Home forms eventually a minority or a majority, and even if they were a majority Palestine would not become a Jewish national state.

Q: Even if they were in the majority?

A: Even if they were in the majority Palestine should not become a Jewish National state.

…

Q: That is your conception?

A: It is not a Jewish State but it is the next best.

Q: You would rather have the Jewish State?

A: No, nor do I suggest you would like to trip me up with the question … *If there is one day going to be a Jewish State it will only be when we are worthy of it and it may take hundreds of years.* At present I should be satisfied with a National Home in Palestine and to prove worthy of a Jewish State, if it has to come, in the fulness of time.[95]

Churchill was also asked whether, at the time he wrote the 1922 White Paper, when the Jewish population of Palestine was 80,000, "anyone envisaged the idea of there being by 1936, 400,000 Jews there?" Churchill's answer was characteristically candid: "Yes, certainly, I hoped for it."[96] At the same time, however, Churchill criticized the Jewish Agency's requirement that Jewish landowners hire only Jewish labor as "a mistake."[97]

Churchill also rejected one of the key Arab legal arguments, that Jewish immigration harmed the "position" of the Arabs, noting

> [w]hy is there harsh injustice done if people come in and make a livelihood for more and make the desert into palm groves and orange groves? Why is it injustice because there is more work and wealth for everybody? The injustice is when those who live in the country leave it to be a desert for thousands of years.[98]

Churchill made other comments that would be deemed unacceptable in modern-day western society, but reflected in many ways the still-prevailing colonial mentality of the mid-1930s. For example, near the end of his *in camera* testimony, Churchill was asked about the moral dilemma facing England in dealing with Arab violence in Palestine – whether to negotiate or use force. Churchill had already chastised the Mandatory Government earlier in his testimony for weakening the local gendarmerie, and then he added:

Chairman: Might I say there that it is not only a question of being strong enough, but she might have some compunction if she felt she was downing the Arabs year after year when they wanted to remain in their own country?

A: I do not admit that the dog in the manger has the final right to the manger, even though he may have lain there for a very long time. I do not admit that right. I do not admit, for

> instance, that a great wrong has been done to the Red Indians of America, or the black people of Australia. I do not admit that a wrong has been done to those people by the fact that a stronger race, a higher grade race, or at any rate, a more worldly-wise race, to put it that way, has come in and taken their place. I do not admit it. I do not think the Red Indians had any right to say, "The American Continent belongs to us and we are not going to have any of these European settlers coming in here." They had not the right, nor had they the power.[99]

Herbert Samuel testimony

Samuel served as the first British High Commissioner to Palestine from 1920–25. As a Jew, Samuel had always been regarded with suspicion by both sides. The Arabs viewed him as a closet Zionist, while the Zionists believed he tried too hard to prove he was fair and even-handed, often taking positions harmful to Zionist aims. A British General expressed sympathy with Samuel's plight in a June 1920 note to the Foreign Office, agreeing with those who predicted "[f]or the first six months, he will require a British bodyguard to protect him from the Moslem and Christian, after six months he will require a doubled British bodyguard to protect him from the Zionists."[100]

In public Samuel tried hard to steer a middle ground between the two sides. Behind the scenes, however, Samuel often advocated for Zionist interests. For example, in 1919–20 he pushed unsuccessfully to draw the boundaries of Palestine to encompass both sides of the Jordan River. Samuel also advocated for Palestine to receive water rights to the Litani River in southern Lebanon, to provide as much cultivable land and usable water as possible for the Jewish National Home.[101]

Samuel also tried to influence the Peel Commission from behind the scenes. On 3 August 1936, less than one week after the members of the Peel Commission were identified, Samuel wrote to Lord Peel regarding the McMahon-Hussein correspondence. Samuel said "it is of the first importance that this issue should be finally cleared up." Samuel enclosed a copy of a memorandum Gilbert Clayton had written to Samuel on 12 April 1923, which Samuel had requested after the former Foreign Secretary Lord Fallodon had made comments in the House of Lords casting doubt on the Churchill White paper's interpretation of the correspondence. Clayton said in his memorandum he had drafted McMahon's letters to Sherif Hussein, and therefore he could say with confidence those letters were never intended to include Palestine in the areas pledged for future Arab independence.[102]

Samuel also enclosed a copy of Feisal's 10 December 1919 letter to Samuel, in which Feisal had expressed sympathy for the Zionist cause.[103] Samuel sent the originals of both documents to the Peel Commission's Secretary, John M. Martin, on 7 September 1936.[104]

Samuel eventually testified *in camera* before the Commission on 5 March 1937. Samuel made the following comments in response to a question about the McMahon-Hussein correspondence:

> The Arabs feel that they have a grievance because they took part in the War, not particularly the Palestinian Arabs, but the Arab World generally, on the side of the Allies, and now they have been let down, because the Balfour Declaration cut across the McMahon promise. Well, I do not think that is true and if the Commission did feel it right to clear up this matter it would be, in my judgement, a useful service.[105]

Samuel then discussed his 3 August 1936 letter to Lord Peel, and read aloud the entire text of Clayton's 12 April 1923 memorandum. Samuel described Clayton's memorandum as "a document of importance."[106] Samuel said the reason for the "rather indirect terms" in McMahon's 24 October 1915 letter was "on account of the feelings of the French and the fact that the situation was not cleared up *vis a vis* the French, that it was not desirable in so many words to say 'Palestine west of the Jordan' and, therefore, they put it 'Districts west of the Damascus Jerusalem line.'"[107]

This explanation did not seem to satisfy the Commission. Samuel tried to convince them the McMahon letter made sense in the context of how Palestine was eventually divided along the Jordan River into two separate halves:

> Now Palestine east of the Jordan was clearly within the McMahon pledge and when the Jews complain, as they do complain, that I was a party to excluding Transjordan from the scope of the Balfour Declaration, my reason was solely that there was a pledge and it seemed to me as definite a pledge on one side as the Balfour Declaration was on the other side; and if the Jews claim that Britain is bound, as I think she is bound, to carry out the Balfour Declaration, they must admit that she is equally bound to carry out the McMahon pledge which applies to Transjordan.[108]

But this still did not satisfy the Commission:

> *Sir Laurie Hammond*: In your opinion, it was impossible for McMahon to have put it down in black and white that Palestine was excluded? It strikes the average man as being unfortunate?
>
> *A*: I do not know whether it was impossible or not, but he did not put it and apparently for those reasons, that the situation was so very delicate. It was previous to the Sykes-Picot Agreement, which itself was afterwards disallowed and never ratified, and I imagine that must have been the reason, but you see what Sir Gilbert Clayton says in his note.
>
> *Sir Harold Morris*: From the lawyer's point of view, it is not the intention of the writer; it is what the words actually mean; and you have always to look at it from the point of view of the recipient, and the recipients might well have been misled?
>
> *A*: I do not think so, because I think King Hussein and his sons quite clearly understood the position …
>
> *Q*: The difficulty in that is this. What was the position they understood? What did they think was going to happen in Palestine?
>
> *A*: They knew perfectly well that it was not to be included in the Arab domain.
>
> …
>
> *Chairman*: I can only say it is unfortunate, is it not, that in the McMahon statement [July 1922 letter to Shuckburgh] he says it was never the intention; he does not argue that the words mean what he says; he merely argues the intention, and exactly the same thing is said by Sir Gilbert Clayton …
>
> *A*: If I may say so, Sir Gilbert Clayton does not say that it was merely regarded, he says the introductory words of Sir Henry's letter "were thought at the time, perhaps erroneously,

clearly to cover that point."

Q: If you read the statement itself, there is ambiguity. There is no doubt about that?

A: Not if you take map, a Turkish map, and look at the districts as they were then …[109]

Samuel seemed determined, from the moment the Royal Commission was formed, to advocate against the Arab interpretation of the McMahon-Hussein correspondence. Whether he was motivated as a member of the House of Lords by the desire to uphold British honor, or as a Jew to help the Zionist cause is unclear. He remains something of an enigma.

David Lloyd George in camera testimony

Former Prime Minister David Lloyd George discussed the British Government's wartime motivation for issuing the Balfour Declaration. Lloyd George, testifying *in camera*, was also quite candid with the Commission, noting the Balfour Declaration was issued

> due to propagandist reasons … in 1917 the issue of the War was still very much in doubt … we had every reason at that time to believe that in both countries [the United States and Russia] the friendliness or hostility of the Jewish race might make a considerable difference.[110]

Lloyd George explained the Germans had been courting the Zionists, which made it more urgent for the British to win over the Jews by issuing the Balfour Declaration. He described how the British political parties largely supported the Balfour Declaration, even though at least one prominent Jewish Cabinet Minister, Edwin Montagu, opposed it.[111] Ultimately the Balfour Declaration achieved the strategic objective of obtaining Jewish support for the allied war effort. Britain, therefore, was honor-bound to fulfill its part of the bargain:

> The Zionist leaders gave us a definite promise that, if the Allies committed themselves to giving facilities for the establishment of a National Home for the Jews in Palestine, they would do their best to rally Jewish sentiment and support throughout the world to the allied cause. They kept their word, and the only question now seems to me to be whether we are going to honour ours.[112]

Lloyd George criticized the current British Government and the Mandatory Administration for not upholding its promises under the Balfour Declaration, in two respects: first, by failing

> to secure adequate protection for life and property to the Jews who, on the strength of our promise, have gone to Palestine to establish a home. This fact is in itself a deterrent to immigration. Who will emigrate to meet a massacre? A large number of the Zionist settlers and their women and children have been butchered.[113]

Second, argued Lloyd George, Britain had failed to keep its Balfour promise because it had "hesitated and vacillated" regarding Jewish immigration.[114]

Lord Peel asked Lloyd George about the possibility of the Jewish National Home someday evolving into a Jewish State. Lloyd George's answer was similar to Churchill's position, and like Churchill's position more definitive than Weizmann's:

> *Chairman*: Then you are quite clear and definite really that the promises made to the Jews, which you think this country ought to stand by, did cover certainly the possibility in a certain time of Palestine having a Jewish majority and becoming in a sense a Jewish state?

A: Yes.[115]

John Chancellor in camera testimony

Former High Commissioner for Palestine Sir John Chancellor also testified in secret. At one point during his testimony Chancellor expressed dismay at the Mufti's iron-clad grip on the Presidency of the Supreme Moslem Council, and then engaged in almost joking banter with the Commission about sending the Mufti into exile:

Sir Laurie Hammond: What about the Mufti?

A: The Mufti is quite untrustworthy. I once threatened him with a visit to the Seychelles.

Q: Did he respond?

A: He understood. He behaved fairly well while I was there. At any rate, I was not able to catch him out in making disloyal speech or hostile acts.

…

Q: Do you see much prospect of peace as long as he is in that position [as Head of the Supreme Moslem Council]?

A: No, I think a change of air to the Seychelles would not be a bad thing.

Q: Dr. Weizmann suggested a holiday in Cyprus.

Sir Horace Rumbold: That is much too close?

A: Yes. Seychelles is the place.[116]

Arab testimony and written submissions

Boustany monograph

In July 1936 W.F. Boustany, a Haifa-based writer, submitted a monograph to the Colonial Office containing a variety of arguments against the validity of the Balfour Declaration and the Mandate.[117] Boustany was not a lawyer, but he wrote the monograph in the form of a legal brief, reflecting and refining many of the concepts Auni Bey and others had been advancing since the mid-1920s. Boustany argued the Mandate was a "contrivance for [the] gradual creation of a Jewish State" in conflict with Article 22, and therefore Britain's recession from the Mandate would be "entirely justifiable, if not imperative."[118]

Foreshadowing the Mufti's and Auni Bey's testimony, Boustany further argued the Balfour Declaration and the Mandate, which were intended to benefit the "Jewish People," conflicted with the language of Article 22 of the Covenant of the League of Nations, which was intended solely for the benefit of the "communities formerly belonging to the Turkish Empire," which clearly did not apply to the global "Jewish People."[119] Moreover, by incorporating the Balfour

Declaration, the Mandate constituted a "prior obligation or understanding" inconsistent with Article 22 of the Covenant, and therefore was rendered null and void by Article 20's abrogation of all such prior inconsistent obligations.[120]

Boustany also argued the Balfour Declaration and the Mandate were invalid because they conflicted with the McMahon pledge to Sherif Hussein. Boustany first argued McMahon's 24 October 1915 letter to the Sherif included Palestine, inviting his readers to consult an Atlas:

> Get an atlas of your own out, if you like, to find out what are these portions of Syria. It is as easy as possible. Find Damascus first: it is the key place. There it is in the centre of Syria; roughly speaking, the French mandatory area is north, the British south. The French overlaps a little. Where is the next place, now Homs? North. Where is Hama? North again. Where is Aleppo? Northernmost of all. The four towns form a line, as it were, on the desert's edge. What are the excluded portions lying west of them? Approximately it is the country facing Cyprus, comprising the towns of Sidon, Beyrout, Tripoli, Latakia, Antioch as we go up towards Alexandretta, Mersina, and the rest of the excluded land. Where does Palestine lie? Where are Haifa, Nablus, Jaffa, Jerusalem, the cities and town of Palestine? South, south, far to the south.[121]

Boustany also criticized the Churchill White Paper's attempt to gloss over the geographic reality as having been "produced as from a conjurer's tall hat."[122]

Therefore, Boustany argued, Britain's subsequent pledge of Palestine (or even portions of it) to the Jews could not be legally valid:

> They [Arabs] claim that it [the Balfour Declaration] was a breach of faith for the British Government, having guaranteed Palestine as an independent State, subsequently to guarantee within it a "Jewish National Home," and they maintain with an exactness which cannot be questioned that such subsequent guarantee is null and void and that the Balfour Declaration has and has had absolutely no value nor binding force whatsoever, formerly, now, or hereafter.[123]

Arab Higher Committee Memorandum

On 11 January 1937 the Arab Higher Committee submitted a Memorandum to the Royal Commission focusing on the McMahon-Hussein correspondence and the British breach of McMahon's pledge of Palestine to the Arabs.[124] The Memorandum recapitulated the Arab arguments since the 1920s that McMahon's 24 October 1915 letter did not exclude Palestine from the areas promised to the Arabs. Instead, the Memorandum argued:

> These exclusions were only made to avoid a collision with the French interests in the western parts of Syria. France had no interests at that time save in the Lebanon … The excluded area comprised only those parts falling to the west of the Districts of Damascus, Hamah, Homs and Aleppo. Palestine, it is clear, does not fall to the west of any of those Districts.[125]

The following day the Mufti testified, and picked up where the Memorandum had concluded, listing his demands on behalf of all the Arabs of Palestine.

Haj Amin Al-Husseini public testimony

As earlier noted, the Arabs initially boycotted the Peel Commission and refused to produce any witnesses or evidence. Ultimately King Ibn Saud of Saudi Arabia prevailed upon the Mufti and other leading Palestinian Arabs to cooperate with the Royal Commission. Wauchope wrote a candid letter to Ormsby-Gore regarding the situation:

> You will have been glad to hear that the Arab leaders have, after many hesitations, decided to give evidence before the

> Royal Commission. As you know I urged this course at the start but it needed the influence of the Arab Kings to cause them to change their earlier and hasty decision. Their action offers one more example were any needed to show what difficult people they are to deal with …[126]

The Mufti appeared before the Commission at a public session on 12 January 1937.[127] Prior to his appearance, the Colonial Office debated whether the Royal Commission should provide the same courtesy to the Mufti as had the Shaw Commission, taking the Mufti's testimony at his residence. The Colonial Office rejected the idea, noting the greater importance and prestige of the Royal Commission outweighed any need to show deference to the Mufti.[128]

The Mufti spent a large portion of his public testimony before the Peel Commission, just as he had before the Shaw Commission, arguing Britain had promised Palestine to the Arabs in the McMahon-Hussein correspondence, and that both the Balfour Declaration and the Mandate were legally invalid.

The Mufti began by characterizing McMahon's 24 October 1915 letter to the Sherif Hussein as "the Treaty of 1915," under which Britain induced the Arabs to rebel against the Turks in exchange for independence. "[T]here is not the least doubt that Palestine was included in the pledges contained in that Treaty," the Mufti argued.[129] The Arabs joined the War pursuant to that "Treaty, which was acknowledged by British leading statesmen."[130] The Mufti noted General Allenby's proclamation of 7 November 1918 had made clear the British entered the war to liberate the Arabs from Turkish rule. The Mufti claimed Allenby had acknowledged in 1922 that his 1918 Proclamation included Palestine, prompting Lord Peel to interject "there is no record of it, is there?"[131]

The Mufti then argued, as he had before the Shaw Commission, that the Balfour Declaration was inconsistent with Articles 20 and 22 of the Covenant of the League of Nations and therefore was legally null and void. The Mufti argued Article 22 of the Covenant had recognized the principle of self-determination and independence for the *Arab* peoples liberated from the Ottoman Empire. Article 20 of the Covenant abrogated any and all prior inconsistent conventions or obligations. Because the Balfour Declaration was a prior obligation and was inconsistent with the Article 22 pledge of *Arab* independence throughout the former Ottoman lands (including Palestine), Article 20 rendered the Balfour Declaration null and void.[132]

The Mufti returned to this line of attack later in his testimony:

> It is a matter of surprise and grief to the Arabs to see Great Britain, which has extensive relations in the Moslem and Arab worlds, adhere to the Balfour Declaration which is null and void and utterly inequitable and illogical and fails to adhere to the repeated pledges which were given to the Arabs before and after the Balfour Declaration …[133]

Lord Peel noted, however, the express language of Article 20 abrogated only prior inconsistent obligations *inter se*, meaning *among Members* of the League of Nations. Thus, it could not have applied to the Balfour Declaration, which was a letter from the British Foreign Secretary *to a private citizen*, Lord Rothschild.[134] But the Mufti, who had studied law in Cairo, refused to budge from his legal position:

> In spirit, and as a matter of principle, the Covenant of the League of Nations aimed at or provided for self-determination and that every other principle which is inconsistent with such a principle of self-determination is to be considered as inconsistent with its terms … I wish to say that England and France agreed on the Balfour Declaration *after* [sic] this Covenant [of the League of Nations] in 1917, and, therefore, the second part of this Article [20] applies to that Declaration.[135]

This statement prompted Lord Peel to interject, “I do not know whether anything turns on this, but I think his Eminence’s dates are not quite right.”[136]

FIGURE 5.3 Haj Amin al-Husseini, Grand Mufti of Jerusalem, departing after his testimony (Matson Photograph Collection, Library of Congress).[139]

The Mufti alleged “Jewish pressure” on the British Government had caused Britain to make decisions regarding Palestine detrimental to the Arab population, prompting another interruption

from Lord Peel, who asked with more than a hint of sarcasm, "You do not credit the British Government with having a mind of its own then?"[137] Undeterred, the Mufti insisted "[w]hat I can see and my experience up till now shows that the Jews can do anything as far as Palestine is concerned … The Jews have great influence in England."[138]

The Mufti also reprised other Arab arguments to the Lofgren and Shaw Commissions, claiming "without the least doubt, the Jews' ultimate aim is the reconstruction of the Temple of King Solomon on the ruins of the *Haram esh Sharif*, the El Aqsa Mosque, and the Holy Dome of the Rock … "[140] The Mufti continued in the same vein:

> We are not saying that the Mandatory Power itself will ever interfere with the fabric or management of the Moslem shrines, but simply for the sake of argument, if the Jews were at one time to become a majority in this country, what would be the position of the Arabs when they know that the Jews have such intentions and desires? What can the Arabs do? Who could prevent the Jews from making such claims to Moslem shrines?[141]

The Mufti pressed the argument even further, arguing that even if Britain were still the Mandatory Power, once the Jews overtook the Arabs and became the majority population in Palestine, they would destroy the Muslim Holy sites and rebuild the Temple:

> *Chairman*: Do you think they [the Jews] would be able to persuade the Mandatory Power to destroy those Mosques and put up there a Jewish Temple?
>
> *A*: I know that they have already demolished Mosques in villages which were acquired by them.
>
> *Q*: Who have demolished them?
>
> *A*: The Jews have demolished Mosques in villages which were acquired by them, and I am prepared to give the names of the villages which were affected, and the Jews are still a minority in the country.
>
> *Q*: Might I repeat my question? It was whether his Eminence thinks that the Jews have such influence with the Mandatory Power that they would be able to persuade them to allow them to destroy the Mosque of *Al Aqsa*, I suppose, and have a Temple set up in its place?
>
> *A*: I do not imagine that the British Government will do that itself, but the people who have persuaded a great government like Great Britain to destroy the integrity of the Arab people in order to replace it by their own can easily do that.
>
> …
>
> *Q*: I only want to be quite clear. You think it could be done or would be done by the Jews even though Great Britain was still the Mandatory Power?
>
> *A*: When they become the majority in the country they can have many such influences.
>
> *Professor Coupland*: The suggestion is that, although the British Government would still be the Mandatory and still, therefore, in control and still be bound by those articles of the Mandate, the power of the Jews would somehow impel the British Government to allow the desecration or removal of the Moslem sacred shrines? Is that the suggestion?

A: I would like to answer you quite frankly. If this question had been put to me a few years ago I would have said definitely "No," but if I were to say "No" now I would not be true to myself, because according to my information and experience I know that the Jews have great influence in England.

Q: So the answer is "Yes"?

A: As far as the consequences are concerned, the answer is "Yes," the ultimate answer is "Yes."[142]

Near the end of his public testimony the Mufti made four demands: first, Britain must abandon "the experiment" of the Jewish National Home; second, Jewish immigration to Palestine must be halted immediately and completely; third, land sales to Jews must cease immediately and be completely prohibited; and fourth, the Mandate must be terminated and independence granted to the Arabs of Palestine.[143] The Mufti added:

> The policy of establishing a National Home for the Jews in this country must inevitably lead to continued anxiety and disturbances and will make of the Holy Land which of all countries in the world should enjoy peace and tranquility the permanent scene of disorders.[144]

The Mufti concluded with several observations, one of which evidently helped persuade the Commission to recommend partition, even though that was not what the Mufti seemed to have mind. The Mufti said, "[i]t is impossible to place two distinct peoples, who differ from each other in every sphere of life, in one and the same country."[145] For his final comment to the Royal Commission, the Mufti argued the Arabs of Palestine had been better off under Turkish rule, and that Britain should consider reverting Palestine to the Turks.[146]

Auni Bey Abdul Hadi public testimony

Auni Bey, by now out of detention, testified twice in public before the Peel Commission. Prior to testifying, Auni Bey sent a letter to the Commission laying out his argument for an immediate halt to Jewish immigration, as "[t]he cup has overflown and the country, in its present condition, cannot absorb one additional Jewish immigrant."[147]

Auni Bey's first appearance before the Commission came the day after the Mufti had testified. He began by noting the ambiguous nature of the concept of a "National Home for the Jewish People" as used in the Balfour Declaration. He criticized the various official British Government explanations of the concept as providing little or no meaningful clarity. For example, Auni Bey criticized the Churchill White Paper for its circular reasoning:

> All that we understand from that interpretation is that it defines the National Home and it defines it as a home, in the same way as if we want to describe water and we say it is water. When the National Home is defined, it is defined as meaning that the Jews should be enabled to found here their home. It is no more than describing water that it is water.[148]

Auni Bey then argued the Balfour Declaration was illegal, and therefore the Mandate should be rendered null and void, for two reasons. First, the Balfour Declaration should not be viewed as lawful, because "no nation in the world can be allowed to dispose of another nation's property."[149] The British Government had no right, "legally or morally, in assigning a property or possession which is not its own."[150] The Balfour Declaration was "not based on any right," but instead was "based on force and the power of the sword."[151]

Second, Auni Bey continued the same line of argument as the Mufti, claiming the Mandate should also be nullified as a matter of law because it conflicted with Article 22 of the Covenant of the League of Nations. Auni Bey argued the Mandate constituted an "agreement" between Britain and the Principal Allied Powers. Because the Mandate was an "agreement," it was voidable if it conflicted with the second clause of the first paragraph of Article 20 of the Covenant:

> The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and *solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof*.[152]

Auni Bey argued the italicized language in Article 20 rendered the Mandate null and void, because the Mandate was an "agreement" (i.e. an "engagement"), and that agreement or engagement was inconsistent with the following language of Article 22 of the Covenant:

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where 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.[153]

According to Auni Bey, the reference to "certain communities" could only have meant the indigenous Palestinian Arabs, not the global "Jewish people" referred to in the Balfour Declaration and the Mandate.[154]

Therefore, the Balfour Declaration, which promised a National Home for the "Jewish People," no matter where in the world they had resided during the Ottoman era, was rendered void by virtue of the contradictory language in the Covenant, which limited the Article 22 beneficiaries

solely to those communities formerly belonging to the Turkish Empire, and thus did *not* apply to European, American, and other foreign Jews.[155] Auni Bey therefore urged the Mandate should be "abolished altogether … and replaced with a treaty" between Britain and the Palestinian Arabs.[156]

In his final appearance before the Commission, Auni Bey reiterated the Arab attack on the legality of the Balfour Declaration, based on the conflict between the Balfour Declaration and the McMahon-Hussein correspondence. Auni Bey argued the reference in McMahon's 24 October 1915 letter to areas west of Damascus, Homs, Hama, and Aleppo meant "Lebanon and not Palestine at all." Auni Bey further noted:

> The boundaries were the Red Sea and the Mediterranean Sea, and those boundaries were never changed. The only boundaries which were changed were those affecting Homs and Hama. If Palestine had been included [sic, should be "not been included"] within those boundaries, naturally the boundary would have been the Jordan and not the Red Sea and the Mediterranean.[157]

Auni Bey then addressed the British argument that McMahon's reference to the non-existent "District of Damascus" in his 24 October 1915 letter should be interpreted to mean the actual *Vilayet* of Syria:

> It has been stated by some British statesmen that Damascus meant or was taken to mean the district of Damascus, the vilayet of Damascus. There was no such thing as the vilayet of Damascus under the Ottoman regime. There was the vilayet of Syria, and now it is contended that the word Damascus or the vilayet of Damascus included all of Syria. That could not be the case, because, in fact, Homs and Hama at that time formed part of the vilayet of Syria. If the intention was that Damascus should be meant, and the vilayet of Syria, which existed at that time in the Ottoman regime, then no special reference would have been made to Homs and Hama.[158]

Finally, regarding the general reservation in favor of French interests in McMahon's 24 October 1915 letter, Auni Bey simply asserted "France never put in any claim to Palestine."[159]

Later that day Auni Bey made the argument, for the first time in public by any Palestinian – and an argument some Muslim lawyers and politicians have sometimes repeated to this day,[160] even after the Holocaust – equating the plight of the German Jews as of early 1937 with the Palestinian Arabs. Commissioner Rumbold seemed taken aback by the claim:

> *Sir Horace Rumbold*: Are you taking a leaf out of Germany's book?
>
> *A*: It is different here. The case here is the contrary. Here we are in the same position as the Jews in Germany.
>
> *Q*: How do you make that out?
>
> *A*: The Jews are being driven out of the land upon which they lived for centuries and they are losing their existence, but the policy which is being adopted here will culminate in destroying our national existence here.
>
> *Q*: You compare yourselves, in fact, to the Jews in Germany?
>
> *A*: We are in an even worse position. There their personal rights are affected, but here the national rights of a people are affected.[161]

Near the end of his testimony the Commission asked Auni Bey if he would be willing, for the

sake of peace, to sit down at a British Government-organized roundtable conference with the British and Jewish sides. Auni Bey's answer left no room for doubt: "The Arabs do not admit the existence of the Jews as Zionists at all … *we utterly refuse to meet at the same table with any persons who call themselves Zionist Jews*."[162]

Auni Bey concluded his testimony on a blunt, ominous note:

> No friendship can ever be maintained between the Arabs and the Jews so long as the Zionist policy exists … Every Arab in Palestine will do everything possible in his power to crush down that Zionism, because Zionism and Arabism can never be united together … the Arabs of Palestine consider this country as their own land and, as such, they cannot give up even one metre of it.[163]

Auni Bey followed up his testimony with a letter to the Royal Commission, dated 20 January 1937. The letter focused on the McMahon-Hussein correspondence, attaching a lengthy memorandum Auni Bey had prepared, along with accompanying exhibits. "[A] thorough study of these documents," Auni Bey wrote, "supports the claim of the Arabs that Palestine was never intended to be excluded from the frontiers of the Arab countries as set out in the letters of Sir Henry McMahon."[164]

George Antonius public testimony

Antonius spent a considerable portion of his testimony arguing Palestine had always been part of Syria, and detaching Palestine (or a portion of it) for a Jewish National Home ignored the reality that "Palestine has always been an integral part of Syria and that what was common to Syria was common to Palestine."[165] It seems highly doubtful any Palestinian leader would make such an argument today.

Jamal Husseini public testimony

Husseini, the plaintiff in the 1925 postage stamp case[166] and the leader of the Arab delegation who attended the 22 August 1929 meeting at Luke's house to try to reach a compromise over the Wailing Wall, and who subsequently testified before the Lofgren Commission, added his own gloss to Auni Bey's legal arguments against the validity of the Balfour Declaration and the Mandate:

> [T]he two basic principles of Article 22 of the Covenant have not been carried out, namely, the granting to the Arab nation released from Turkish rule of provisional independence, and the principle that the well-being and development of the people of the land should be the basis upon which the Mandate of Palestine is to be founded. I say that the Mandate is really a flagrant violation of the provisions of the Covenant and it should be abolished and the Balfour Declaration revoked …[167]

Abdul Latif Bey Salah written submission

Following the completion of the hearings in Jerusalem, an Arab lawyer named Abdul Latif Bey Salah, President of the National Block, sent his own memorandum to the Royal Commission, reiterating Auni Bey's argument that the Mandate was legally invalid because it conflicted with Articles 20 and 22 of the Covenant of the League of Nations.[168] Latif Bey further argued the guarantee of "civil" rights under Articles 2 and 6 of the Mandate also covered Arabs' political

rights. He argued the word "position" in Article 6 required the Mandatory to place the Palestinian Arabs in a *better* position than they occupied under Turkish rule. Finally, he argued the purpose behind the Jewish National Home simply

> refers to the rights of the Jews to consider Palestine as a centre for them … a community of Jews whose presence would not prejudice the Arab interests, so that when this community settles in this centre the establishment of a national home would be completed. This indeed was done long before the disturbances of 1929.[169]

Emir Abdullah written submission

In early March 1937 the Emir Abdullah of Transjordan hand-delivered to Lord Peel in Amman a memorandum arguing the Balfour Declaration was unlawful because it conflicted both with McMahon's prior pledges to his father, the Sherif, and with subsequent Anglo-French pledges to the Arabs.[170]

Abdullah submitted another memorandum to the Commission in July 1937, reiterating his position that McMahon had promised Palestine to his father, the Sherif of Mecca.[172]

Jewish testimony and written submission

Jewish Agency Memorandum[173]

As noted, the Jewish Agency submitted Leonard Stein's nearly 300-page, highly legalistic "pre-trial" Memorandum to the Royal Commission on 22 November 1936. The Memorandum addressed, among other things, the legal issues involving the validity of the Balfour Declaration and the Mandate, as well as Arab fears regarding alleged Jewish designs on the *Haram al-Sharif*.

Regarding the McMahon-Hussein correspondence and the legality of the Balfour Declaration and the Mandate, the Memorandum quoted the many prior official British Government statements denying McMahon had intended to include Palestine within the pledged areas for Arab independence. Stein noted how "improbable" it would have been for Britain to have "by a stroke of the pen, have put Palestine at the disposal of the Sherif …"[174] Stein also noted the correspondence took place between McMahon and the Sherif of Mecca, *not* the Palestinians, who had no basis to claim they were the intended third party beneficiaries of the pledges made to the Sherif, especially given both the Sherif's and Feisal's early positive comments about Jewish settlement in Palestine.[175]

FIGURE 5.4 Lord Peel, Sir Horace Rumbold, and Prof. Reginald Coupland with the Emir Abdullah, January 1937 (Matson Photograph Collection, Library of Congress).[171]

The Memorandum also addressed Auni Bey's anticipated argument regarding the alleged conflict between the Balfour Declaration and the Mandate with Articles 20 and 22 of the Covenant of the League of Nations. The Memorandum first addressed the language in Article 22

that “the wishes of those communities [formerly under Turkish rule] must be a principal consideration in the selection of the Mandatory,” and the Arab claim that because the Palestinian Arabs had not been consulted regarding the selection of Britain as the Mandatory Power, the Mandate was invalid. The Memorandum noted the Jews had sought legal advice in 1921 from Sir William Finlay, who opined the language was not applicable to Palestine, and even if it did, the wishes of the local community were merely *a* and not *the* principal consideration.[176]

Regarding the conflict between the “certain communities formerly belonging to the Turkish Empire” language of Article 22 and the Mandate’s requirement to establish a homeland for the Jewish people, the Memorandum argued:

> If, however, the strict construction of the Article … is to be pressed, it may be observed that the “certain communities” mentioned in paragraph 4 are not specified, and are not necessarily to be taken, as a matter of course, to include Palestine; indeed, it is well arguable, if the Article is to be read literally, that the use of the words “certain communities” indicates that not all communities formerly belonging to the Turkish Empire, and detached from it as a result of the War, were intended to be included, and that had this been meant, it would have been easy to say “the communities formerly belonging to the Turkish Empire …” [177]

Stein also argued Article 22 was not drafted as a legal document, but instead as a political statement, meaning “it is not a code couched in the language of legal precision, and is not to be taken as dealing exhaustively with every possible application of the mandatory system.”[178]

FIGURE 5.5 Chaim Weizmann arriving for his testimony

(Matson Photograph Collection, Library of Congress).[179]

Chaim Weizmann public testimony

Notwithstanding the Jewish Agency's comprehensive memorandum, the bulk of the Jewish case was presented through Chaim Weizmann, who testified once in public and four times *in camera*, making him by far the most prolific witness the Commission heard.

Weizmann's testimony showcased his considerable skills as an advocate for the Zionist cause and more importantly as a diplomat who ingeniously positioned the Jews as the far more reasonable party in the conflict over Palestine. For all his mistakes in micro-managing the Shaw Commission and selecting the wrong legal team to represent the Jewish side in that trial, Weizmann's brilliant and eloquent performance before the Peel Commission in many ways saved Zionism.

During his public testimony, Weizmann made a passionate appeal to the Commission on behalf of Zionism:

> [There has not been] a single century in the nineteen centuries which has passed since the destruction of Palestine as a Jewish political entity, not one single century in which the Jews did not attempt to come back … when the material props of the Jewish Commonwealth were destroyed, the Jews carried Palestine in their hearts and in their heads wherever they went.[180]

Weizmann then made a prescient comment about the danger facing European Jewry:

> [I]t is no exaggeration on my part to say that to-day almost six million Jews … there are in this part of the world six million people doomed to be pent up in places where they are not wanted, and for whom the world is divided into places where they cannot live, and places into which they cannot enter.[181]

Weizmann denied the Balfour Declaration, which he called the "Magna Carta of the Jewish people," had been a cynical wartime British ploy to win over wealthy Jewish support for the British side during the War. The "rich Jews, or what are called the rich Jews, at that time in an overwhelming majority, were definitely opposed to the Balfour Declaration."[182] Weizmann explained the Balfour Declaration's Promise of a "National Home" meant "'national,' meaning that we should be able to live like a nation in Palestine; 'home' in contradistinction to living in sufferance everywhere else."[183]

Weizmann then described his 1919 meeting with Feisal, characterizing his written agreement with Feisal in language mirroring the Mufti's characterization of the McMahon-Hussein correspondence:

> [W]e found ourselves in complete agreement, and this was the beginning of a lifelong friendship and our relationship was expressed in a treaty – perhaps treaty is too ambitious a word, I was not a contracting party; but in a document whose moral value cannot be contested.[184]

Moments later, however, Weizmann insisted Feisal's letter was a "treaty … *I actually signed a treaty*."[185]

Weizmann in camera testimony

Weizmann testified in secret four times before the Commission. During Weizmann's first *in camera* appearance the Commissioners tried to extract an admission that the project of creating a National Home in Palestine for the Jewish People had been completed as of November 1936:

> *Chairman*: You mean there is now a Jewish Home in Palestine; is that what you mean?
>
> *A*: There is certainly the beginnings and the foundations of the Jewish Home … If we are kept in a state of permanent minority then it is not a National Home, it may become a death trap.

…

Sir Horace Rumbold: Perhaps it is a speculative question, but could you give us any indication as to what in your mind constitutes the completion of the development of a National Home?

A: Sir Horace, never.

Q: You never could do it?

A: It is *never* finished. England has never been built up finally …[186]

Interestingly, this line of questioning (and Weizmann's answers) closely mirrored the cat-and-mouse game during the cross-examination of Harry Sacher conducted by the Arab Executive's counsel, William Stoker, during the Shaw Commission hearings:

Stoker: Your view is that the Jewish National Home has not yet been established; it is in process of establishment?

Sacher: It is in process of being established.

Q: When in your opinion will it be finally established? What is your opinion as regards that?

A: I regard the connection, the historic connection between the Jews and Palestine as a continuing process. It is something which never ends …

…

Q: And the Jewish home would never be completely established, but would always be in process of being established; is that your view?

A: That is my view.

…

Q: That this establishment of the Jewish National Home should continue on for ever with the British Government carrying on the Mandate?

A: I have never discussed the particular point with my colleagues as to whether the Mandate is to be permanent, but that is my view.

Q: Supposing that the Jewish population, in the course of the establishment of this home, exceeded the Arab population by being double or treble their number, would you think the time was ripe for establishing a Jewish State?

A: Really you are asking me what I should think at some remote speculative time at which I shall not be living.

…

Q: Your view is that, whatever development this Jewish National Home may attain and whatever may be its numbers in comparison with the numbers of other people in this country, the Mandate should go on indefinitely?

A: I think this is in the best interests of everybody.

Q: And no Jewish State ever be established?

A: That is my view, yes.[187]

Weizmann had several interesting exchanges with the Commission regarding the role of the law in addressing the problems the Commission was investigating. During his first *in camera* appearance before the Commission, Weizmann repeated the 1922 Churchill White Paper's statement that the Jews are in Palestine "as of right and not on sufferance," prompting Lord Peel to reply "the difficulty in all these things is I do not feel all these legal arguments lead us very far."[188]

During his fourth and final *in camera* appearance before the Commission on 8 January 1937, Weizmann and the Commission had an exchange about the potential role of the Permanent International Court of Justice. Weizmann started the discussion when, in answer to a different question, he noted:

> The final authoritative interpreter of the Mandate is really the Court at the Hague. It is woven into the fabric of international law. Not that I am anxious that anybody should be dragged to the Hague, but some day an authoritative interpretation which is accepted for the time being, for a period or some years, ought to be given.[189]

Finally and most importantly, the Commission asked Weizmann during his final appearance for his reaction to the potential recommendation the Commission was contemplating; namely, partitioning Palestine into *separate* Jewish and Arab states. The following exchange represented the first-ever airing, albeit in a secret, *in camera* session, of the possibility of what today has come to be known as the two-state solution for Palestine:

Chairman: Do you think there would be much chance of any response from the Arabs if we put it [the partition proposal] before them?

A: I would never cease to try. After all, the Arab world does not begin and does not end with the Mufti, and I venture to say that if the Mufti had been sent on a holiday to Cyprus things might have gone quite differently; not that I am anxious that it should be done, but I think things might have gone quite differently. To revert for a moment to this proposal of Professor Coupland's, let me think on it. I would not like to close the door on any proposal which is brought forward with the authority of the Commission.

Professor Coupland: It is only one of several proposals we thought we ought to examine. I am not quite sure that you have the proposal quite clearly in your mind … but the idea that, if there were no other way out to peace, might it not be a final and peaceful settlement – to terminate the Mandate by agreement and split Palestine into two halves, the plain being an independent Jewish State, as independent as Belgium with treaty relations with Great Britain – whatever arrangements you like with us – and the rest of Palestine, plus Transjordania, being an independent Arab State, as independent as Arabia. That is the

ultimate idea.

…

A: Permit me not to give a definite answer now. *Let me think on it*.[190]

Eleven days after his last appearance before the Royal Commission, Weizmann sent a long letter to Lord Peel supplementing his *in camera* testimony.[191] Weizmann by now had reflected on the partition proposal, and offered his first official reaction:

> All I can say on this subject … is that any scheme of dividing Palestine into predominantly Jewish and predominantly Arab territorial units, and of closing the latter to Jewish immigration and settlement, could not but be regarded by the Jewish Agency as an infringement of the Mandate. So far as the Jewish national home is concerned the Mandated territory of Palestine has already been largely reduced by the exclusion of Transjordan … The Jewish people cannot regard the cantonisation proposal as other than a design for the gradual and continuous liquidation of the Jewish national home.[192]

As we will see, Weizmann privately viewed the partition proposal far more favorably.

David Ben-Gurion public testimony

David Ben-Gurion, the future first Prime Minister of Israel, testified both publicly and *in camera* before the Commission on 7 January 1937. During his public testimony Ben-Gurion first noted the Jewish claim to Palestine derived from the Bible, not the Balfour Declaration:

> [T]he Bible is our Mandate, the Bible which was written by us, in our own language, in Hebrew, in this very country. That is our Mandate. Our right is as old as the Jewish people. It was only the recognition of this right that was expressed in the Balfour Declaration and the Mandate.[193]

When asked about Jewish statehood in Palestine, Ben-Gurion, like Weizmann, also exercised caution. Ben-Gurion, who twelve years later would become Israel's first Prime Minister, explained statehood was *not* the goal of Zionism, and that he would prefer the Jewish National Home in Palestine become part of the British Commonwealth rather than a separate state. Ben-Gurion explained, "there are other inhabitants in Palestine who are here and, as we do not want to be at the mercy of others, they have a right not to be at the mercy of the Jews."[194]

Finally, Ben-Gurion denied any Jewish designs on the Muslim Holy Places. In fact, and perhaps in light of the outcome of both the Shaw and Lofgren proceedings, he called for the international community to take charge of *all* the Holy Places in Palestine (including presumably the Wailing Wall), as

> it is *not* in our interest that we should be made responsible for them. We recognize that they should be placed under a higher supervision, under some international control or a mandatory or some other international body, as is laid down in the Mandate.[195]

Ben-Gurion in camera testimony

At the conclusion of his public testimony Ben-Gurion asked to continue testifying in secret. During the *in camera* session he informed the Commission of ongoing, secret Jewish–Arab contacts and negotiations. Ben-Gurion disclosed he and Moshe Shertok had met with Auni Bey to try to convince him to accept the inevitability of Jewish settlement in Palestine, and to realize

the Arabs could benefit from Jewish know-how in agriculture, irrigation, and other fields. Ben-Gurion told Auni Bey the Jews desired to maintain close ties with Great Britain and to bring European culture to Palestine, but Auni Bey saw "no basis" for further negotiations.[196]

Testimony of Jewish lawyers

Several Jewish lawyers testified before the Commission on a wide variety of legal issues. Dr. Mordechai Eliash, the lead counsel for the Jewish side in the Lofgren hearings, testified regarding the jurisdiction and functioning of the Rabbinical Courts.[197] Most of the Jewish legal testimony, however, came from two other lawyers: Leonard Stein, who had taken the lead in drafting the Jewish Agency Memorandum submitted to the Commission prior to the start of the hearings, and Solomon Horowitz, a British-born lawyer who had been practicing law in Palestine since 1922, and who had also testified before the Shaw Commission.

Stein and Horowitz testified separately and on one occasion jointly before the Commission. During their joint appearance Stein argued the "double duty" in the Balfour Declaration and the Mandate involved obligations "of equal weight, but they are different in character." Stein argued the obligation to establish a Jewish National Home in Palestine was a positive, active obligation, whereas the obligation not to prejudice the rights of the existing non-Jewish communities was a negative, passive obligation.[198] Stein noted that although the Balfour Declaration had not been drafted as a legal document, it later became vested with legal force once it was incorporated into the Mandate.[199]

Stein then focused on the clause in the Balfour Declaration referring to the "civil and religious rights of existing non-Jewish communities," arguing "communities" meant religious communities (Christian and Muslim), and "existing" meant as of 2 November 1917, the date the Balfour Declaration was issued.[200]

Stein then began discussing his legal interpretation of the Mandate, and almost immediately became embroiled in a quarrel with Commissioner Rumbold, who was himself a highly regarded lawyer:

> *Sir Horace Rumbold*: Let us have a word about the mandate. You spoke about a lawyer's interpretation just now and you will not be surprised that that appealed to me. Is it the first canon of construction to a lawyer to give the words their ordinary and natural significance?
>
> *A*: May I just at this point say I think it might be better if any legal discussion was conducted in the way legal discussions are usually conducted. A point is stated and when stated I shall do my best to deal with it. I do not think one can develop an argument in this way, taking it step by step …
>
> *Chairman*: I cannot conduct matters in this way. You had no right to say "Will you develop your point" to a member of the Commission. If you are asked questions you must answer them, not ask members of the Commission to develop their points.
>
> *A*: I must reserve my answer until I have heard the whole point developed.
>
> *Q*: It is not a question of developing a point. We can ask questions if we choose, if we want to ask questions, and it is the way in which Royal Commissions or any sort of enquiry is

conducted. If you are not quite sure whether you would like to answer the question, because you do not see where it is leading, you are entitled to say "I cannot or do not want to answer," but you are not entitled to ask one of the Commissioners to develop his point or thesis before you answer the question.

A: Until I see where a question is leading I prefer not to answer it … If a legal point is put to me and clearly put I can do my best to deal with it, but if I am asked to deal with metaphysical abstractions hanging in the air I cannot deal with them.[201]

Stein testified again several days later. The Commission asked whether the Mandatory had the legal power under the Mandate to cantonize/partition Palestine, and Stein said it did not.[202] Stein also opined the Mandate could last permanently, saying "it has always been contemplated that the Mandate would be one of infinite duration."[203] He also said he had "no doubt" the Balfour Declaration contemplated a Jewish State in Palestine.[204]

But near the end of his testimony – his final appearance before the Commission as the lead counsel for the Jewish Agency – Stein once again (just as Merriman had done at the conclusion of his closing argument before the Shaw Commission) needlessly clashed with the Commission, after they had grown tired of his long-winded answers to their questions:

Q: … I am putting to you what I suggest are the civil rights. You can say "yes" or "no" to it. I suggest to you that if the Jews came in in such vast numbers that there was a large amount of unemployment in the existing non-Jewish communities, that would prejudice their civil rights. You can say "yes" or "no" to that?

A: I am not going to answer either "yes" or "no" but to develop my answer in a reasonable way, and my answer to that question would be this.

Q: Mr. Stein, have you ever spoken like that to a judge of the High Court?

A: No sir, nor, on the contrary, have I ever been addressed in the High Court in such terms.

…

Q: Do you suggest there are no rules here?

A: There are rules here.

Q: Certainly, but you are contrasting us in that unfavourable manner with the High Court?

A: I am sorry that sometimes the contrast suggests itself to a most unwilling mind.

Q: I do not think that is a very polite observation.

A: I am very sorry, Sir, that I should have said something discourteous, but I must say, as the point has been raised, that I have observed, and I observed it much more strongly last time, that there is a marked contrast between the procedure to which I am accustomed in the Courts and the procedure which prevails here.

Q: If you are going to argue in that way I think we had better not go on with the

sitting …[205]

Stein's needlessly combative tone with the Commission could not have helped the cause of his client.

Vladimir Jabotinsky public testimony

The final Jewish witness to testify in public was Vladimir (Zev) Jabotinsky, leader of the New Zion (Revisionist) Party, who appeared before the Royal Commission in London on 11 February 1937.[206] Jabotinsky made perhaps the most forceful presentation of any witness for the Jewish side. He was far more blunt and direct in his testimony than Weizmann, but he avoided provoking the Commission as had Stein.

Jabotinsky's primary contention was that Jewish immigration to Palestine benefited the Arabs, and that Britain should open Transjordan for Jewish settlement to extend those benefits to the Arab communities on both sides of the Jordan River:

> … Palestine on both sides of the Jordan should hold their Arabs, their progeny, and many millions of Jews. What I do not deny is that in that process the Arabs of Palestine will necessarily become a minority in the country of Palestine. What I do deny is that that is a hardship … No tribunal has ever had the luck of trying a case where all the justice was on the side of one party and the other party had no case whatsoever. Usually in human affairs any tribunal, including this tribunal, in trying two cases has to concede that both sides have a case on their side, and, in order to do justice, they must take into consideration what should constitute the basic justification of all human demands – the decisive terrible balance of need.[207]

Jabotinsky later sent two memoranda to the Commission elaborating on his testimony. In the first written submission, Jabotinsky claimed the phrase "in Palestine," as used in the Balfour Declaration and repeated several times in the various articles of the Mandate, "is so obviously meant to cover the whole of the country that it would be inconceivable to suggest any other interpretation."[208]

The royal commission report and reactions

The Royal Commission's Report was dated 22 June 1937, and it was made public on 7 July 1937.[209] The British Government simultaneously issued an official Communique indicating the Government was "in general agreement with the arguments and conclusions of the Commission."[210]

The Royal Commission's 400-page Report represented by far the most thorough examination ever undertaken of the situation in Mandatory Palestine. Weizmann praised the Report as "the most searching and painstaking of all official enquiries from which Palestine has suffered since the War."[211]

"Deadlock" in Palestine

The Report first addressed the Arab claim that McMahon's 24 October 1915 letter to Sherif Hussein included Palestine within the future area of Arab independence. Prior to the issuance of the Report, the British Cabinet met to consider Lord Peel's request to quote portions of the

McMahon-Hussein correspondence, which had never officially been made public. The Secretary of State for the Colonies recommended granting permission, as "it was high time that a more authoritative statement than had yet been published should be made on this matter, which was the basis of the Arab claim."[212] The Secretary of State for India noted the fears of a backlash amongst the Muslim population in India[213] had subsided, as he had "discreetly consulted certain Moslem friends who were in London for the coronation" and they "had not thought any considerable difficulties would be raised."[214] On that basis the Cabinet approved Lord Peel's request.

While acknowledging a detailed examination of the history of the McMahon-Hussein correspondence was beyond the scope of its Terms of Reference, the Commission said "[w]e think it sufficient for the purposes of this Report to state that the British Government have never accepted the Arab case."[215] But the Report went further:

> It was in the highest degree unfortunate that, in the exigencies of war, the British Government was unable to make their intention clear to the Sherif. Palestine, it will have been noticed, was not expressly mentioned in Sir Henry McMahon's letter of the 24th October 1915. Nor was any later reference made to it. In the further correspondence between Sir Henry McMahon and the Sherif the only areas relevant to the present discussion which were mentioned were the Vilayets of Aleppo and Beirut. The Sherif asserted that these Vilayets were purely Arab; and, when Sir Henry McMahon pointed out that French interests were involved, he replied that, while he did not recede from his full claims in the north, he did not wish to injure the alliance between Britain and France and would ask "for what we now leave to France and Beirut and its coasts" till after the War. There was not more bargaining over boundaries.[216]

Having dealt with the McMahon-Hussein issue, the Report addressed comprehensively the Balfour Declaration, the Mandate, land and immigration, education and public health, and a broad range of other issues. Regarding the Balfour Declaration, the Report pointedly noted, quoting Lloyd George's *in camera* testimony, the strategic importance of the Declaration to the Allied war victory, and the benefits that victory brought to the Arabs:

> The Arabs do not appear to realize in the first place that the general position of the Arab world as a whole is mainly due to the great sacrifices made by the Allied and Associated Powers in the War and secondly, that, in so far as the Balfour Declaration helped to bring about the Allies' victory, it helped to bring about the emancipation of all the Arab countries from Turkish rule. If the Turks and Germans had won the War, it is improbable that all the Arab countries, except Palestine, would now have become or about to become independent States.[217]

The Report also explained, however, how the Arabs perceived the Balfour Declaration as a breach of McMahon's prior commitments to the Sherif of Mecca, and therefore the Arabs considered the Balfour Declaration and those portions of the Mandate implementing the Balfour Declaration as null and void.

The Report further addressed the Arab claims regarding the conflict between the Balfour Declaration and Article 22 of the Covenant of the League of Nations. The Report noted the language of the fourth paragraph of Article 22, provisionally recognizing "certain communities formerly belonging to the Turkish Empire" as prime candidates for early independence should be read merely as permitting, but not *requiring* independence for all such communities. Moreover, the Report pointed to other language in Article 22 vesting broad authority in the League of Nations to define the degree of authority to be vested in the Mandatory Power.

Finally, the Report noted the fundamental differences between the Palestine Mandate and the mandates for Iraq and Syria. The Report concluded this issue by noting the "double-duty" imposed "equally binding" obligations on Britain, but "[u]nquestionably, however, the primary purpose of the Mandate, as expressed in its preamble and its articles, is to promote the

establishment of the Jewish National Home."[218]

The Report also expressed sympathy with the Palestine Government's difficulty in administering the provisions of the Mandate:

> We doubt whether there is any country in the world where the position of the Government is less enviable than that of the Government of Palestine, poised as it is above two irreconcilable communities, compelled to follow a path between them *marked out by an elaborate, but not very lucid, legal instrument*, watched at every step it takes by both contending parties inside the country and watched from outside by experienced critics on the Permanent Mandates Commission and by multitudes of Jews throughout the world.[219]

The Report concluded the underlying causes of the 1936 violence were Arab nationalism and Arab resistance to the establishment of a Jewish National Home in Palestine, as well as Arab fears of the Jews eventually overtaking them as the majority population. The Commission found all attempts to reconcile the Arab and Jewish sides had failed, and therefore "[t]he situation in Palestine has reached a deadlock."[220]

"Drastic proposals"

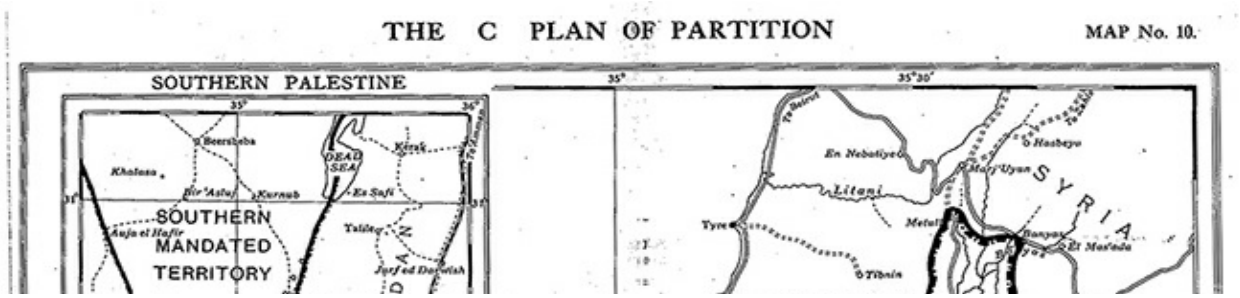
The Commission decided, therefore, it needed to offer "drastic" proposals.[221]

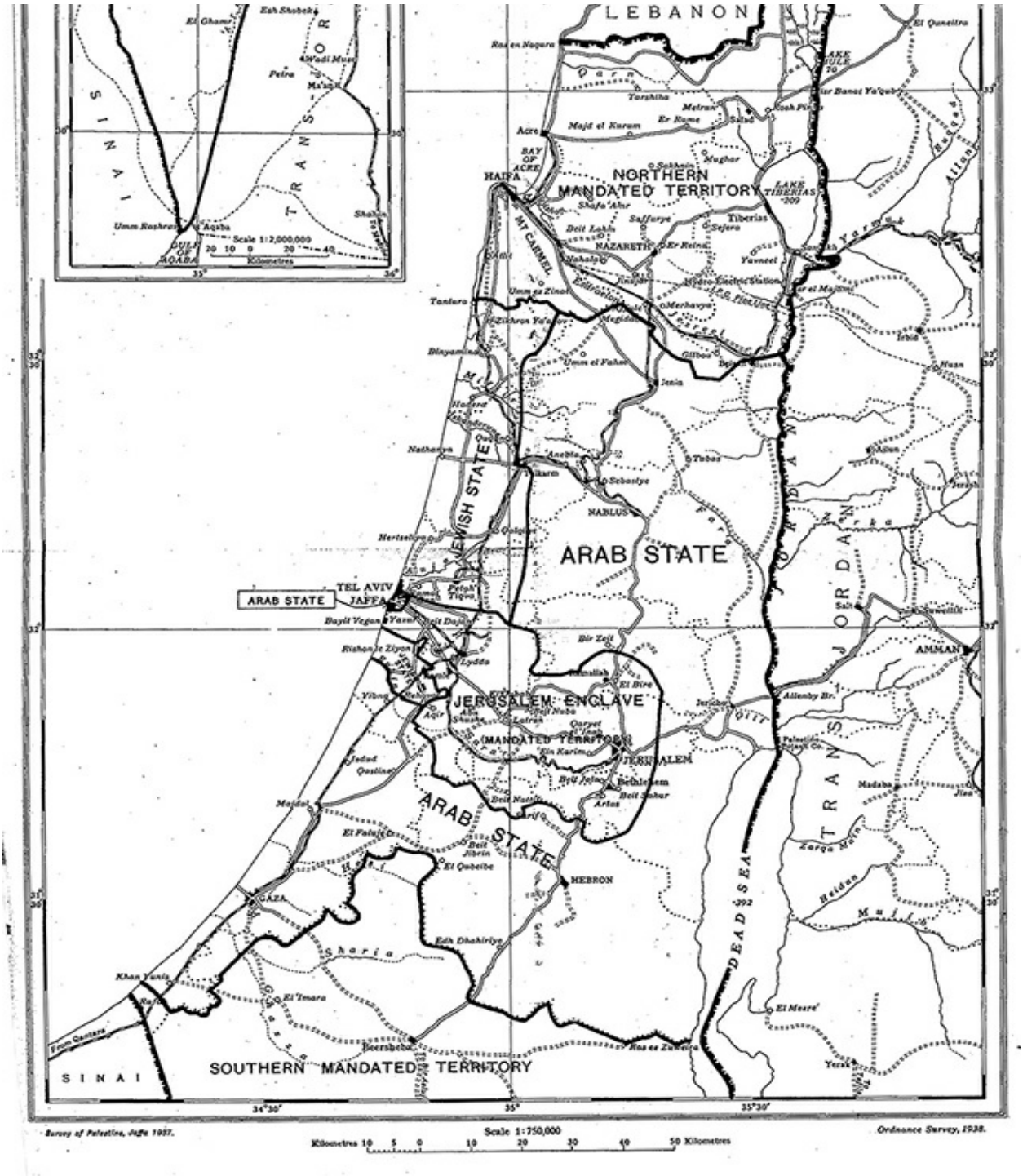
Noting that an "irrepressible conflict has arisen between two national communities within the narrow bounds of one small country," and that "it seems probable that the situation, bad as it is now, will grow worse," the Commission wrote, "we should be failing in our duty if we said anything to encourage a hopeful outlook for the future peace of Palestine under the existing system or anything akin to it."[222] "To put it in one sentence," said the Commission, "we cannot … both concede the Arab claim to self-government and secure the establishment of the Jewish National Home."[223]

This led the Commission to describe the "drastic" solution it had in mind – *partition*:

> Manifestly the problem cannot be solved by giving either the Arabs or the Jews all they want. The answer to the question "Which of them in the end will govern Palestine?" must surely be "Neither." … Partition seems to offer at least a chance of ultimate peace. We can see none in any other plan.[224]

The Commission said it would not propose the final details of partition, but recommended the final plan needed to be practicable and must "do justice" to the Arabs and the Jews. The Commission proposed the tripartite division of Palestine into Jewish and Arab states, with an "exchange of populations" resulting in the resettlement of Galilee Arabs, and the payment of British and Jewish subventions to the Arab State.[225] The Arab state would be merged into Transjordan. A small area in the middle of the country containing Jaffa, Jerusalem and Bethlehem would remain under permanent British Mandatory rule.[226]





MAP 5.1 The Peel Commission partition plan

(Cmd. 5854)[227]

Two months before the Commission issued its report, Commissioner Sir Laurie Hammond wrote a note for the file regarding the "Clean Cut," the Commissioners' confidential short-hand description for the eventual partition recommendation:

> I am as fully convinced as any of my colleagues that the present system of Mandatory Government is hopeless and can

> only lead to great trouble and expense in the future. Our report proves this in my opinion most convincingly. Further, I believe the only remedy lies in giving the Arabs and the Jews separate States with full sovereign powers except to such extent as they may be curtailed by reluctant acquiescence in an imposed treaty … I dislike signing in the dark.[228]

The Report concluded with these famous words:

> "Half a loaf is better than no bread" is a peculiarly English proverb; and, considering the attitude which both Arab and the Jewish representatives adopted in giving evidence before us, we think it improbable that either Party will be satisfied at first sight with the proposals we have submitted for the adjustment of their rival claims. For Partition means that neither will get all it wants. It means that the Arabs must acquiesce in the exclusion from their sovereignty of a piece of territory, long occupied and once ruled by them. It means that the Jews must be content with less than the Land of Israel they once ruled and have hoped to rule again. But it seems to us possible on reflection both parties will come to realize that the drawbacks of Partition are outweighed by its advantages. For, if it offers neither party all it wants, it offers each what it wants most, namely freedom and security … To both Arabs and Jews Partition offers a prospect – and we see no such prospect in any other policy – of obtaining the inestimable boon of peace.[229]

Reactions to the Report

As with the Shaw and Lofgren Commissions, reactions to the Peel Commission Report varied among the parties. The British were satisfied they had come up with a way to wash their hands of the Palestine problem that had bedeviled them for the past twenty years. The Arabs reacted angrily and threatened more violence, threats they made good for the next two years as they continued their revolt. The Jews, for their part, were publicly skeptical but privately open to partition, albeit wary of the details and concerned about British backsliding.

British reaction

The Times hailed the Report as "a State document of the highest importance." It called the partition recommendation "a practical solution of what had seemed an insoluble problem."[230]

The House of Lords discussed the Royal Commission Report on 20 July 1937. Former Shaw Commission member Harry (now Lord) Snell opened the discussion, commending the Peel Commission "for having placed at the disposal of Parliament a clear, courageous, and brilliantly drafted document."[231] Snell also congratulated Lord Peel on producing a Report with the unanimous support of all six Commissioners, recalling how he had cast the lone dissent from portions of the Shaw Commission Report, and taking credit for having foreseen the outcome of the Peel Commission's deliberations:

> I congratulate them also on having produced a unanimous Report. It was my misfortune to place a different meaning upon the evidence submitted to the Commission of which I was a member than that of my colleagues, and it is perhaps only an evidence of a pugnacious and stubborn mind that I feel more certain to-day that I was right than I did at the time. That judgment, I venture to suggest, is justified by subsequent events and by the Report which we are to consider to-day.[232]

Snell nevertheless expressed disappointment at the Commission's recommendation to divide Palestine into separate Jewish and Arab states, preferring instead to continue efforts to forge peaceful relations and conciliation between Jews and Arabs in Palestine:

> It is possible that partition will succeed better than the method hitherto tried, but it is at least speculative, and the Commissioners seem to have arrived at the conclusion that Palestine will never be united until it is divided. That does not seem to me to be a real approach to the subject. Things are rarely as bad as they seem in this world, and turbulent seas are followed very often by calm weather. Personally, as I say, I do not believe that the problem is insoluble. I do not see that the short cut of partition is more likely to succeed than the experiment which we have tried. There is a more excellent way

> in my judgment: the right, the eternally sure way of understanding and co-operation between the two races.[233]

In the meantime Sir John Chancellor, the former High Commissioner for Palestine and one of the British Government witnesses who testified before the Royal Commission, sent congratulatory notes to the members of the Commission following the release of their report. Lord Peel wrote back to Chancellor thanking him, adding "the Arabs cannot now complain that their case has not been fully stated for the British public."[234]

Chancellor also received an interesting letter from Frances Newton, the Honorary Secretary of the anti-Zionist Palestine Information Centre, writing from her home in Haifa. Newton had testified as a witness for the Muslim side in the Shaw Commission hearings, where Merriman had accused her (without proof) of passing secret British Government documents to the Arabs during the British military administration of Palestine.[235] Newton did not hide her distaste for the Jews in her letter to Chancellor:

> Every one [in Palestine] is simply pole axed by the recommendation for partition. One friend very aptly described us; "the Report is just like a flit pump and we are the flies on the floor" … The first [Arab] response is naturally one of absolute repudiation of partition; and I find this attitude is hardening as the days go by … I now see what was meant when the R.C. [Royal Commission] secretary said to me "we are prepared this time to face the music!!" Partition seems to be going to be determinedly pushed through by the British Government … The core of the arab treaty is the necessity of the transfer of the arab population … Apart from the injustice of this uprooting, how masterly a proposition it is to leave the Jews to prey upon each other!![236]

Arab reaction

Arab reaction to the Report was highly negative. The Arab Higher Committee sent a lengthy letter, dated 23 July 1937, to the High Commissioner in Palestine and the Permanent Mandates Commission in Geneva, expressing their "extreme disappointment" in the Report and its "repugnance to the whole of the partition scheme."[237] The letter outlined many arguments that continue resonating in the conflict today.

For example, the letter began with a general objection to the Report's treatment of the Jews as equal to the Arabs of Palestine:

> We regard as a profound error the point of view adopted by His Majesty's Government that in their mutual relations the Arabs and the Jews of Palestine stand as opposed litigants with equal rights … For the Arabs of Palestine are the owners of the country and lived in it prior to the British occupation for hundreds of years and in it they still constitute the overwhelming majority. The Jews on the other hand are a minority of intruders …[238]

The letter reiterated the Arabs' repudiation of the Balfour Declaration and their demand that it be rescinded. The letter criticized the partition proposal as "strange." It noted the presence of "hundreds" of mosques, churches, religious shrines and cemeteries in the area designated as the future Jewish State, and argued placing such sites under Jewish control would be "illogical, humiliating, impracticable and fraught with danger."[239]

The letter also objected to the creation of a permanent British-controlled area in the center of the country, noting "this corridor effectively cuts off the Southern from the Eastern and Northern sections of the proposed Arab State."[240] The letter expressed additional concerns, on behalf of the Muslim and Christian Arabs of Palestine, that "[t]he security of the Holy Places … can only be prejudiced by the establishment of a mandatory regime in which the Jews will undoubtedly be predominant."[241]

The letter then noted the "Arabs of Palestine, of whatever party or class, forcibly repudiate the partition scheme in its entirety."[242] The letter bluntly threatened further violence, noting the prior disturbances in Palestine had been caused by Jewish encroachment, and therefore:

> [I]t is only natural to expect that the struggle will be intensified if the Jews receive immediately many times the extent of the territory which they have been able to acquire in the 15 years during which the mandate has been fully implemented … We therefore assert without hesitation or doubt that the peace for which the Royal Commission declares it is working and which it calls an "indispensable [sic] boon" cannot be established in this country by continuation of these arbitrary experiments.[243]

The letter concluded by reiterating Palestine belonged solely to the Arabs, based on the McMahon pledge and Articles 20 and 22 of the Covenant of the League of Nations.[244]

Arab reaction outside Palestine was also harsh. The British High Commissioner in Egypt, Sir Miles Lampson, cabled the Foreign Office on 27 July 1937 to report his conversation the previous evening with the Prime Minister of Egypt, Mostafa el-Nahas:

> Nahas said he could not too strongly deplore the suggestion of partition. To start with Egypt could not regard with equanimity prospect of an independent Jewish State as her neighbor. Apart from questions of defence, etc., who could say the voracious Jews would not claim Sinai next? Or provoke trouble with the Jewish community in Egypt itself? He urged only solution was creation of an independent Arab State allied with Great Britain and with fullest guarantees of religious and racial toleration for the Jews, Arabs, Moslems and Christians alike.[245]

Jewish reaction

Weizmann, who seemed caught off guard when he was asked about the partition proposal during his *in camera* testimony, reacted with cautious optimism to the partition plan after he read the Report. In late June 1937 he wrote to Stephen Wise:

> [T]he Commission seems convinced that a permanent settlement, and future peace with the Arabs, lie in the direction of partition. Partition is not *my* project; it has never been and never will be my project. It was sprung upon me in the last hour of the four secret sessions I had with the Commission, I refused to give an opinion off-hand; I consulted with my colleagues; and I think am speaking the truth when I say that our general conclusion was: Here is a new line of thought – an audacious proposal; it contains in it the germs of a great future, but also grave dangers; everything will depend on the details; if it is inevitable that it should come about, we must try to influence this new proposal in such a way as to make possible the realization of the aspirations embodied in the Mandate through this new medium. We felt that it would be wrong to let the thing go by default by simply saying "No" … [246]

Churchill, perhaps hoping the Jews could negotiate a better outcome, advised Weizmann in mid-June to tell the British Government "they should not assume that I [Weizmann] am in any way committed to the acceptance of any project of partition which the Government may propose."[247] Weizmann followed the advice when the Zionist Congress met in August 1937 in Zurich. The Congress passed resolutions condemning the partition plan in the form described in the Royal Commission Report, but authorizing Weizmann and the Zionist Executive to negotiate with Britain to "ascertain the precise terms of His Majesty's Government for the proposed establishment of a Jewish State."[248]

Privately, however, Weizmann increasingly embraced the idea of partition. He wrote to Nicolai Kirschner in late September 1937:

> I feel sure that the present, and the immediate future, would look much more satisfactory if an acceptable and workable scheme of partition could be evolved. I have reached this conclusion not without a great deal of thought and worry and suffering. But when I look at the world now, and what is going on it, I feel that we may, after all, perhaps not do so badly

> if we can succeed in modifying the tentative scheme of the Royal Commission so as to make it *viable* and effective, and it is therefore on this problem that our efforts have now to be concentrated.[249]

Three days later Weizmann wrote to General Smuts, noting if the partition plan could be improved, then "I should feel myself bound in duty to consider it."[250]

By the end of December, 1937, Weizmann was convinced a "grave situation would arise" if the British Government were to abandon the partition scheme.[251] And by the spring of 1938, Weizmann had grown even fonder of the partition idea, writing to Albert Einstein that it presented

> the best way to peace and to the fulfillment of the aspirations of both sides: a far-reaching autonomy for the Jews in a limited territory and for the Arabs in their areas. Thus the [two] States concept was born. I was present at the birth![252]

Jabotinksy, however, adamantly opposed the partition plan, telling the British Parliament in July 1937 it would mean the "doom of death" for "real Zionism, not the kind of Zionism-de-luxe concerned with creating in Palestine a toy-garden of Hebrew literature, but real Zionism bent on saving millions of men and women from their distress."[253]

Aftermath

Following the issuance of the Peel Commission Report, the House of Commons directed the Government on 20 July 1937 to present the partition proposal to the League of Nations, and thereafter to present a detailed partition plan to Parliament.[254]

Ormsby-Gore presented the partition proposal to the Permanent Mandates Commission (PMC), telling them "a solution on the lines of partition should be explored as the best and most helpful solution of what the mandatory Power is itself convinced is, in fact, a deadlock."[255] The PMC's Report to the Council of the League of Nations noted it favored partition "in principle," subject to depriving the Arabs "of as small a number as possible of the places to which they attach particular value," and ensuring "the areas allotted to the Jews should be sufficiently extensive, fertile and well situated … to be capable of intensive economic development, and consequently to dense and rapid settlement."[256]

In September 1937 Ormsby-Gore addressed the Council of the League of Nations, seeking approval for appointing a new Commission to visit Palestine to develop "proposals for a detailed scheme of partition."[257] On 16 September 1937, the Council of the League adopted a Resolution approving Ormsby-Gore's request.[258]

In January 1938 the British Government published a Command Paper announcing the Government had decided to send a Technical Commission to Palestine to prepare a detailed report regarding the mechanics of partition. The Technical Commission (which the Arabs boycotted),[259] was chaired by Sir John Woodhead. The Government would withhold final judgment whether to seek approval from the League of Nations to implement a final plan of partition pending receipt of the Woodhead Commission's report, assuming such a plan were "equitable and practicable."[260]

The Woodhead Commission released its report on 7 November 1938, backing away significantly from the Peel Commission's partition recommendation:

> We conclude that, apart from the question whether plan C, which is the best plan that the majority of us have been able to devise, will be accepted by those concerned, the financial and economic objections to that plan without a customs union

> between the three areas, are so serious that we could not recommend it. If, therefore, we were to confine ourselves strictly to our terms of reference, we should have no choice but to report that we have been unable to recommend boundaries which will afford a reasonable prospect of the eventual establishment of self-supporting Arab and Jewish States.[261]

The British Government completely abandoned the partition idea less than a year later, when Colonial Secretary Malcolm MacDonald issued yet another White Paper on 17 May 1939, setting forth a new policy for Palestine under which a single state (the "one-state solution" in today's parlance) would be established within ten years. Jewish immigration would be capped at 15,000 per year for the first five years and 10,000 per year for the next five years, subject to the economic absorptive capacity of the country.[262]

Assessment

The Peel Commission hearings once again offered all three players in the Mandatory Palestine drama – Arabs, Jews, and British – to present their cases to a quasi-judicial tribunal. Although no outside lawyers questioned the witnesses, both sides used outside lawyers – Auni Bey Abdul Hadi for the Arabs and Leonard Stein for the Jews – to act as legal advocates through their testimony. The Commissioners themselves built an extremely detailed record through their intensive questioning of the witnesses.

Ironically, the most important and interesting testimony was heard during the Commission's secret sessions, despite Lord Peel's early insistence on public transparency. Indeed, the printed transcript of the secret testimony exceeds the printed transcript of the public testimony by more than one hundred pages.[263]

The secret transcripts reveal several fascinating dynamics. Churchill and Lloyd George presented themselves as ardent supporters of Zionism, but the Commissioners nevertheless felt the Palestinian Arabs were entitled to some form of self-determination, albeit under the Transjordanian flag. Herbert Samuel's quest to prove McMahon had not pledged Palestine to the Arabs likewise fell flat, as he failed to convince the Commission the Arabs did not deserve sovereignty over at least some portion of Palestinian soil. Weizmann, ever the diplomat, left the door open for negotiations over partition when he said he wanted to "think on it." Ben-Gurion, ever the practitioner of *realpolitik*, made clear he was more interested in negotiating a deal with the Arabs than he was in acquiring control of the Wailing Wall.

The Jewish willingness to negotiate and compromise – absent during the Shaw Commission hearings, employed skillfully but to limited effect during the Lofgren Commission hearings, and on full display through Weizmann's multiple *in camera* appearances before the Peel Commission – finally produced a moderately successful outcome for the Jewish side. Weizmann's patience, persistence and perseverance were rewarded with the Royal Commission's formal endorsement of Jewish statehood in at least part of Palestine, albeit tempered by the Commission's adverse recommendations on other matters.

The public transcripts also contained important evidence. The Mufti once again demonstrated his complete unwillingness to negotiate or compromise. Indeed, the Mufti's 1937 Peel Commission testimony remained entirely consistent with his 1929 Shaw Commission testimony. But this time it was the Mufti's approach that backfired. The British, who by then had grown weary of the Mufti's irredentism and his penchant for inciting violence, decided to take an entirely new and radical approach to resolving the conflict, an approach that would not only accelerate the creation of the Jewish National Home, but would elevate it to full-fledged

statehood, while relegating the Palestinian Arabs to a merger with Transjordan. By embracing the "clean cut" and proposing the partition of Palestine into separate Jewish and Arab states (a smaller Israel and a larger Transjordan), the Royal Commission handed a decisive defeat to the Mufti.

The Mufti's unwillingness to compromise, it must be said, cost the Palestinian Arabs their statehood in 1937 (albeit under Transjordanian sovereignty). The Palestinian Arabs have never recovered from the Mufti's strategic blunder.

Following World War II, the United Nations General Assembly reinvigorated the two-state solution, approving Resolution 181 on 29 November 1947. The Resolution adopted a variant of the original Peel Commission partition proposal, and ordered the British Mandate terminated no later than 1 August 1948.[264] The Jewish side accepted the Resolution and the partition plan, even though once again the amount of land allocated for the Jewish state was far less than the available land in Palestine. The Arab side, consistent as always, rejected Resolution 181, rejected partition, rejected the two-state solution, and instead declared war on the nascent Jewish State. When the war ended, Jordan wound up with control of most of the area that Resolution 181 had designated for Palestinian Arab statehood.

For the next 19 years (1948–1967), Arab policy continued the all-or-nothing demand for Arab sovereignty over *all* of pre-1948 Palestine. During those two decades the Arab world and the international community did *nothing* to promote the creation of a Palestinian State in the West Bank, the former area of Palestine now under Jordanian control. The Arabs argued instead after 1948, using the same arguments the Mufti and Auni Bey had been making since the 1920s, that Israel (the "Zionist Entity") should be declared legally null and void, as it was based on the "illegal" Balfour Declaration and the "illegal" implementing provisions of the Mandate. It was only *after* Israel occupied the West Bank and Gaza strip during and after the June 1967 Six-Day War that the international community and the Palestinians themselves asserted Palestinian self-determination rights in the West Bank.

More than 80 years after the Peel Commission issued its Report, most observers continue to believe the two-state solution provides the only viable option for a peaceful resolution of the conflict. Ironically, the Mufti (followed by the entire Arab world, who voted unanimously against Resolution 181) rejected the very outcome the Palestinian Arabs and their supporters advocate for today.

Notes

1 Hansard, HL Deb. 20 July 1937 vol. 106 at 606.

2 Peel Public Testimony, *op. cit.* The transcript of the public testimony before the Peel Commission was published in 1937 as Colonial Paper No. 134.

3 The transcript of the secret, *in camera* testimony before the Peel Commission was not published. Only three copies exist today; one hard-bound copy and two soft-bound copies. All three copies may be found in the Colonial Office files at the British National Archives, file numbers FO 492/19, FO/492/20, and FO 492/21, each entitled *Palestine Royal Commission, Minutes of Evidence Heard at Secret Sessions*. All citations herein are to the hard-bound volume, FO 492/19 ("Peel Secret Testimony"). The hard-bound and soft-bound volumes are identical to each other, with one exception: the hard-bound volume contains a handwritten, two-page unsigned minute at the very beginning, prior to the cover page of the transcript. The minute, dated 1 February 1940, is interesting and reads in part:"

> 30 copies of the Minutes of Secret Evidence heard by the Palestine Royal Commission have been printed. This evidence was given on the understanding that it was for the members of the Commission (and their staff) only and the Commissioners did not allow witnesses to retain copies of the record of their evidence. In the circumstances no use can be

made of these copies for now; but the record contains a mass of information relating to an important chapter in the history of Palestine and the Jewish people and will, no doubt, be of considerable value to the historians of the remote future. I think it is worthwhile ensuring that the copies are retained in safe keeping with confidential records until the time when they can be made available."

According to a subsequent handwritten notation at the bottom of the second page, only three copies of the *in camera* transcript had survived as of July 1968. All three copies are currently held at the British National Archives under the file numbers listed above.

4 In fact, Hope Simpson, a former civil servant and MP, possessed no expertise regarding Palestine. He admitted candidly to Kisch at their first meeting in Jerusalem on 22 May 1930 that "he knew nothing of Palestine except what he had read since he was appointed; if he had any qualifications, he thought these lay only in his experience with the Greek Settlement Commission and his practical knowledge of farming." Kisch, *op. cit.* at 295.

5 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XIV at 257, Letter No. 233 (Letter from Weizmann to Charles Prestwich Scott, 31 March 1930) and editor's n.4 at 257 to Letter No. 233 (explaining the British Government decided not to send Smuts because "he might adopt a one-sided attitude in favour of the Jews.").

6 *Id.* at 282, Letter No.269 (Letter from Weizmann to Vera Weizmann, 13 May 1930). Weizmann wrote two days later to the Palestine Zionist Executive in Jerusalem, predicting the British Government would use Hope Simpson's eventual report as "a prelude to concessions to the Arabs." *Id.* at 298, Letter No. 273 (Weizmann to Palestine Zionist Executive, 15 May 1930). Weizmann's suspicions about Hope Simpson were well-founded. Many years later Hope Simpson, in a letter to Chancellor, described the Balfour Declaration as "an immoral document. And it might more truly be dubbed the 'Zionist Declaration,' for it was drafted, not by Balfour, but by the Zionists of G.B. and the USA." Chancellor Papers, MSS Brit Emp. S 284, Box 16/6, Letter from Hope Simpson to Chancellor (15 October 1945).

7 Cmd. 3686 at 54.

8 Cmd. 3686, *Palestine: Report on Immigration, Land Settlement and Development* (Oct. 1930).

9 Cmd. 3692, *Palestine: Statement of Policy by His Majesty's Government in the United Kingdom* (Oct. 1930) (hereafter "Passfield White Paper) at 3.

10 *Id.* at 4.

11 *Id.*

12 *Id.*

13 *Id.*, quoting statement of Prime Minister Ramsay MacDonald to House of Commons (3 April 1930).

14 *Id.* at 11.

15 *Id.* at 6.

16 *Id.* at 6–7.

17 Cmd. 1700, *op. cit.* at 19.

18 *Id.* at 7–8.

19 *Id.* at 16.

20 *Id.* at 17–18 [emphasis added]. Kisch noted in his diary entry for 7 July 1930, "Hope Simpson is evidently worried about the clause in the Keren Kayemeth (Jewish National Fund) leases which prohibits the employment of Arabs." Kisch, *op. cit.* at 321.

21 Cmd. 3692, *op. cit.* at 18–19.

22 *Id.* at 20.

23 *Id.* at 21.

24 *Id.* at 23.

25 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XIV at 387–88, Letter No. 364 (Letter from Weizmann to Lord Passfield, 20 October 1930); *see also The Times*, 21 October 1930 at 15. Regarding Weizmann's threat to resign in the spring of 1930 following the issuance of the Shaw Report, *see* Chapter 3, nn.182–83 and accompanying text.

26 Kisch, *op. cit.* at 356.

27 *Id.* at 358 ("The End of Israel").

28 *The Times*, 23 October 1930 at 15.

29 *Id.*

30 Esco Foundation, *op. cit.* at 649.

31 *The Times*, 4 November 1930 at 15 [emphasis added].

32 L. Stein, *The Palestine White Paper of 1930* at 84 (Jewish Agency for Palestine, Nov. 1930).

33 HC Deb. Vol. 248 cc751W (13 February 1931).

34 *Id.* at 753W.

35 *Id.* at 753-54W.

36 *Id.* at 754-55W.

37 *Id.* at 755-56W.

38 *Id.* at 757W.

39 *The Times*, 14 February 1930 at 8. During his *in camera* testimony before the Peel Commission, Weizmann was asked

whether he had seen a draft of the MacDonald letter before he received the final, signed version. Weizmann replied he had not. Peel Secret Testimony, *op. cit.* at 207, paras. 3176–78. After completing his testimony Weizmann wrote to Lord Peel and admitted he had, in fact, seen several drafts of the MacDonald letter. *See infra* n. 189 and accompanying text.

40 R. Ovendale, *The Origins of the Arab–Israeli Wars* (4th ed.) at 72 (Routledge, 2004); *see also* W. Matthews, *Pan-Islam or Arab Nationalism? The Meaning of the 1931 Jerusalem Islamic Congress Reconsidered*, International Journal of Middle East Studies 35(1) at 8 (2003); *The Times*, 19 May 1936 at 17 (describing Arab reaction to the MacDonald letter as "bitter disillusionment").

41 Chancellor Papers, MSS Brit. Emp. s 284, Box 20/MF 11, Letter from Auni Bey Abdul Hadi to High Commissioner (16 February 1931).

42 Esco Foundation, *op. cit.* at 660.

43 CO 733/346/8, *Report of the Commission Appointed by His Excellency the High Commissioner for Palestine by Notification No. 1561 Published in the Palestine Gazette dated 16 November 1933*; Peel Commission Report, *op. cit.* at 83–84.

44 Peel Commission Report, *op. cit.* at 96–102.

45 CO 733/318/11, Telegram No. 208 from the Secretary of State for the Colonies to the High Commissioner for Palestine (18 May 1936); *The Times*, 19 May 1936 at 17.

46 Peel Public Testimony, *op. cit.* at iv (comments of Palestine High Commissioner Sir Arthur Wauchope at Opening Session, 12 November 1936).

47 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XVII at 245, Letter No. 217 (Telegram to Lord Melchett, 3 May 1936).

48 CO 733/318/12, F.J. Pedler minute (19 May 1936).

49 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XVII at 251, Letter 223 (Telegram to Jewish Agency, Jerusalem, 13 May 1936).

50 *Id.* at 266, Letter 247 (Letter to Judge Leopold Greenberg, 12 June 1936).

51 CO 733/318/12, C. Parkinson minute (22 May 1936), quoting letter from High Commissioner Wauchope to Colonial Office, 11 May 1936.

52 *Id.*, C. Parkinson minute (29 May 1936).

53 HC Deb. Vol. 313 at 1321 (19 June 1936).

54 *Id.*

55 *Id.* at 1320, 1392. Auni Bey by then had taken over leadership of the *Istiqlal* (Independence) Party after the Mufti fired him following the Lofgren Commission hearings. Peel Secret Testimony, *op. cit.* at 5, para. 72 (Wauchope *in camera* testimony).

56 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XVII at 295–97, Letter No. 272 (Letter to Ormsby-Gore, 1 July 1936).

57 *Id.*

58 *Id.* at 301–02, Letter No. 278 (Letter to Arthur Ruppin, 7 July 1936).

59 CO 733/318/12, Extract from Private and Confidential Letter from Ormsby-Gore to Wauchope (10 June 1936).

60 *The Times*, 28 July 1936 at 9.

61 *The Times*, 30 July 1936 at 15. O.G.R. Williams of the Colonial Office misogynistically viewed the request to appoint a woman to the Commission as "trivial" and "would almost certainly be misunderstood by the Moslems and would probably appear to them ridiculous." CO 733/319/4, Williams minute to Parkinson (20 June 1936).

62 *See* Ch.3, n.42, *supra*.

63 Peel Commission Report, *op. cit.* at vi.

64 CO 733/320/2 (Royal Warrants appointing Lord Peel and other Commissioners, 7 August 1936).

65 *The Times*, 30 July 1936 at 15.

66 HC Deb. Vol. 315 at 1511 (29 July 1936).

67 Id. at 1512–13. Colonel Wedgwood visited Palestine in 1927, and thereafter wrote a short book advocating Britain treat Palestine as a bi-national (Jewish–Arab) "seventh dominion" of the British Empire, along the same lines as other bi-national dominions such as Canada (British–French) and South Africa (British–Dutch). J. Wedgwood, *The Seventh Dominion* (Labour Publishing Co., 1928). Wedgwood ultimately testified as the last witness to appear before the Peel Commission. Peel Public Transcript, *op. cit.* at 380–89 (Wedgwood public testimony, 11 February 1937).

68 *Weizmann Letters and Papers*, *op. cit.* Series A, Vol. XVII at 362–63, Letter No. 336 (Letter to Shertok, 14 October 1936).

69 *Memorandum Submitted to the Palestine Royal Commission on behalf of the Jewish Agency for Palestine* (hereafter "Jewish Agency Memorandum"), reprinted in Klieman, *op. cit*., Vol. 23 (entire volume).

70 Weizmann was irritated with the last-minute changes Shertok and Ben-Gurion wanted made to the Jewish Agency Memorandum. Ultimately Shertok and Ben-Gurion gave in, and the Memorandum was submitted to the Commissioners before they departed from England for Palestine to commence the hearings. *Weizmann Letters and Papers*, *op. cit.* Series A, Vol. XVII at 351–52, Letter No. 351 (Letter from Weizmann to Shertok, 31 October 1936) and editor's n.1 to Letter 351.

71 CO 733/318/12, Letter from D. Ben-Gurion to Under-Secretary of State for the Colonies (31 July 1936).

72 CO 733/318/11, Telegram No. 425 from the Secretary of State for the Colonies to the High Commissioner for Palestine (20 August 1936); *see also* Peel Commission Report, *op. cit.* at x.

73 CO 733/320/7, Palestine Royal Commission, Draft Minutes of the First Meeting (Private) (6 October 1936).

74 Id.; CO 733/318/12, Handwritten note from Lord Peel to Commission Secretary John M. Martin, 25 August 1936.

75 CO 733/318/12, draft Public Notice regarding Commission Procedures (released 21 September 1936).
76 CO 733/320/8, The Commissioners' Powers (Conferment of) Ordinance, No. 71 of 1936.
77 Peel Public Testimony, *op. cit.* at v.
78 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.18240, accessed 11 September 2019.
79 Peel Commission Report, *op. cit.* at x.
80 Ovendale, *op. cit.* at 75.
81 *See infra* at nn. 210–12 and accompanying text.
82 Peel Secret Testimony, *op. cit.* at 1, para. 1 *et seq.* (Wauchope *in camera* testimony).
83 *Id.* at 1, paras. 1–2.
84 *Id.* at 4, paras. 65–67.
85 *Id.* at 5–6, paras. 93–97.
86 *Id.* at 31, para. 597. Wauchope originally requested the Terms of Reference include language specifically acknowledging the "double duty." Wauchope wanted to placate the Arabs, "who hate the Mandate as such, it would at least be some reassurance to them if the Commissioners were bound in their terms of reference to the equality of the dual obligations." The Colonial Office, however, rejected the request. CO 733/318/12, C. Parkinson minute, 29 May 1936. In an interesting twist, Weizmann, unaware the Colonial Office had already finalized the Terms of Reference, sent a draft of the Jewish Agency's preferred Terms of Reference to Ormsby-Gore on 9 July. The second proposed Term included language regarding the double duty: "[t]o examine the grievances of the Jews and Arabs *in the light of the dual obligation* contained in the Mandate (including the preamble thereto) towards the Jewish people and the Arab and other non-Jewish sections of the population of Palestine" [emphasis added]. Yet the Colonial Office still chose to omit any reference to the double duty when it finalized the Terms of Reference at the end of July. *Weizmann Letters and Papers*, *op. cit.* Vol. XVII at 306–07, Letter No. 283 (Letter from Weizmann to Ormsby-Gore dated 9 July 1936).
87 Peel Secret Testimony, *op. cit.* at 15, paras. 269–74 (Wauchope *in camera* testimony).
88 *Id.* at 7, para. 126; *id.* at 29, paras. 556–57.
89 *Id.* at 35, para. 691.
90 Library of Congress Prints and Photographs collection, www.loc.gov/pictures/item/2017871963/resource/, accessed 4 September 2019.
91 *Id.* at 501, para. 8634 (Churchill *in camera* testimony).
92 *Id.* at 503, paras. 8656–68.
93 *Id.* at 502, para. 8648; id. at 504, para. 8676 [emphasis added].
94 *Id*. at 502, paras. 8643–44.
95 *Id.* at 211–13, paras. 3251–54, 3275–78 (Weizmann *in camera* testimony) [emphasis added].
96 *Id.* at 505, paras. 8685–86 (Churchill *in camera* testimony).
97 *Id.* at 505, para. 8688.
98 *Id.* at 502, para. 8646.
99 *Id.* at 507, para. 8728; *see also id.* at 501, paras. 8637–39, *id.* at 507, para. 8722 (need for strong gendarmerie to deter and quell violence).
00 Memorandum from General L. Bols to Foreign Office, 7 June 1920, *reproduced in* Priestland, *op. cit.*, Vol. I at 534.
01 *See, e.g.*, Letter from Herbert Samuel to Sir William Tyrell, 5 June 1919, *reproduced in* Priestland, *op. cit.*, Vol. I at 331; Telegram, No. 279 from Samuel to Foreign Office (2 October 1920) ("Following points essential in the interests of Palestine. Control over [both] banks of Jordan … Hope arrangements previously contemplated can be effected enabling Palestine to draw portion of Litani if water needed in the future."), *reproduced in* Toye, *op. cit.* Vol II at 732.
02 *See* Ch. 1 nn.101–02 and accompanying text.
03 *See* Ch. 1 n.70 and accompanying text.
04 CO 733/320/3, Letter from Samuel to Martin (7 September 1936).
05 Peel Secret Testimony, *op. cit.* at 481, para. 8413 (Samuel *in camera* testimony).
06 *Id.* at 481, para. 8415. Samuel would later read an excerpt from the Clayton Memorandum to the House of Lords after the Peel Commission released its Report and made no mention of the Memorandum. *See* Ch. 1, nn.108–09 and accompanying text, *supra*.
07 *Id.*
08 *Id.* at 482, para. 8416.
09 *Id.* at 482, paras. 8418–20, 8423–24.
10 *Id.* at 516–17, para. 8786 (Lloyd George *in camera* testimony).
11 *See* Minutes of War Cabinet, 3 September 1917 and 4 October 1917, *reproduced in* Priestland, *op. cit.* Vol. III at 598–602 (quoting Montagu as making "strong objections" to the proposed declaration); *see also* Memorandum from Montagu to the Cabinet, August 1917, www.balfourproject.org/edwin-montagu-and-zionism-1917/("I assert that there is not a Jewish nation … I deny that Palestine is to-day associated with the Jews or properly to be regarded as a fit place for them to live in."), accessed 29 August 2019. For a fascinating discussion of Montagu's failed attempt to derail the Balfour Declaration, *see* R. Philpot, "How a Curious Love Triangle Spurred UK's Cabinet to Pass the Balfour Declaration," *Times of Israel*, 9 February 2019, www.timesofisrael.com/how-a-curious-love-triangle-spurred-uks-cabinet-to-pass-the-balfour-declaration/,

accessed 29 August 2019.

12 Peel Secret Testimony, *op. cit.* at 517, para. 8786 (Lloyd George *in camera* Testimony).

13 *Id.* at 518, para. 8786.

14 *Id.* at 519, para. 8786.

15 *Id.* at 523, para. 8856.

16 Peel Secret Testimony, *op. cit.* at 468, paras. 8257–62 (Chancellor *in camera* testimony). The British Government considered arresting and deporting the Mufti in late July 1937, three weeks after the Royal Commission's Report had been published. FO 371/20,810, Cypher Telegram from the High Commissioner to the Secretary of State (29 July 1937) (recommending arrest and deportation); FO 371/20,180, G. W. Rendel minute discussing meeting at Colonial Office (31 July 1937) (recommending against arrest and deportation, as "the arrest of the Mufti was likely to produce a bad reaction in the surrounding countries, even if it could be effected … the Prime minister felt that the time had come to adopt a different line."). Several years later the British sought to arrest the Mufti for his wartime collaboration with Nazi Germany, and the United Nations placed him on the war criminals list in July 1945. Jewish Telegraph Agency, *Daily News Bulletin*, 20 July 1945 at 2; *see generally* J. Herf, *Haj Amin al-Husseini, the Nazis and the Holocaust: The Origins, Nature and Aftereffects of Collaboration*, Jewish Political Studies Review 26(3/4) (Fall 2014); T. Herscho, *Le Grand Mufti de Jérusalem en France: Histoire d'une Evasion*, Controverses: Revue d'Idees 1 at 252 (2006).

17 W.F. Boustany, *The Palestine Mandate Invalid and Impracticable: A Contribution of Arguments and Documents Towards the Solution of the Palestine Problem* (American Press, Beirut 1936). Boustany submitted his monograph to the Peel Commission in August 1936. S. Bartal, Jerusalem Center for Public Affairs, *The Peel Commission Report of 1937 and the Origins of the Partition Concept* (14 November 2017), http://jcpa.org/article/peel-commission-report-1937-origins-partition-concept/, accessed 29 August 2019.

18 *Id.* at 19, 30.

19 *Id.* at 19–20.

20 *Id.* at 32–33.

21 *Id.* at 44–45.

22 *Id.* at 45.

23 *Id.* at 43–44.

24 Memorandum Submitted by the Arab Higher Committee to the Royal Commission (11 January 1937), *reproduced in* R. Gavison (ed.), *The Two-State Solution: The UN Partition Resolution of Mandatory Palestine* at 65–71 (Bloomsbury, 2013).

25 *Id.* at 67.

26 CO 733/320/10, Letter from Sir Arthur Wauchope, High Commissioner for Palestine to Sir William Ormsby-Gore (12 January 1937).

27 Unlike the Shaw Commission, which gave the Mufti the courtesy of taking his testimony at his home, the Royal Commission required the Mufti to appear at the Commission's hearing room in Jerusalem. CO 733/342/13, Telegrams and Correspondence between High Commissioner Arthur Wauchope and Cosmo Parkinson of the Colonial Office (6 November 1936, 7 November 1936 and 13 November 1936). Martin wrote to Williams on 11 May 1936, noting "[b]oth Lord Peel and Sir Horace Rumbold are emphatic that it would be most inappropriate that the *Royal* Commission should follow the 1929 [Shaw Commission] precedent." Williams replied, "[i]t would be a pity if this silly point were to be used to make political capital, but I agree that it would be inappropriate and open to misconstruction and misrepresentation if the Royal Commission were to take evidence from the Mufti in his own house, especially after the part he is known to have played or suspected of playing during the disorders." CO 733/318/13 (both minutes dated 5 November 1936).

28 CO 733/342/16, Telegram No. 649 (Secret) from Secretary of State for the Colonies to High Commissioner (6 November 1936) ("I understand that Chairman's view is that if the Mufti will not come to the Commission (which unlike Shaw Commission is a Royal Commission) [the] attitude of the Commission should be that they will dispense with his evidence.").

29 Peel Public Testimony, *op. cit.* at 293, para. 4561.

30 *Id.*

31 *Id.*

32 *Id.* at 293–94, paras. 4565–89 (Mufti public testimony).

33 *Id.* at 297, para. 4637.

34 *Id.* at 293, paras. 4567–69.

35 *Id.* at 293, paras. 4569–70.

36 *Id.* at 293, para. 4574.

37 *Id.* at 295–96, paras. 4612–14.

38 *Id.* at 297, paras. 4628, 4634.

39 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.18254, accessed 4 September 2019.

40 *Id.* at 296, para. 4619.

41 *Id.* at 296, para. 4626.

42 *Id.* at 297, paras. 4629–35.

43 *Id.* at 297, para. 4637.

44 *Id.*
45 *Id.* at 298, para. 4637.
46 *Id.* at 299, para. 4679.
47 CO 733/343/10, Letter from Auni Bey Abdul Hadi to Sir Arthur Wauchope (18 December 1936).
48 *Id.* at 301, para. 4694 (Auni Bey public testimony).
49 *Id.* at 302, para. 4720.
50 *Id.*
51 *Id.* at 302, para. 4723.
52 Covenant of the League of Nations, *op. cit.*, Art. 20, first paragraph.
53 *Id.*, Art. 22, fourth paragraph.
54 Peel Public Testimony, *op. cit.* at 302–04, paras. 4723–48 (Auni Bey public testimony).
55 *Id.* at 304, paras. 4751–56.
56 *Id.* at 306, paras. 4789–90.
57 *Id.* at 368, para. 5635.
58 *Id.*
59 *Id.*
60 *See, e.g.*, Recep Tayyip Erdogan, President of the Republic of Turkey, "Al-Quds is the Common Cause of us All," Speech to 2nd Conference of the Association of Parliamentarians for Al-Quds (14 December 2018) ("Today, the Palestinians are subjected to pressures, violence and intimidation policies no less grave than the oppression done to the Jews during WWII. To us, it does not matter who the perpetrator is. Both of these are massacres, atrocities and oppressions. Shelling with bombs the children playing on the beach of Gaza is as serious a crime against humanity as the inhumane crime called the Holocaust."), www.tccb.gov.tr/en/news/542/100118/-al-quds-is-the-common-cause-of-us-all-, accessed 29 August 2019.
61 Peel Public Testimony, *op. cit.* at 312–13, paras. 4906–08.
62 *Id.* at 313, paras. 4916–18 [emphasis added].
63 *Id.* at 313, paras. 4919, 4922, 4927. Notwithstanding his hardline, anti-Zionist tone in public, Auni Bey privately facilitated, on at least one occasion, the sale of 7,500 acres of Arab land in Palestine to Zionist settlers, "for which he was rewarded to the tune of £2,700." E. Karsh, *Zionism and the Palestinians*, Israel Affairs, 14(3) at 367 (2008); *see also* n.195, *infra* (Auni Bey met secretly with Zionist leaders); see also H. Cohen, *Army of Shadows: Palestinians and Collaboration with Zionism, 1917–1948* at 47 (Univ. of Calif. Press, 2008) (quoting diary entry by Palestinian journalist Akram Zu'itar, complaining that "a member of the Supreme Muslim Council sells land to the Jews and remains a respected personage.").
64 CO 733/344/22, Letter from Auni Bey Abdul Hadi to Secretary, Palestine Royal Commission (20 January 1937).
65 Peel Public Testimony, *op. cit.* at 365, para. 5626 (George Antonius public testimony).
66 *See* Ch. 1, n.210 and accompanying text.
67 *Id.* at 318, para. 4978 (Jamal Bey El-Husseini public testimony).
68 CO 733/343/10, Letter from Abdul Latif Bey Salah to Secretary, Royal Commission (16 January 1937).
69 *Id.*, Memorandum attached to Latif Bey's letter setting forth his written evidence for the Royal Commission.
70 CO 733/344/11, Memorandum from Emir Abdullah at 7 (March 1937).
71 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.18252, accessed 4 September 2019.
72 CO 733/353/2, Letter from High Commissioner Wauchope to Sir Cosmo Parkinson, Colonial Office (31 July 1937), enclosing two memoranda, each dated 25 July 1937 from Emir Abdullah.
73 The *Va'ad Leumi* and the *Histadrut* also submitted separate memoranda to the Royal Commission focusing on Jewish community-specific issues. *See Memorandum Submitted to the Palestine Royal Commission on Behalf of the Vaad Leumi* (Jerusalem, 1936) and *Palestine Labour's Case before the Royal Commission*, Palestine Labor Studies 4 (London, 1937).
74 Jewish Agency Memorandum, *op. cit.* at 67, para. 112.
75 *Id.* at 67–68, paras. 113–21.
76 *Id.* at 57–58, paras. 96–97.
77 *Id.* at 58, para. 101.
78 *Id.* at 59, para. 102.
79 Library of Congress, Matson Photograph Collection, http://hdl.loc.gov/loc.pnp/matpc.18243, accessed 4. Sept. 2019.
80 Peel Public Testimony, *op. cit.* at 31, para. 695 (Weizmann Public Testimony).
81 *Id.* at 31, para. 689.
82 *Id.* at 35, para. 700–01.
83 *Id.* at 35, para. 701.
84 *Id.* at 37, para. 701.
85 *Id.* at 37, paras. 702–03 [emphasis added].
86 Peel Secret Testimony, *op. cit.* at 53 paras. 929–30, 58 paras. 993–94 [emphasis added] (Weizmann *in camera* Testimony).
87 Shaw Commission Transcript, *op. cit.* at 790, paras. 19,869–70; 19,873–74; 19,876–77; 19,879–80.
88 Peel Secret Testimony, *op. cit.* at 57 paras. 971–72 (Weizmann *in camera* Testimony).
89 *Id.* at 378, para. 6618.
90 *Id.* at 381, paras. 647–48 [emphasis added].

91 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol XVIII at 3–22, Letter No. 4 (Weizmann to Lord Peel, 19 January 1937).
92 *Id.* at 17.
93 Peel Public Testimony, *op. cit.* at 288, para. 4533 (Ben-Gurion public testimony).
94 *Id.* at 289, paras. 4539, 4542.
95 *Id.* at 289, para. 4542 [emphasis added].
96 Peel Secret Testimony, *op. cit.* at 359, paras. 6286–91 (Ben-Gurion *in camera* testimony). Auni Bey nevertheless continued meeting secretly with Zionist representatives, including twice during August 1937 in Geneva during the Permanent Mandates Commission's consideration of the Peel Commission's partition proposal. Auni Bey asked the Jews to agree to a single-state solution in which the Arabs would remain the majority of the population. The Jewish side preferred partition. Memorandum from Gershon Agronsky to Weizmann, Ben-Gurion, Shertok and Goldman regarding "Second Talk with Auni Bey," Geneva, 26 August 1936, C.Z.A. Z4\32,084-2 and -3. Ben-Gurion had previously met secretly with Auni Bey in Jerusalem on 18 July 1934 at the home of Hebrew University President Judah Magnes. Ben-Gurion recalled many years later his immediate dislike of Auni Bey. "My initial impression was not encouraging. His face was not very pleasant." D. Ben-Gurion, *My Talks with Arab Leaders* at 18 (Third Press, 1973); *see also* S. Theveth, *Ben-Gurion and the Palestinian Arabs: From Peace to War* at 135–37 (Oxford, 1985).
97 Peel Public Testimony, *op. cit.* at 199–204 (Testimony of Dr. Mordechai Eliash).
98 *Id.* at 244–46, paras. 3921–30 (Stein and Horowitz public testimony).
99 *Id.* at 248, para. 3937.
00 *Id.* at 248, paras. 3937–38.
01 *Id.* at 250, paras. 3962–65; *id.* at 252–53, para. 4015.
02 *Id.* at 279, paras. 4405 (Stein public testimony).
03 *Id.* at 277, para. 4365.
04 *Id.* at 281, paras. 4431–32.
05 *Id.* at 282–83, paras. 4459–60, 4463–66. The Commission did not end the session at that point, and continued asking Stein questions for several more minutes.
06 The Palestine Government refused to allow Jabotinsky to enter Palestine. New Zionist Organization, *Evidence Submitted to the Palestine Royal Commission* at 6 (New Zionist Press, 1937).
07 *Id.* at 370–71, para. 5641 (Jabotinsky public testimony).
08 New Zionist Organization, *op. cit.* at 43.
09 Cmd. 5479, *op. cit.*
10 Official Communique No. 11/37, *Statement of Policy by His Majesty's Government in the United Kingdom – Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty* (7 July 1937), *reproduced in* Priestland, *op. cit.*, Vol. III at 470–71. The Communique was later reprinted verbatim as a Command Paper, Cmd. 5513 (July 1937).
11 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XVIII at 214, Letter No. 200 (Letter from Weizmann to Jan Christiaan Smuts, 29 September 1937).
12 CAB/24/269/54, Cabinet 23 (37), Extract (Secret) from Conclusions of Cabinet Meeting (2 June 1937).
13 *See* Ch. 1, n.127.
14 CAB 24/269/54, *op. cit.*
15 Peel Commission Report, *op. cit.* at 20, para. 8.
16 *Id.*
17 *Id.* at 24, para. 19.
18 *Id.* at 39, para. 42.
19 *Id.* at 136, para. 47 [emphasis added].
20 *Id.* at 363.
21 *Id.* at 370.
22 *Id.* at 370–73.
23 *Id.* at 374.
24 *Id.* at 375–76.
25 Commissioner Copeland wrote a lengthy memorandum to the other Commissioners regarding the partition proposal, indicating it represented his and Commissioner Hammond's "joint suggestions on the main points." The note characterized the swaps of land and populations as "by far the most difficult part of the whole scheme." CO 733/346/9, R. Coupland, "Note for Discussion of Partition" (the note is undated, but the file indicates a date of 7 December 1936, which is remarkable given the Commission was still several months away from completing the hearings).
26 *Id.* at 381–91. A note by Commissioner Coupland, written prior to the completion of the final Report, sheds interesting light on the Commission's deliberations regarding partition. Coupland described the partition proposal as the "Clean Cut" idea, saying "[i]n broad outline it amounts to an effort to buy out the Arabs from a part of Palestine in which the Jews would be left, we hope, undisturbed. We have no idea of what it may cost, or whether it is really practicable … I own to a fear that the 'clean cut' may result in a contused festering wound, and the blame for hasty clumsy surgery may be laid at our door." CO 733/346/9, R. Coupland, "Note on 'Clean Cut'" (23 May 1937).

27 Map from http://jcpa.org/article/peel-commission-report-1937-origins-partition-concept/, accessed 10 September 2019.
28 CO 733/346/9, Sir L. Hammond, "Note on 'Clean Cut'" (21 May 1937).
29 *Id.* at 394–95.
30 *The Times*, 8 April 1937.
31 Hansard, HL Deb. 20 July 1937, Vol. 106 at 599.
32 *Id.* at 599–600.
33 *Id.* at 600.
34 Chancellor Papers, MSS Brit.Emp/. s 284, File 15/7, Letter from Lord Peel to Chancellor (11 July 1937).
35 Shaw Transcript and Exhibits, *op. cit.* at 440, paras. 11.149–63.
36 *Chancellor Papers*, *op. cit.*, *File 15/7*, Letter from Frances Newton to Chancellor (12 July 1937). Newton wrote another letter to Chancellor on 18 August 1937, this time blasting the Zionists "by blackguarding us" and "dictating their terms to us." Newton concluded this letter with an interesting warning: "I only hope we shan't deal with the Arabs as insignificant mosquitos and wake up to find them hornets!" *Id.* During her testimony before the Shaw Commission, Newton called the Jews "arrogant." Shaw Transcript and Exhibits, *op. cit.* at 4331, para. 10, 793.
37 FO 371/20,810, Letter from Arab Higher Committee to High Commissioner of Palestine (23 July 1937). The letter was also published in pamphlet form, and can be viewed at www.loc.gov/rr/amed/pdf/palestine1/Memorandum-submitted-by-Arab%20higher-committe.pdf, accessed 29 August 2019.
38 *Id.* at 2.
39 *Id.* at 6, 8–9.
40 *Id.* at 11.
41 *Id.* at 13.
42 *Id.* at 19.
43 *Id.*
44 *Id.* at 19–20.
45 FO 371/20,810, Telegram No. 427 from Sir Miles Lampson to Foreign Office (27 July 1937).
46 *Weizmann Letters and Papers*, *op. cit.*, Series A, Vol. XVIII at 135, Letter No. 121 (Weizmann to Stephen S. Wise, 29 June 1937) [emphasis in original].
47 *Id.* at 117, Letter No. 105 (Weizmann to Winston Churchill, 14 June 1937).
48 *Id.* at 375–76, Letter No. 332 (Weizmann to Sir Harold MacMichael, 4 May 1938).
49 *Id.* at 207–08, Letter No. 194 (Weizmann to Nicolai Kirschner, 26 September 1937) [emphasis in original].
50 *Id.* at 218, Letter No. 200 (Weizmann to Jan Christiaan Smuts, 29 September 1937).
51 *Id.* at 278, Letter No. 255 (Weizmann to Leon Blum, 31 December 1937).
52 *Id.* at 369, Letter no. 329 (Weizmann to Albert Einstein, 28 April 1938).
53 R. Gavison (ed.), *op. cit.* at 87. For a more complete discussion of Jewish reaction to partition, *see* Y. Haim, *Zionist Attitudes toward Partition, 1937–1938*, Jewish Social Studies 40(3), 303–20 (1978).
54 Cmd. 5634, *Policy in Palestine* at 5 (Jan. 1938).
55 *Id.*; *see also* C.330.M.222, 1937, VI, Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session (30 July – 18 August 1937).
56 Cmd. 5634, *op. cit.* at 8.
57 *Id.* at 10.
58 *Id.* at 11.
59 Cmd. 5854, *Palestine Partition Commission Report* at 8 (Nov. 1938)
60 *Id.* at 4.
61 *Id.* at 13–14.
62 Cmd. 6019, *op. cit.* at 6–11, paras. 10–15.
63 The printed transcript of the public testimony heard by the Royal Commission contains 408 pages (Colonial No. 134), whereas the printed transcript of the secret testimony contains 531 pages (FO 492/19).
64 United Nations General Assembly, Resolution 181 (II), A/RES/181(II) (29 November 1947)

6

THE EARLY LEGAL BATTLES AND THEIR RELEVANCE TODAY

Introduction

The early years of the Arab–Jewish conflict in Palestine were remarkable for the enormous role the law played, both substantively and procedurally. The parties constantly invoked the Petition process, developing a custom and practice of seeking relief from a succession of outside authorities, from the Ottomans to the British to the League of Nations.

By the late 1920s and early 1930s the conflict had become as much a battle fought in the courtroom as in the streets. The Arab and Jewish sides poured enormous time, effort and resources into developing their legal arguments before the Shaw, Lofgren, and Peel Commissions regarding the McMahon-Hussein correspondence, the validity of the Balfour Declaration and the Mandate, and their respective rights and claims to the Wailing Wall. They honed their legal arguments and refined their procedural tactics in a constant effort to gain legal and political leverage against each other and to influence international opinion. The echoes of those early substantive legal arguments and procedural tactics continue resonating to this very day.

The substantive arguments made in the three trials before the Shaw, Lofgren, and Peel Commissions, as well as the arguments the parties made to the Permanent Mandates Commission of the League of Nations, planted the seeds for nearly all the key arguments the parties continue making today regarding issues such as the legality of the Israeli occupation of the West Bank; the legality of the Israeli-constructed barrier along sections of the so-called “green line”; the legal justification for the Boycott, Divestment, and Sanctions movement; the legitimacy of the State of Israel; and the ongoing Muslim suspicions of Israeli intentions regarding the Temple Mount.

And, of course, the Peel Commission gave rise to the idea of partition – the two-state solution – which remains one of the key debates in the conflict today.

The modern legal conflict has also seen the parties reverse their roles in certain respects. For example, during the 1920s and 1930s both sides repeatedly sought redress from the Permanent Mandates Commission of the League of Nations, although the Jewish side enjoyed more success, given the League’s general sympathy with the cause of Zionism. The Arab side also repeatedly expressed reluctance about the objectivity of certain countries and generally mistrusted the international community as a source of support.

In today’s world, quite the opposite situation prevails, as the Palestinian Arabs repeatedly have sought – with great success – to engage the United Nations and its component agencies, as well as the European Union on their behalf. The Israelis, on the other hand, generally regard with skepticism the international community’s ability to serve as a fair and objective arbiter of the

parties' respective legal claims, and therefore have invoked the same sorts of jurisdictional objections the Palestinians raised before and during the Lofgren hearings.[1]

To appreciate the interplay between the early legal battles and today's legal conflict, we will first summarize the early Arab and Jewish legal arguments, and then examine their relevance today.

The early legal battles summarized

Summary of the early Arab legal case

The early Arab legal case, as it evolved before the Shaw, Lofgren, and Peel Commissions, was presented with skill and creativity. The Arab arguments became most effective, and created the most concern for the British and the Jews, when they focused on textual, legal analyses of the McMahon-Hussein correspondence and the provisions of the Covenant of the League of Nations, rather than on the merits of British policy in Palestine. This focus on legal rather than policy issues helped the Arab side hone their arguments, preparing them for the next several decades of legal combat with the Israelis.

The early Arab legal case can, therefore, be summarized as follows.

First, the Balfour Declaration of 2 November 1917, and its statement that the British Government "viewed with favour the establishment of a National Home in Palestine for the Jewish People," was void *ab initio*, because Britain had no legal right or standing to demise Palestine to anyone as of November 1917. Britain had not yet conquered Palestine. World War I had not yet ended. No treaties had yet been signed giving Britain *any* legal standing to assign Palestine or any portion of it to anyone other than the pre-existing indigenous Arab majority.

Second, even if Britain possessed any legal right or authority to give or promise Palestine (or any portion of it) to anyone while war was still raging, it had *already* exercised those rights in favor of the local Palestinian Arabs when it allocated Palestine *to them* in McMahon's 24 October 1915 letter to the Sherif, a full two years and 18 days prior to the Balfour Declaration.

Third, McMahon's 24 October 1915 letter and the Sherif's response to the letter formed a treaty between current and future sovereigns, binding Britain thereafter to uphold McMahon's pledges to Hussein.

Fourth, the Covenant of the League of Nations, in paragraph four of Article 22, *ratified* McMahon's pledge of Palestine to the Sherif by declaring:

> *Certain communities formerly belonging to the Turkish Empire* have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

The explicit reference to "certain communities formerly belonging to the Turkish Empire" can only be read to mean the population of Palestine as it existed as of the end of the War, a population consisting of more than 90 percent Arabs and less than ten percent Jews. Thus, the text of the Covenant is consistent with McMahon's correspondence with Hussein, promising Palestine as one of the future territories for Arab independence.

The League, moreover, viewed this as a hallowed obligation, as a *sacred trust* of civilization, codifying President Wilson's commitment to self-determination for the former Ottoman imperial

territories.

Fifth, the McMahon-Hussein correspondence neither explicitly nor implicitly excluded Palestine or reserved *any* portion of Palestine for additional Jewish immigration and settlement. The word "Palestine" appears nowhere in any of McMahon's letters. The specific reservation in McMahon's 24 October 1915 letter of "portions of Syria lying to the west of the Districts of Damascus, Homs, Hama and Aleppo" can only logically be understood as referring to modern-day Lebanon, which lies directly to the *west* of those four cities, and not Palestine, which lies to the *southwest*. The ordinary canons of construction under English and International law require the 24 October 1915 letter be interpreted based on the unambiguous wording of the letter. Any attempt to alter the meaning by reading McMahon's supposed intent into the letter fails as a matter of law.

Sixth, nor does the general reservation in favor of French interests support the argument that Palestine was excluded. After all, France voted for the Covenant of the League of Nations (it even hosted the Peace Conference that produced the Covenant). The Covenant says *nothing* about Palestine or any supposed exclusion of Palestine from the areas set aside for future Arab independence, nor does it say *anything* about the Balfour Declaration or the Jewish People. Certainly France, if indeed it claimed any interests in Palestine, would have taken steps to protect those interests by demanding language be included in the Covenant, rather than voting for it without such language.

Seventh, even if the Balfour Declaration was somehow valid *ab initio*, its promise of a national home in Palestine to the "Jewish people," wherever they may have been located, cannot be reconciled with the very specific reference to "certain communities *formerly belonging to the Turkish Empire*" in Article 22 of the Covenant of the League of Nations. The irreconcilable conflict between the Balfour Declaration and Article 22 thus rendered the Balfour Declaration legally null and void the moment the Covenant was ratified, based on the language of Article 20:

> The Members of the League severally agree that this Covenant is accepted as *abrogating all obligations or understandings inter se which are inconsistent with the terms thereof*, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

The Balfour Declaration constituted an official British Government promise of a national home in Palestine to the entire "Jewish people," wherever they lived throughout the world. But the language of Article 22 of the Covenant would, at most, *only* have applied to the Jewish community *already* residing in Palestine as of the end of the War, "a community formerly belonging to the Turkish Empire." The Balfour Declaration's far broader promise to the non-Palestinian Jews living in Europe and elsewhere conflicted directly with Article 22, and therefore became void upon the ratification of the Covenant.

Eighth, therefore, the Balfour Declaration, even if it were somehow legally valid *ab initio*, was abrogated by operation of law the moment 42 nations ratified the Covenant of the League of Nations on 10 January 1920. Thus, the subsequent incorporation of the legally abrogated Balfour Declaration into the San Remo resolutions on 25 April 1920 was itself legally null and void, as was the incorporation of the San Remo resolutions into the never-ratified Treaty of Sevres on 10 August 1920.

Ninth, the incorporation of the Balfour Declaration into the 24 July 1922 Mandate for Palestine likewise was legally null and void, regardless whether the Declaration was void *ab initio* or subsequently voided as a result of the ratification of the Covenant of the League of

Nations. Therefore, all the provisions of the Mandate referencing the Balfour Declaration, the establishment of a National Home for the Jewish people in Palestine, the role of the Jewish Agency, and close settlement of the Jews on the land of Palestine, had no legal validity and must be struck from the Mandate. Palestine, therefore, should have been treated the same as the other former Ottoman Class A mandates such as Iraq, Transjordan, Syria, and Lebanon.

Tenth, the Mandate was also null and void for the separate reason that Britain was selected as the Mandatory Power in violation of Article 22 of the Covenant of the League of Nations, which required "the wishes of those communities [formerly under Turkish rule] must be a principal consideration in the selection of the Mandatory." Because the Palestinian Arabs had not been consulted regarding the selection of Britain as the Mandatory Power, Britain's appointment should have been rescinded until a new Mandatory Power could be chosen after consultation with the Palestinian Arabs. The Mandate should not have taken effect until that selection process could be completed.

Eleventh, the only legally valid document bearing on Palestine subsequent to the ratification of the Covenant of the League of Nations was the Treaty of Lausanne, ratified 24 July 1923. The Treaty formally ended World War I, with Turkey surrendering all claims to its former Arab territories, including Palestine. As with the Covenant of the League of Nations, but unlike the ill-fated Treaty of Sevres, the Treaty of Lausanne said *nothing* about the Balfour Declaration, and said *nothing* about a national home for the Jewish People in Palestine.

Twelfth, regarding the Wailing Wall and the pavement, the Muslims consistently maintained their position that both the Wall and the Pavement were sacred Muslim shrines that had been dedicated as *Wakf* property hundreds of years ago, following the Muslim conquest of Jerusalem. As such, they were governed exclusively by *Sharia* Law and fell under the exclusive jurisdiction of the *Sharia* courts.

Therefore, neither the British Government, nor the Lofgren Commission, nor the League of Nations had *any* legal standing to adjudicate the supposed rights and claims of the Jews to the Wall. The *sole* arbiters of those rights were the Muslim religious authorities, who had consistently declared the Jews enjoyed no more and no less rights or claims than all other non-Muslim religious communities.

Thirteenth, even if the Mandate had legal force, it still had to be construed in favor of granting the Jews only *de minimis* rights at the Wall. The *Status Quo* concept, codified as a principle of law in Article 13 of the Mandate, applied solely to "existing rights," meaning only those very limited rights the Jews enjoyed under Turkish rule. Thus, the Jews were permitted to visit the Wall as tourists any time they wished, but pursuant to the legal force of the *Status Quo*, it was *against the law* for the Jews to conduct prayer services at the Wall, or to bring any religious paraphernalia or appurtenances of prayer to the Wall.

Because the Arabs viewed the Mandate as unlawful and the Wall as outside the jurisdiction of either Britain or the League of Nations, the Arabs participated under protest in the three trials before the Shaw, Lofgren, and Peel Commissions. But they participated vigorously nonetheless, using the opportunity to press their legal arguments to influence British policy and world opinion regarding the situation in Palestine from their perspective.

Summary of the early Jewish legal case

The Jewish case before the Shaw, Lofgren, and Peel Commissions, and before the Permanent Mandates Commission of the League of Nations, tended to focus more on principles of fairness and equity rather than on strict textual analyses of the various documents, although the Jews also made certain arguments of a highly technical nature.

The Jewish case rested almost entirely on the legality of the Balfour Declaration and the Mandate as independent, self-executing documents.

First, the Jewish side viewed the Balfour Declaration as a binding commitment undertaken voluntarily by the British Government at a time when it was clear Britain was about to defeat the Turks and oust them from Palestine. The commitment *required* Britain to use its "*best* endeavors *to facilitate*" the establishment of a National Home in Palestine for the Jewish people.

Second, many of the same nations who had ratified the Covenant of the League of Nations in January 1920 also approved the incorporation of the Balfour Declaration into the San Remo Resolutions only three months later. By doing so, those nations elevated the Balfour Declaration to the status of an enforceable international legal instrument, thereby undermining the Arab claim that the Balfour Declaration lacked the *imprimatur* of the international community because of the absence of any mention of it in the Covenant of the League.

Third, the Council of the League of Nations, acting on behalf of *all* member states, approved the Mandate for Palestine in 1922. The Preamble not only repeated the wording of the Balfour Declaration but took it a step further, declaring "recognition has thereby been given to the *historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country*."

Fourth, the implementing provisions of the Mandate also made clear that establishing a National Home for the Jewish people was the top priority and main focus of the Mandate. Hence, Article 2 required the Mandatory to place the country under such political, administrative, and economic conditions as would secure the establishment of the Jewish national home. Article 4 recognized the Zionist Organization as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine. Article 6 required the Mandatory to facilitate Jewish immigration and encourage "close settlement by Jews." Article 22 recognized the recently reborn Hebrew language as one of the official languages of the country, and required Hebrew to appear on all postage stamps and currency. Significantly, *no* similar provisos were included on behalf of the Palestinian Arabs.

Fifth, as discussed in Chapter 5, the Jewish side also refuted the Arab legal claims regarding the McMahon-Hussein correspondence, relying heavily on subsequent British Government statements affirming McMahon's intent to exclude Palestine from his pledge to the Sherif. The Jews also echoed British arguments that the Palestinian Arabs should not be viewed as third party beneficiaries of McMahon's commitments to the Sherifian Arabs, especially given Feisal's supportive letters in 1919 to Frankfurter and Samuel, and most importantly in light of the "treaty" Feisal signed with Weizmann in 1919.

Sixth, regarding the alleged conflict between the Balfour Declaration and the Mandate with Articles 20 and 22 of the Covenant of the League of Nations, the Jewish side argued the words "*certain* communities" meant *some*, but not *all* the communities formerly belonging to the Turkish Empire. Therefore, absent any clear language referencing the indigenous Arab community of Palestine, there was no basis for finding a conflict between Article 22 and the Mandate.

Seventh, regarding the Arab claim that the Mandate was void because the Palestinian Arabs had not been consulted regarding the selection of Britain as the Mandatory Power, the Jewish side noted the legal advice it had received in 1921 from Sir William Finlay, who opined the language was not applicable to Palestine. Moreover, even if the language were applicable to Palestine, the language merely indicated the wishes of the local community were *a* principal consideration, but not *the* principal consideration in determining who to select as the Mandatory.

Eighth, having established the legality of the Balfour Declaration and the Mandate, the Jewish side argued for the broadest possible interpretation of its terms, while taking care not to demand outright (at least not during the pre-Holocaust period) a State of their own in Palestine. Thus, the Jews argued the Mandate should be interpreted as requiring Britain to do everything possible to facilitate Jewish immigration and land acquisition, while using its military and police power to protect the Jews from Arab violence (or allow the Jews to arm and protect themselves). The Jews viewed the project of building the National Home as an ongoing, never-ending work in progress, meaning Britain's mandate-related obligations to the Jews would also remain ongoing and never-ending.

Summary of the early British legal case

The British legal case reflects the Government's constant struggles with the McMahon-Hussein correspondence and its attempts to reconcile its "double duty" to the Jewish people and the Palestinian Arabs.

The British argued McMahon's 24 October 1915 letter was, on its face, unambiguous and did not contain any promise of Palestine to the Arabs, based on both the specific geographic reservation of areas lying to the west of the Districts of Damascus, Homs, Hama, and Aleppo, and the general reservation in favor of French interests. The British further argued that any ambiguity in the letter should be resolved in Britain's favor. Even though ordinary legal rules require documentary ambiguities to be resolved against the drafter, Britain argued the strong evidence of British intent to exclude Palestine, and the equally strong evidence of the Sherif's and Feisal's contemporaneous acquiescence in that intent, required the ambiguity be resolved against the Arabs. On that basis, the correspondence did not create any legally binding promise of Palestine to the Arabs. Therefore, neither the Balfour Declaration nor the Mandate were in conflict with the McMahon-Hussein correspondence.

Nor did Articles 22 and 20 of the Covenant of the League of Nations undermine the legal validity of the Mandate. Even if the Palestine Arabs were included in the term "certain communities," at most their independence was treated merely as a future possibility, "*provisionally* recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."

Regarding Article 20, the British response, best articulated by Lord Peel during his questioning of the Mufti, focused on the words "*inter se*," limiting the abrogation of prior inconsistent agreements *only* to those agreements *between* members of the League of Nations. The Balfour Declaration was *not* such an agreement, as neither Lord Rothschild nor the "Jewish People" were members of the League. Nor did President Wilson's endorsement of the Declaration somehow render the Declaration an agreement between the United States and Britain, and even if it did, the United States itself was not a member of the League. Thus, the

abrogation requirement of Article 20 had no impact on either the Balfour Declaration or the related provisions of the Mandate.

On the other hand, the British consistently argued, despite Churchill's contrary position in his secret testimony before the Peel Commission, that the Balfour Declaration and the Mandate created two *equally* binding British obligations to the Jews and Arabs. The important obligation to facilitate the establishment of a Jewish National Home and Jewish immigration had always to be balanced against the equally important duty to safeguard the civil and religious rights of the non-Jewish population of Palestine, and to ensure the "rights and position" of the Palestinian Arabs were not prejudiced.

Britain tried to strike this balance by adopting a narrow interpretation of its obligations under Article 2 of the Mandate to secure the establishment of a Jewish National Home in Palestine, and its obligations under Article 6 of the Mandate to "facilitate Jewish immigration under suitable conditions" and "encourage … close settlement by Jews on the land." Throughout the 1920s and 1930s the British expressed concern about Jewish land acquisition and the impact on Arab tenant farmers. British officialdom seized on the Churchill White Paper's "economic absorptive capacity" concept as a way to justify their narrow reading of their obligations to the Jews while carrying out their obligation to protect the Arabs. Thus, the Shaw Commission Report, the Hope Simpson Report, the Passfield White Paper, the Peel Commission Report, and the MacDonald White Paper all expressed, in varying degrees, concern about the pace of Jewish immigration and the impact on the Arab "position" in Palestine.

The British also interpreted the phrase "National Home" narrowly. If the British could argue the National Home had been established by virtue of the large influx of Jews during the 1920s and early 1930s, as well as the creation of Jewish cities, towns, colleges, and universities, and the success of Jewish agriculture, then the British could declare they had fulfilled their Mandate-related obligations to the Jews, and could therefore ban or impose strict limitations on future Jewish immigration and land acquisition, while focusing on continuing to safeguard Arab religious and civil rights.

In many ways, the British reliance on the *Status Quo* and the Mandate as having the force of statutory law trapped them into an overly legal view of the conflict on the ground. The decision to address the rapidly increasing tensions at the Wailing Wall following the 1928 *Yom Kippur* incident by issuing a legalistic White Paper, followed shortly by a request to the Law Officers of the Crown for legal advice, demonstrates just how much Britain viewed the Muslim-Jewish conflict in Palestine as an inherently legal conflict, one that could be addressed with substantive and procedural legal responses.

Political context of the early legal battles

All three parties to the early legal battles – Arab, Jewish, and British – used the law during the Mandate period not just as a substantive legal and procedural tool, but also as a political lever. The Arabs and Jews, each lacking sufficient military or economic power to achieve their objectives, hoped to gain political advantages against each other by using the law to increase the political pressure on the British and the League of Nations. The British, as the ruling power in Palestine, used the law initially as a mechanism to position themselves as a neutral party, focused on balancing their competing obligations under the Mandate, and later as the basis for justifying a tilt toward Arab interests.

The British: tension between law and politics

The British political commitment to the Jews began with the wartime Balfour Declaration. The Balfour Declaration later acquired legal status when the League of Nations incorporated it into the Mandate. The British administered Palestine using the same governance model it had employed throughout the Empire, creating a local civilian government headed by a High Commissioner who reported directly to the Colonial Secretary. The British established a legal infrastructure in Palestine, with lawyers, judges and police acting to maintain public order by enforcing a combination of various laws inherited from the Ottomans, plus additional British Orders-In-Council and Mandatory government enactments.

The Mandate, however, also superimposed an additional layer of governance on Palestine, along with an overarching legal regime. The British Government stood accountable for the manner in which it implemented the Mandate to the Council of the League of Nations, through the supervisory authority and oversight of the Permanent Mandates Commission. The British government in Palestine also had to comply with and enforce the substantive provisions of the Mandate itself, including the apparently conflicting requirements to secure the establishment of a National Home for the Jewish people, while simultaneously safeguarding the civil and religious rights of the non-Jewish population of Palestine and ensuring the Arabs' rights and position were not prejudiced.

The British recognized early the legal and political challenges the Mandate presented. They realized both the Arab and Jewish sides believed the British Government had made binding promises of self-determination to each of them. They understood the depth of religious and political division between the communities. The British, therefore, sought to use the law and the legal process to position themselves as a neutral and even-handed arbiter of Jewish–Arab relations in Palestine. Britain's reliance on substantive legal concepts such as the *Status Quo*, its interpretation of the Mandate as permitting Jewish immigration only to the extent of the economic absorptive capacity of the country, and its use of procedural mechanisms such as Commissions of Enquiry, were all designed to portray Britain as non-partisan, fair, and committed above all else to the rule of law.

Britain's heavy reliance on the *Status Quo* as a *legal* concept illustrates this point. By interpreting Article 13 of the Mandate as codifying prior Turkish rules regarding the Holy Places, Britain sought to position itself as simply carrying out the directive of the League of Nations to maintain and enforce the *same* legal regime that existed under Turkish rule. Britain repeatedly argued, both to the local Arabs and Jews, to the Zionist leadership in London, and to the Permanent Mandates Commission in Geneva, that its *sole* obligation under Article 13 was to continue enforcing the prior Turkish rules *exactly* as the Turks had done before the War, and not to add or detract from those rules.[2]

In many ways, however, the entire concept of the *Status Quo* was based on fiction. The Ottomans never promulgated any legislation addressing Jewish worship rights at the Wall, nor did they issue even a basic set of rules or "instructions" for Jewish prayer at the Wall, as the British had done in October 1929. The spotty record of Ottoman *firmans* and *Sharia* Court rulings introduced into evidence before the Lofgren Commission hardly comprised any basis upon which the British could meaningfully define the pre-War legal rules regarding the Wall and the pavement. Indeed, the evidence introduced before the Lofgren Commission unmasked the pre-existing *Status Quo* as a highly malleable concept, ebbing and flowing and depending more

on petty bribery rather than on a fixed set of rules.

Nevertheless, Britain anchored itself to the *Status Quo* because it wanted to treat the Wall dispute as essentially a *legal* question, rather than as a highly charged intercommunal religious or political clash. Britain cast itself as a neutral, impartial third party simply discharging a legal obligation to the League of Nations to maintain compliance and continuity with Turkish law. Cust's comprehensive memorandum describing the *Status Quo* represented the British authorities' attempt to demonstrate they were following pre-existing Turkish legal practices to the letter. Indeed, throughout the 1920s the British authorities repeatedly described the *Status Quo* as having the force of law. This explains why Keith-Roach viewed the removal of the screen during the fateful events of *Yom Kippur* 1928 as nothing more than a simple law enforcement matter.

Britain also had other political motives for the legalistic approach it took to the Wall. By applying a narrow interpretation to Article 13 of the Mandate as embodying *only* the pre-War *Status Quo*, and by treating the *Status Quo* as having the force of law, Britain tried to achieve the political objective of avoiding a repeat of Muslim violence in Palestine (already a worry after the 1920 *Nebi Musa* riots and the 1921 Jaffa riots). Britain was also keenly focused on avoiding a rift with the much larger Muslim population in India. By maintaining strict compliance with prior Turkish practices, Britain hoped to avoid offending Muslim sentiment in Palestine and elsewhere by arguing it was faithfully implementing the same policies as the prior Ottoman Muslim rulers.

Britain's continuous reliance on Commissions of Enquiry also reflected its commitment to using the legal process and legal procedure to achieve the political objective of even-handedness. But those same Commissions also sowed the seeds for Britain's eventual tilt in favor of Arab rights in Palestine. The Haycraft Commission criticized Zionist aspirations. The Shaw Commission raised deep concerns over Jewish immigration and land acquisition, even though those issues fell far beyond the scope of the Commission's Terms of Reference. Preedy's performance during the Shaw Commission hearings, especially the stark contrast between his friendly cross-examination of the Mufti and his extremely hostile questioning of Braude and Sacher, raised questions about the British Government's objectivity. And the Peel Commission recommended dividing Palestine into separate Jewish and Arab states, even though Britain had maintained well into the late 1920s and beyond that McMahon had never promised the Sherif *any* portion of Cisjordan Palestine as part of the areas set aside for future Arab independence.

The British, therefore, began by approaching the law as a means of establishing its *bona fides* as a fair, even-handed administrator of Palestine. But as public order deteriorated sporadically during the early 1920s and more intensively during the August 1929 riots and thereafter, the British substantially altered their approach, employing the law in the service of their increasingly urgent political objectives of limiting Jewish immigration and land acquisition and reducing Arab violence by placating Arab fears of an eventual Jewish majority in Palestine.

Therefore, beginning with the Shaw Commission and continuing through the Hope Simpson report, the Peel Commission Report, the Woodhead Commission report, and eventually culminating in the 1939 MacDonald White Paper, Britain slowly and inexorably used the legal constructs of "economic absorptive capacity," "double-duty," "safeguarding Arab rights and position" and the "completion" of the Jewish National Home in Palestine to abandon the pretense of legal neutrality and serve the evolving British political interest in restricting Jewish immigration and land acquisition, and adopting a more pro-Arab stance.

The Arabs: law as a key political resource

For the Arabs, the law began during the early years of the conflict as a platform for filing petitions with the Sultan and later the British government in Palestine. The Arabs were highly skeptical of participating in the Shaw, Lofgren, and Peel hearings, fearing they would not receive fair treatment, and raising doubts about the jurisdiction of the Commissions to adjudicate matters involving Muslim Holy Sites and Arab land.

But the Arabs soon realized the enormous potential of the law as a resource for advancing their political objectives. Their success before the Shaw Commission was particularly striking. The Arabs began the trial having *already* been declared guilty in Chancellor's 1 September 1929 Proclamation, and yet emerged from the trial with a stunning and sweeping victory. The Arab side benefited especially from the excellent legal skills of Stoker and Auni Bey. Stoker, who came into the Shaw hearings as a little-regarded British barrister, and who the Zionists ridiculed as a nonentity, displayed far greater strategic courtroom skills than his vaunted opponent, the once-and-future Solicitor General of His Majesty's Government, Sir Boyd Merriman.[3]

Stoker and Auni Bey effectively used the law and legal concepts to argue the Arabs had been treated unjustly, and to raise questions regarding the legal validity of the Balfour Declaration and the corresponding provisions of the Mandate. They succeeded beyond anyone's expectations. The Shaw Commission blamed the Jewish *Tisha b'Av* demonstration as the immediate cause of the riots, found the riots had not been premediated, determined the riots were not seditious, exonerated the Mufti, and strayed far beyond its Terms of Reference to address the Arab-raised "major issues" such as the McMahon-Hussein correspondence, the Balfour Declaration, and Jewish immigration and land acquisition.

While the Arabs were not quite as successful before the Lofgren Commission, they built on their experience from the Shaw Commission by using the Lofgren trial as a platform to make their case to a broader international audience and to energize the Muslim world on behalf of the Palestinian Arab cause. The Mufti therefore succeeded in using the legal dispute regarding Jewish rights of access to the Wall and their appurtenances of prayer as a launching pad for transforming the courtroom debate into part of the larger battle against Zionism, a political-religious cause for the entire Muslim world.

Indeed, by the time the Lofgren Commission hearings had concluded, the Mufti seemed determined to achieve the political objective of halting and reversing the progress of Zionism through the unlikely combination of violence and law. The more violence he incited, the more pressure the British would feel to make concessions to the Arabs during the legal process.

The Arabs tried to further this approach during the Peel Commission hearings, when they offered (albeit late, only after initially boycotting the proceedings) not just their most important political and legal personalities as witnesses, but also made various comprehensive written legal submissions to the Commission. But the Mufti's intransigence and his refusal to compromise produced a huge setback for the Arab cause when the Peel Commission endorsed the creation of a Jewish State in a portion of Palestine.

The Arab side nevertheless persisted in its legal arguments following the disappointing outcome of the Peel Commission. By the time the Arabs met with the British in London in 1939, they had succeeded in moving the British, through the force of their legal arguments, to question the strength of Britain's own legal case regarding whether McMahon had excluded Palestine from his pledge to the Sherif. Several British officials openly expressed skepticism of Britain's

legal position.

The Arab legal approach during the early years of the conflict (as it is today) was also marked by a great degree of consistency and an unwillingness to compromise or moderate their legal positions. From the moment in the early 1920s when the Arab side began arguing the Balfour Declaration was illegal, their core argument remained the same: McMahon had entered into a binding treaty with the Sherif promising Palestine to the Arabs, and therefore the Balfour Declaration was illegal. The Arabs developed additional supporting arguments along the way, but the core argument remained the same and continues to appeal to certain Arab groups today.[4]

Ironically, while the Arabs increasingly embraced the law as a favored tool during the early years of the conflict, they failed to litigate their way to complete political victory against the Jews. The experience of the Shaw Commission, in particular, demonstrated that knock-down, drag-out litigation would never offer a viable means for resolving the conflict between the parties. The experience of the failed settlement negotiations during and after the Lofgren Commission hearings further demonstrated the limitations of the law as a platform for achieving voluntary agreement between the parties. But the lesson the Mufti seemed to draw from both experiences was that the law offered a highly useful tool for the Arab side, in tandem with violence, to cause the British to harbor second thoughts about its commitments to the Jews.

The Palestinian Arabs continue relying today on the law as one of their key tools in the conflict. They have enjoyed even more success than the Mufti, given the far more favorable receptivity to their arguments throughout the international community and the added factual element of Israel's post-1967 occupation of the West Bank. The same international community that had little or no interest in Palestinian statehood during the Jordanian occupation of 1948–67 has, ever since 1967, championed Palestinian self-determination in the West Bank and Gaza as one of the top two or three issues animating the global agenda. In large part that has been the result of the Palestinian reliance on many of the same legal arguments originally developed by the Mufti and Auni Bey Abdul Hadi during British rule.

The Jews: law as an uncertain political resource

The Jewish experience with the law during the early years of the conflict evolved from high hopes to dashed expectations to revived optimism. Weizmann expended enormous political capital to persuade the British Government to order the Shaw Commission to conduct a full-blown trial pitting the Jews against both the Arabs and the Mandatory Government. Weizmann also expended enormous sums of money to pay Merriman's and Lord Erleigh's legal fees.

But Weizmann's gambit backfired, as Merriman and Erleigh turned out to be no match for the supposedly less qualified Stoker and Preedy. Merriman and Weizmann made an enormous strategic error by seeking to use the trial to condemn the Government of Palestine and its highest officials, seemingly blind to the reality that a Commission of Enquiry composed of a former Colonial Judge and three MPs would never deliver a verdict in favor of the Jews and against the Mandatory Government or any of its officials.

Fortunately for the Jewish side, however, Weizmann changed course for the Lofgren trial, allowing Kisch to retain Mordechai Eliash to represent the Jews. Eliash was, by far, the best lawyer to appear before any of the British Commissions of the 1920s and 1930s. One could take issue with his quick concession regarding Jewish lack of ownership of the Wall; or one could

defend the early waiver as a brilliant tactical move that took the strongest Arab legal argument (*Wakf* ownership) off the table, thereby enabling Eliash to focus the Commission on the key issues involving the Jewish rights of access to the Wall and to bring appurtenances of prayer. Either way, Eliash's performance before the Lofgren Commission was superb, and set the stage for the even better performance of the Jewish witnesses (especially Weizmann) before the Peel Commission.

But for all of Eliash's skill in the courtroom, the Mufti refused to consider settling the dispute after the trial concluded and before the verdict was rendered, even though Lofgren and the British had implored him to do so. The Mufti instead preferred to take the risk that the Muslims could end up with a worse outcome in the form of an adverse verdict.

The failed settlement negotiations revealed a key difference in the parties' early strategic approach to the law. Whereas the Jews would have been happy to use Eliash's highly effective courtroom performance as leverage to drive a negotiated settlement of the dispute over the Wall, the Mufti had no interest in settling anything, preferring instead to use the courtroom and the legal process as a platform for consistently and continuously airing Palestinian Arab grievances, taking absolutist positions, and pitting Arab nationalism against Zionism, while fomenting violence to force British concessions. What mattered most to the Mufti was keeping the dispute alive, whereas what mattered most to the Jews was making the dispute go away.

In many ways the same can be said of the parties' approach to the role of the law in the conflict today. The Palestinian Arab strategy, as we will see below, continues to be based on using the law not necessarily as a means to achieve a final settlement of the conflict, but instead as a platform for airing their grievances, for keeping Israel on the defensive in the court of international public opinion, and for delegitimizing various Israeli actions and perhaps even the State of Israel itself.

The Jews, therefore, after initially viewing the law as a key tool in the conflict, quickly lost confidence in the utility of the law and focused on pursuing other options, especially following the crushing defeat before the Shaw Commission. The Jews tended to place much more importance on Weizmann's personal relationship and behind-the-scenes diplomacy with the British Government, even with those officials who did not like him. This new approach played out before the Peel Commission, when Weizmann testified *in camera* on four separate occasions – far more than any other witness – patiently and persuasively making the case for Zionism, far more as a stateman than as a legal advocate.

The modern-day Israeli government likewise places less emphasis on the law as a lever in the conflict than does the Palestinian Arab side, preferring instead behind-the-scenes diplomacy, military might and economic strength as the keys to protecting and advancing its interests.

The legal battles today

These, therefore, were the core substantive legal arguments the parties developed during the 1920s and 1930s to advance their positions and influence international opinion. The parties developed a custom and practice of repeatedly using the law and the legal process to make those arguments, and took full advantage of the Shaw, Lofgren, and Peel Commission hearings to make those arguments through testimony, cross-examination, opening statements, closing arguments, and written submissions.

The arguments the parties made 90 years ago contained the seeds of many of the substantive

arguments the parties continue making today. Moreover, the procedural tactics the parties developed to pursue those arguments during the early years of the conflict, and the custom and practice arising from those tactics, continue to be followed to this day, as the parties – especially the Palestinians, the party lacking statehood – have continued the longstanding pattern of using the law as tool, a resource, and a weapon to advance their positions and influence global opinion.

We can, therefore, trace the substantive legal strategies and procedural tactics the parties employ today regarding the legality of the Balfour Declaration and the Mandate, and their rights and claims to the Wailing Wall, to the strategies and tactics they tested and refined nearly one hundred years earlier. A full exploration of the current legal arguments and legal strategies of the parties lies beyond the scope of this study, but it is interesting nonetheless to take note of the similarity between today's arguments and strategies and those of nearly a century ago.

New dimensions – same substance

The Legitimacy of the Balfour Declaration and the Mandate

In May 1964 the Palestine Liberation Organization was formed and the original Palestine National Charter was adopted as its governing document.[5] The Charter called for the liberation by armed force of *all* of Palestine, including the portion comprising the State of Israel.

The Charter invoked some of the same legal language Auni Bey had used decades earlier before the Shaw and Peel Commissions. For example, the Charter characterized the Balfour Declaration and the Mandate as a "fraud."[6] The Charter further described the 1947 United Nations partition plan, which the General Assembly approved, as "illegal."[7] The Charter again mirrored Auni Bey's legal approach when it declared, "[t]he People of Palestine believe in peaceful coexistence on the basis of *legal* existence, for there can be *no* coexistence with aggression, nor can there be peace with occupation and colonialism."[8]

Three years later, in July 1967 (several weeks following the Six-Day War), a group of Arab jurists convened in Algiers to discuss the legal implications of Israel's military victory and its occupation of the West Bank, Gaza, and Sinai.[9]

The report of the proceedings of the Algiers conference demonstrates how the participants took their cues from the Mufti's and Auni Bey's arguments decades earlier before the Shaw, Lofgren, and Peel Commissions regarding the legitimacy of the Balfour Declaration and the Mandate. The Algiers Conference therefore represents a key bridge between the early and modern legal eras of the conflict.

First, the Conference reiterated the Arab legal argument that Britain had promised Palestine to the Arabs in the McMahon-Hussein correspondence:

> The exclusion of Palestine from the field of British promises – which, according to the British interpretation, did not cover the above-mentioned areas of Syria – was in reality a consequence of the fact that these areas were the ones over which France was anxious to exert her influence. These areas are situated along the coast of northern Syria and are close to Beirut. But Palestine is not included in the said areas, for it is situated to the south, not to the north of Syria.[10]

Second, the jurists argued the Balfour Declaration was illegal, because "it concerned a territory with which Britain had no legal relation and which she bestowed on a party that was not qualified to receive it."[11] This argument tracked Auni Bey's testimony before the Peel

Commission when he said, “no nation in the world can be allowed to dispose of another nation’s property.”[12]

Third, the Conference argued the Balfour Declaration lacked legal force because it was not an agreement between states, but instead merely a private letter between Balfour and Rothschild.[13]

Fourth, the Conference argued, as had the Mufti, Auni Bey, and others before the Shaw and Peel Commissions, that the provisions of the Mandate incorporating the Balfour Declaration were null and void, because they conflicted with Articles 20 and 22 of the Covenant of the League of Nations.[14]

Fifth, the Conference noted the Treaty of Lausanne “made no mention at all” of the Balfour Declaration or a Jewish national home in Palestine, that the omission was deliberate, and it meant the international community did not intend to allow a National Home for the Jewish people in all or any part of Palestine.[15]

The Algiers Conference concluded by noting “the Mandate for Palestine remains in conformity with the Covenant of the League of Nations, *except in its provisions regarding the creation of a Jewish national home*.”[16]

The following year, Law Professor Nathan Feinberg of the Hebrew University of Jerusalem published a lengthy rebuttal to the Arab jurists’ arguments, reprising many of the Jewish legal arguments from the 1920s and 1930s and representing yet another source of continuity with the early legal battles of the conflict.[17] For example, Feinberg rebutted the Arab jurists’ argument regarding the Treaty of Lausanne’s failure to mention Balfour Declaration, noting the omission was legally insignificant, “since the decision as to Palestine was taken a year before the signing of the Treaty, there was absolutely no need for Palestine and the Balfour Declaration to be mentioned it.”[18]

Other modern-era Arab legal scholars have maintained this continuity of legal argument with the early efforts of the Mufti and Auni Bey. For example, the Palestinian lawyer and law professor Henry Cattan argued in the early 1970s that the Balfour Declaration “was an illegal interference with, and a trespass upon, the natural rights of the Palestinians in their homeland,” and was therefore invalid *per se*.[19] Moreover, Cattan argued, as had both the Mufti and Auni Bey, that the Balfour Declaration was invalid because it conflicted with McMahon’s prior pledge of Palestine to the Arabs.

Cattan also argued, as had Auni Bey, that at the time Britain issued the Balfour Declaration it “possessed no sovereignty or dominion in Palestine enabling it to make a valid promise of any rights, whatever their nature or extent, in favour of the Jews of the world.”[20] Cattan further echoed the Mufti and Auni Bey when he argued the Mandate for Palestine was invalid because it conflicted with Article 22 of the Covenant of the League of Nations. He also argued the Mandate was invalid because it did not provide for Palestinian self-determination, and because the Palestinian Arabs were not consulted in advance of Britain’s selection.[21]

Cattan also discussed the interplay between the Treaty of Sevres and the Treaty of Lausanne. Although the Balfour Declaration had been incorporated into the Treaty Sevres, that treaty was never ratified. On the other hand, the Treaty of Lausanne, which *was* ratified, made *no* mention of the Balfour Declaration or the establishment of a National Home for the Jewish People. Thus, according to Cattan:

> Turkey, as the previous sovereign over Palestine, did not, upon renunciation of its sovereignty, mortgage the future of Palestine with any obligation relating to the establishment of a Jewish national home. Thus, the attempt made in the

> Treaty of Sevres to validate the Balfour Declaration by securing the acceptance of the previous territorial sovereign failed.[22]

Nor, Cattan argued, did the incorporation of the Balfour Declaration into the Mandate legitimize the Balfour Declaration. Once again, Cattan based his argument on Auni Bey's theory that Britain had no lawful authority as of 2 November 1917 to allocate any portion of Palestine for a Jewish National Home:

> The argument of an *ex post facto* validation of the Balfour Declaration by the British mandate has no legal basis. If, as is clear, Great Britain possessed no sovereignty over Palestine and no power to make the Declaration, then such a Declaration was a nullity, and the position is no better if other Powers, such as France, Italy and the U.S.A., or any number of Powers which also possessed no sovereignty over Palestine, joined in approving the Declaration. Such an approval would be a nullity and would have no validating effect. An accumulation of nullities cannot generate a valid juridical act.[23]

In the late 1990s the Palestinian Professor Musa Mazzawi reprised many of the Arab legal arguments from the days of the Mufti and Auni Bey. Muzzawi argued the McMahon-Hussein correspondence promised Palestine to the Arabs (notwithstanding anything Feisal may have said in 1919 to Weizmann or anyone else), that Britain did not have the legal authority when it issued the Balfour Declaration to promise the Jewish people a national home in Palestine, and that Articles 22 and 20 of the Covenant of the League of Nations rendered void those portions of the Mandate regarding the creation of a national home for the Jews.[24]

Recent Arab scholarship continues to follow in the same footsteps, arguing the international community intended Article 22 would lead to Palestinian Arab self-determination.[25] Other non-Arab scholars have made their own significant contributions to the modern Palestinian legal case, including claims that Palestine (as we regard it today) achieved statehood during the Mandate period and has maintained that status ever since, as well as other evolving legal theories about Palestinian refugee rights and other related issues.[26]

The Palestinian side has also continued to maintain a focus on the McMahon-Hussein correspondence as relevant to the conflict today. For example, in 2014 the Institute for Palestine Studies published a book containing reprints of J.M.N. Jeffries' 1923 Daily Mail articles regarding the McMahon-Hussein correspondence.[27] The publication of the book reflected the Palestinians' continuing emphasis, one hundred years after the fact, on the alleged injustice of the broken McMahon pledge of Palestine to the Arabs.

The 100th anniversary of the Balfour Declaration in 2017 also stimulated an outpouring of conflicting commentary and reaction throughout the Arab and Jewish worlds. As noted in the Introduction to this study, the Palestinians demanded Britain apologize for issuing the Declaration, or face litigation if it refused. Other commentary resurrected and echoed many of the arguments the Mufti, Auni Bey, and other prominent Palestinian Arabs had made 90 years earlier to the Lofgren, Peel, and Shaw Commissions.

In a recent essay, for example, Palestinian Authority President Mahmoud Abbas criticized the Balfour Declaration and the November 1947 United Nations partition resolution, employing nearly the same language the Mufti and Auni Bey had used nearly 90 years earlier:

> Balfour's perfidy anticipated the international community's disrespect for the rights of Palestinians after Israel's founding. Thirty years later, on November 29, 1947, the United Nations General Assembly (UNGA) adopted Resolution 181 (II) calling for the partition of Palestine into two states. Again, this decision disregarded the wishes, aspirations, and the very rights of the indigenous population of Palestine. The Palestinian leaders spared no effort in communicating the voice of the people, visiting London countless times, as well as several other world capitals, asking for the rights of the Arab-

> Palestinian people to be respected and calling for the fate of Palestine to be decided through democratic free elections that would reflect the will of the Palestinian people. This was totally ignored by the British government, guided by the Balfour agenda of denying our nation political rights.[28]

In recent years the Palestinian position regarding the legality of the Mandate has continued to evolve, while still rooted in the core argument of the Mufti and Auni Bey that the Mandate could only survive as a matter of law if the Balfour-related provisions were deleted. Thus, the Palestinian legal case today has tended to rely on those portions of the Mandate safeguarding Palestinian civil rights as the legal basis for Palestinian Statehood, while continuing to question the legal validity of the Balfour-Mandate grant of a National Home to the "Jewish People," who, according to some scholars on the Palestinian side, are *not* a recognized entity under international law.[29]

One Jewish scholar, commenting at a recent Hebrew University law faculty colloquium devoted to the Mandate, noted this evolution in the Palestinian position, as well as how Jewish settlers in the West Bank have also looked back to the Mandate to support their own legal claims:

> [A]sking why it is important to revert to the Palestine Mandate as a source of rights, Professor Ronen held that the assertion that the West Bank is Mandated territory serves a number of goals. First, it supports a territorial claim that, like Quigley's claim regarding Mandate-based Palestinian statehood, appears invincible. If Mandatory Palestine is designated to serve as the national home for the Jewish people, no adverse possession or claim can detract from that right: neither Jordan's possession of it in 1948, nor later Palestinian claims to a state. Second, to the extent that the present controversy revolves specifically on the legality of the settlements and the prohibition under Article 49 of the Fourth Geneva Convention, the invocation of an explicit provision calling for settlement means that the conflict is not between a legal norm and a contrary policy, but between two contradictory legal norms.[30]

Another participant at the Hebrew University workshop addressed the Arab claim that Britain had no right to allocate Palestine as a National Home for the Jewish people, noting under international law as it existed as of the end of World War I, as well as the Treaties of Sevres and Lausanne, that as a matter of law both Britain and France "had the power to dispose of the Ottoman Empire, including Palestine."[31]

The ongoing dispute over the legal significance of the McMahon-Hussein correspondence, the legitimacy of the Balfour Declaration and the Mandate, and the parties' legal rights and claims to the Wailing Wall and the Temple Mount attest to the powerful and lasting impact of the early legal disputes on the conflict today.

The Wailing Wall

On 10–11 June 1967, three days after the end of the Six-Day War, the victorious Israelis demolished the Moghrabi dwellings to create a large open-air plaza in place of the narrow pavement area in front of the Wailing Wall.[32]

The Muslim world condemned the action, and those condemnations have continued ever since, including reprising the Mufti's and Auni Bey's accusations regarding the alleged Jewish desire to rebuild their ancient Temple on the *Haram al-Sharif*.[34]

Several months following the demolition of the Moghrabi Quarter, the Institute for Palestine Studies re-published the Lofgren Commission Report, in an effort to remind the international community that the League of Nations had accorded the Jews only limited legal rights to the Wall. The Institute further explained its rationale for resurrecting the Lofgren Commission

Report in an explanatory preface:

> This Report [of the Lofgren Commission] is being republished here in full to provide the reader with background information in view of the regrettable developments that have taken place in Jerusalem since the June War last year. For, no sooner had the Israeli army completed the capture of Jordanian Jerusalem, than it began a frontal assault on the religious *Status Quo* at the Wailing Wall. On 10/6/67, and after the fighting had ceased, Israeli Army demolition squads and bulldozers began an operation involving the destruction of Moslem buildings and religious sites adjacent to the Wall. Between 10 June 1967 and the end of December 1967, the Israeli Army demolished 138 Moslem buildings, including two mosques, in this operation. This act of vandalism has repercussion far beyond the Arab–Israeli conflict since it affects the religious susceptibilities of hundreds of millions of Moslems all over the world. Just how serious and unwarranted a breach of the *Status Quo* these and subsequent Israeli actions are, will perhaps, become evident from the reading of this Report.[35]

FIGURE 6.1 Destruction of the Moghrabi Quarter and Preparation of the Wailing Wall Plaza, June 1967

(Courtesy of Buki Boaz Israeli photograph collection, from the Exhibition *The Mount – Viewing Temple Mount – Haram al-Sharif 1839–2019*, The Tower of David Museum, Jerusalem, Shimon Lev, Curator).[33]

The Palestinians and their supporters to this day continue reprising many of the same legal arguments deriving from the Muslim arguments of the 1920s and 1930s to condemn Israel's modern-era actions at the Wall. For example, a June 2017 posting on the Palestinian Information

Center website reasserts the Muslim claim of ownership of the Wall and notes the Jews disclaimed ownership during the Lofgren Commission hearings. Indeed, the posting contains echoes of Auni Bey's closing argument before the Lofgren Commission:

> "We, Muslims, affirm our right to this wall, which is an integral part of the blessed Al-Aqsa Mosque." The people of Jerusalem confirm that the road at the wall is not a public road. It was established only for the local residents in *al-Maghareba* neighborhood and other Muslims to cross to the *Al-Buraq* mosque and then to the Al-Aqsa Mosque. The Jews were allowed to pass to the wall at the time as a show of religious tolerance, as stipulated by a decree issued by Ibrahim Pasha, the Egyptian ruler of the area in 1840, and not to perform prayers. The Jews did not take the *Al-Buraq* Wall as a place of worship until after the British Balfour Declaration of 1917. This wall was not part of the so-called "Jewish temple," but it was the Islamic tolerance that enabled Jews to stand before the Wall and cry over the destruction of their alleged temple. As time passed, they claimed that *Al-Buraq* Wall was part of their alleged temple. Historical documents prove that Britain, which was the Mandatory colonial power in Palestine, explicitly admitted in its White Paper issued in November 1928 that the Wall and its surrounding area belong to Muslims and it is part of *Al-Aqsa* Mosque. During the era of the British Mandate on Palestine, the visits of Jews to the Wall increased, with Muslims feeling the danger, thus resulting in the outbreak of a revolution on 23 August 1929, in which dozens of Muslims as well as a big number of Jews were killed … Jews admitted to the Committee of the League of Nations in 1929 that they do not claim a right of ownership to *Al-Buraq* Wall …[36]

The Palestinians and their supporters have also argued for decades that Israel's annexation of East Jerusalem following the Six-Day War was illegal.[37] If that argument is correct, then logically it would mean the Lofgren Commission's December 1930 verdict would remain intact as the controlling law regarding the rights and claims of the parties to the Wall, and therefore the Muslims still would own the Wall today, and the Jews would have only certain limited rights to practice their devotions and bring appurtenances with them.

In June 2017 the Executive Director of the United States Campaign for Palestinian rights published an article in the *New Yorker* magazine decrying the 50th anniversary of the destruction of the Moghrabi dwellings. The author invoked the Fourth Geneva Convention's prohibition against the destruction of civilian infrastructure in occupied territory, arguing "the Western Wall Plaza as we know it today is the site of a war crime."[38]

New dimensions, same procedural tactics

During the early 21st century the conflict between the parties has evolved into new areas, mostly arising from Israel's post-1967 occupation of the West Bank. The Palestinians have waged the conflict through a combination of violence and resort to the law and the legal process, just as they did during the 1920s and 1930s. As noted above, the Palestinians have pursued the legal issues in the modern era by relying on many of the same substantive arguments they used before the Shaw, Lofgren, and Peel Commissions. The Palestinians have also continued resorting to many of the same procedural tactics they employed one hundred years earlier.

For example, just as the Jewish side repeatedly invoked the Petition process to seek redress from the generally sympathetic Permanent Mandates Commission of the League of Nations in the 1920s and 1930s, the Palestinians likewise have used the modern form of the Petition process to seek redress from the United Nations General Assembly and Security Council, as well as the International Court of Justice and, more recently, the International Criminal Court.

The Palestinians have for several decades succeeded in persuading the U.N. General Assembly to pass multiple resolutions condemning Israel, many of which find their inspiration in the Arab legal arguments of the 1920s and 1930s. For example, the infamous "Zionism is Racism"

resolution of 1975 bore a stark resemblance to the Mufti's rhetoric.[39] Although General Assembly Resolutions lack the force of law,[40] they have played an important role in galvanizing the international community's broad support for the Palestinians and generating opposition to Israeli policies since the 1967 War. Other U.N. agencies likewise have taken up the Palestinian cause with fervor since the Six-Day War.[41]

The Palestinians have also succeeded at the U.N. Security Council, whose Resolutions do carry the force of international law.[42] For example, Resolution 446, adopted in March 1979, condemned Israeli settlement activity in the occupied territories as "having no legal validity."[43] The Security Council used the same "no legal validity" formulation in another anti-settlement Resolution four months later.[44]

In late 2016 the Palestinians achieved their greatest success at the Security Council, when they persuaded the United States not to veto Resolution 2334. The Resolution went far beyond the "having no legal validity" language of the two Security Council Resolutions from the late 1970s, declaring Israeli settlement activity in the West Bank *and* East Jerusalem a "*flagrant* violation under international law."[45]

The Palestinians have also sought relief from the International Court of Justice, successfully obtaining an Advisory Opinion in 2004 declaring as "contrary to international law" Israel's construction of the so-called "wall of separation" dividing the West Bank from pre-1967 Israel.[46]

More recently, the Palestinian application for membership in the International Criminal Court was granted. The Palestinians immediately urged the prosecutor to investigate Israel for alleged "grave" war crimes in Gaza, opening another front in the modern dimension of the legal conflict.[47]

The Palestinians have even invoked the Petition process within the *Israeli* justice system, frequently seeking relief from the Supreme Court of Israel. By the late 1970s the Court had ruled against the Israeli government several times, with one commentator providing the following summary:

> Each of these cases dealt with a different issue. One, usually referred to as the Elon Moreh case, declared null and void a certain confiscation of land (Dawikat et al. v. Government of Israel (1979)). A second decision, often cited as Mt. Hebron Deportees, ruled against the legality of the deportation of two Palestinian leaders (Kawasme et al. v. Minister of Defense (1980)). In a third case, the court ordered the Minister of Interior to issue a newspaper permit he previously declined to grant (El Asad v. Minister of Interior 1979)). In a fourth decision, the court overruled an official refusal to allow the petitioner to reunite with his family (Samara v. Regional Commander of Judea and Samaria (1979)). And a fifth ruling prevented an acquisition of a Palestinian electricity company (Jerusalem District Electricity Co. v. Minister of Energy et al. (1980)). These cases unquestionably marked a direct confrontation between the government and the court concerning policies and actions in the occupied territories. By declaring certain governmental actions to be void, illegal, or improper, the court publicly embarrassed the government and appeared to endorse alternative courses of action. Since the government deferred to the court's injunctions, these decisions demonstrated judicial boldness and provided evidence of the regime's accountability.[48]

The Palestinians have also launched the so-called Boycott, Divestment, and Sanctions (BDS) campaign against Israel, describing it as "legal" tactic against the "illegal" occupation of the West Bank. The campaign seeks to punish Israel economically by persuading countries to cut commercial ties, academic and cultural exchanges, and other relations with Israel.[49] Proponents of the BDS campaign recently persuaded the European Union to adopt a "consumer protection" rule requiring goods manufactured in the West Bank and Golan Heights to bear a label so indicating.[50]

Some BDS adherents also view Israel as an "outlaw" state, and in recent years have increasingly questioned the legality of the Balfour Declaration and the Mandate, and therefore the legitimacy of Israel itself, following in the tradition of the Mufti and Auni Bey.[51] Comparisons of Israel with apartheid South Africa[52] and the use of phrases such as "from the River to the Sea, Palestine will be free"[53] have rapidly grown in popularity among supporters of the Palestinians, echoing the same position expressed by the Arab side during their legal arguments and testimony to the Shaw, Lofgren, and Peel Commissions.

New dimensions – "lawfare" or more of the same?

Some commentators have characterized the recent Palestinian tactics as embodying an entirely *new* form of legal conflict, a phenomenon they describe as "lawfare," defined as "the use of law as a weapon or method of warfare to achieve a military objective."[54] Some among those commentators have argued the notion of "lawfare" has expanded to include using the law to obtain political goals as well as military objectives.[55]

For example, one commentator described the Palestinian successes in joining the International Criminal Court and persuading the United Nations Security Council to adopt Resolution 2334 as major "lawfare" triumphs:

> Having failed over the last half century to shift the balance of power through negotiations and armed resistance, the PA has turned to new battlefronts – including the Security Council and the International Criminal Court (ICC) – where it deploys international law to advance its territorial claims and further Israel's political isolation. Resolution 2334, which condemned Israel's settlements as illegal, is but the most recent iteration of this strategy: its legal language vindicates the Palestinian political narrative and could provide the centrifuge in the PA's 'nuclear' program of ICC prosecutions … Lawfare is but the most recent tactical iteration of the strategy, and it promotes PA patience on two accounts. First, while no single lawfare act can furnish total victory, individual successes like 2334 can accumulate to intensify Israel's long-run political isolation. Second – and in stark contrast to terrorism – lawfare projects an aura of legitimacy that shields the PA against foreign pressure to negotiate in good faith without preconditions[56]

But the focus on "lawfare" as a new phenomenon overlooks the more than 100 year history of the legal conflict between Palestinians and Israelis. It also ignores the parties' longstanding custom and practice of using the law as a key lever in waging their battles against each other.[57]

First, the lawfare framework, including the notion that it represents a *new* and unprecedented development in the Israeli–Palestinian conflict, misses the continuity between the early legal battles in the conflict and their influence on today's legal engagements. The echoes of the Palestinian Arabs' early legal arguments to the Ottoman Sultans and to the British military and civilian authorities continue reverberating today. Today's legal engagements between the parties, as discussed above, are best understood not as a new phenomenon, but rather as inspired by and representing the continuation of the early legal battles beginning during the late Ottoman period, both substantively and procedurally. Even the BDS movement can be understood as the modern mirror-image of the general strike, the Palestinian Arabs' preferred economic weapon of the 1920s and 1930s.

Second, the Palestinian practice of seeking redress from the Israeli judicial system does not fit neatly into the lawfare construct. Parties do not wage "lawfare" in their enemy's own court system, yet that is exactly what the Palestinians have done for decades, sometimes even represented by Israeli lawyers and civil rights organizations, such as *B'Tzelem*.[58] Just as one hundred years ago both the Arabs and Jews repeatedly availed themselves of the petition process

with the Ottoman and British authorities, the Palestinians have continued that tradition by routinely taking their grievances to the Israeli Supreme Court, albeit with varying degrees of success.[59]

The lawfare model, therefore, does not fit precisely the Israeli–Palestinian legal dynamic, which is better understood when viewed through the lens of more than one hundred years of substantive and procedural legal custom and practice. In any event, to the extent the Israelis and Palestinians employ certain forms of lawfare today, the phenomenon reflects more a continuation of the historic custom and practice of the Jews and Arabs in Palestine under Ottoman and British rule rather than an entirely new and different form of legal combat.

Perhaps the better approach would be to view the Muslim-Jewish legal conflicts of the 1920s and 1930s as the earliest known form of lawfare, as the battlegrounds where the seeds of modern-era lawfare were bred.

Notes

1 Thus, for example, Israel sought unsuccessfully to disqualify the Egyptian Judge on the International Court of Justice during the litigation over the legality of the Israeli "Wall of Separation." *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004 at 3. Israel also raised a number of other jurisdictional and procedural objections, and declined to participate in the substantive briefing and oral argument. See *Written Statement of the Government of Israel on Jurisdiction and Propriety* (30 Jan. 2004), www.icj-cij.org/files/case-related/131/1579.pdf, accessed 29 August 2019. More recently, Israel has argued the International Criminal Court lacks jurisdiction to investigate alleged war crimes in the West Bank and Gaza because Palestine is not a sovereign state. State of Israel, Office of the Attorney General, "The International Criminal Court's Lack of Jurisdiction over the so-called 'Situation in Palestine'" (20 December 2019).

2 This was why the British rejected Sacher's and Stein's arguments that Britain should have interpreted the Mandate as granting the Jews more rights to the Wall and pavement than those the Turks had previously allowed.

3 In today's world the Palestinian Arabs have continued the tradition of relying on skilled advocates and highly respected law professors, making their legal case to the world community and to a United Nations General Assembly and International Court of Justice far more predisposed in their favor than were the League of Nations and the Permanent Mandates Commission.

4 The primary Arab argument from the early days of the conflict that no longer remains today was that Palestine was actually "southern Syria" and should be merged back into greater Syria.

5 Palestine National Charter, (28 May 1964), https://palestina-komitee.nl/wp-content/uploads/2017/11/Palestine-National-Charter-1964.pdf, accessed 29 August 2019.

6 *Id.* art. 18.

7 *Id.* art. 17.

8 *Id.* art. 22 (emphasis added).

9 E. Rizk (translator), *The Palestine Question, Seminar of Arab Jurists on Palestine, Algiers, 22–27 July 1967* (Institute for Palestine Studies, 1968). The proceedings of the Conference were published in French and translated into English.

10 *Id.* at 67.

11 *Id.*

12 PeelPublic Testimony, *op. cit.* at 302, para. 4720 (Auni Bey Abdul Hadi public testimony, 13 Jan. 1937).

13 *Id.* at 68.

14 *Id.* at 69–70.

15 *Id.* at 67 n.4; *but see* N. Feinberg, *The Arab–Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers* at 34 (Hebrew Univ. of Jerusalem, Magnes Press 1970). Feinberg's rebuttal of the Arab jurists' conclusions contains many of the same arguments regarding the McMahon-Hussein correspondence and the Balfour Declaration that the Jews had argued before the Shaw and Peel Commissions.

16 E. Rizk, *op. cit.* at 73 [emphasis added]. The Algiers Conference was also noteworthy for resurrecting the Mufti's analogy of the Palestinian Arabs to the German Jews during his testimony before the Peel Commission. The Arab jurists took the Mufti's argument one step further by comparing Israel to Nazi Germany. For example, during the opening address, the Algerian Minister of Justice compared Israeli propaganda efforts to those of Joseph Goebbels, and described Israel "as a country in search of Lebensraum." *Id.* at 10, 12. The Mufti/Arab Jurist argument has further evolved since then, portraying Israel's treatment of the Palestinians since 1967 as equivalent to or worse than Nazi Germany's treatment of the Jews. *See,*

e.g. Arutz Sheva (Israel National News), "Fatah: Israel worse than Nazis, wants to 'crush' the Arab world" (27 May 2018), www.israelnationalnews.com/News/News.aspx/246518, accessed 29 August 2019.

17 Feinberg, *op. cit.*

18 *Id.* at 34.

19 H. Cattan, *Palestine and International Law* (2d ed). at 57–58 (Longman, 1973).

20 *Id.* at 58.

21 *Id.* at 65–68.

22 *Id.* at 60–61.

23 *Id.* at 61. Other pro-Palestinian scholars in the late 20th century took a more nuanced approach, arguing for example that although the Balfour Declaration may have become lawful once the League of Nations incorporated it into the Mandate, the Declaration's language regarding the establishment of a Jewish national home in Palestine ("His Majesty's Government view with favour") was merely precatory, in contrast to the "comprehensive and explicit" language ("it being clearly understood") protecting the non-Jewish communities of Palestine. *See* W. Mallison and S. Mallison, *The Palestine Problem In International Law And World Order* at 47–69 (Longman, 1986).

24 M. Mazzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab–Israeli Conflict* at 15–79 (Garnet, 1997).

25 *See, e.g.* N. Elaraby, *Palestine and the Law of Nations*, Cairo Review of Global Affairs 27, 47–57 (2017); *but see The Mandate for Palestine: Past and Present, Proceedings of an International Workshop Held at the Hebrew University Faculty of Law, 11 February 2016*, Isr. L. Rev. 49(3), 409, 423–24 (2016, hereafter "*The Mandate for Palestine*") (Prof. Y. Shany noted "[t]he argument could be made that the conduct of the Council of the League of Nations with respect to the Palestine Mandate is not a violation of Article 22 but a construction of self-determination at the time").

26 *See*, e.g. J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge Univ. Press, 2010); S. Akram et al. (eds.), *International Law and the Israeli–Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge, 2011).

27 J.M.N. Jeffries and W. Matthew (Ed.), *The Palestine Deception, 1915–1923: The McMahon-Hussein Correspondence, the Balfour Declaration, and the Jewish National Home* (Institute for Palestine Studies, 2014).

28 M. Abbas, *Lord Balfour's Burden*, Cairo Review of Global Affairs 27 (2017), www.thecairoreview.com/essays/lord-balfours-burden/, accessed 29 August 2019.

29 *See, e.g.* S. Mallison and W.T. Mallison, *The Juridical Basis for Palestinian Self-Determination*, The Palestine Yearbook of International Law, Vol. I at 34, 46 (al-Shaybani Society of International Law Ltd., 1984); M. de Blois, *The Unique Character of the Mandate for Palestine*, Isr. L. Rev. 49(3), 365–89 (2016).

30 *The Mandate for Palestine*, *op. cit.*, at 419.

31 *Id.* at 420 (quoting Professor Robbie Sobel).

32 T. Segev, *1967: Israel, The War, And The Year That Transformed The Middle East* at 400–02 (Henry Holt & Co., 2005). According to Segev, the Israeli Brigadier General Uzi Narkis authorized a group of private Jewish contractors to carry out the demolition, without permits or formal legal approval. *Id.* at 401.

33 The author is grateful to Buki Boaz, Dr. Shimon Lev, and the Tower of David Museum for permission to reproduce the photograph.

34 *See, e.g.* N. Ju'Beh, *Jewish Settlement in the Old City of Jerusalem after 1967*, Palestine-Israel Journal of Politics, Economics, and Culture VIII(1), 48–54 (2001); S. Sosebee, *Seeds of a Massacre: Israeli Violations at Haram al-Sharif*, American-Arab Affairs 36, 104–16 (1991); A. Bishara, *House and Homeland: Examining Sentiments About and Claims to Jerusalem and its Houses*, Social Text 21(2), 141–61 at 147 (2003).

35 Institute for Palestine Studies, *The Rights and Claims of Moslems and Jews In Connection With The Wailing Wall At Jerusalem* at 5–6, Basic Documents Series No. 4 (1968).

36 The Palestine Information Center, *Al-Buraq Wall: Targeted Historical Identity* (9 June 2017), https://english.palinfo.com/news/2017/6/9/al-buraq-wall-targeted-historical-identity, accessed 29 August 2019.

37 *See, e.g.* I. Lustick, *Yerushalyaim and al-Quds: Political Catechism and Political Realities*, Journal of Palestine Studies 30(1), 5–21 at 11 (2000).

38 Y. Munayyer, "Reframing the 1967 War," *The New Yorker* (9 June 2017), www.newyorker.com/news/news-desk/reframing-the-1967-war, accessed 29 August 2019.

39 U.N. General Assembly, A/Res/3379 (10 Nov. 1975), revoked, A/Res/46/86 (16 December 1991).

40 S. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, Proceedings of the Annual Meeting (American Society of International Law), 73, 301–09 (1979).

41 For just one of many hundreds of such examples, *see* "U.N. Agency Says Israel Tortures and Pillages," *New York Times*, 16 February 1977; *see also* A. Becker, *The United Nations and Israel: From Recognition to Reprehension* (Lexington Books, 1988).

42 U.N. Charter, Arts. 24, 25.

43 U.N. Security Council, S/Res/446 (23 March 1979).

44 U.N. Security Council, S/Res/452 (20 July 1979).

45 U.N. Security Council, S/Res/2334 (23 December 2016) [emphasis added].

46 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.* at 136.

47 *See* Introduction, *supra* nn.10–11 and accompanying text. The International Criminal Court (ICC) lacks jurisdiction to investigate and prosecute matters that are "not of sufficient gravity to justify further action by the court." International Criminal Court (ICC) Statute 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38,544, arts. 17(1)d), 53(2)(b); s*ee* E. Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, Isr. L. Rev. 47(3), 379–99 (2014).

48 R. Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, Law & Society Rev. 24(3), 781–806 (1990). For examples of more recent cases and analyses, compare *Public Committee Against Torture v. Government of Israel*, HCJ 5100/94 at 845 (1999) (Israeli security authorities not permitted to use torture despite "ticking bomb" scenario) with M. Samuel, *Punitive House Demolitions in the West Bank: The Hague Regulations, Geneva Convention IV, and a Jus Cogens Bypass*, Berkeley J. Middle E. & Islamic L. 6(1), 1–24 (2014) (criticizing Israeli Supreme Court decisions permitting punitive home demolitions in the West Bank) and G. Harpaz, *When Does a Court Systematically Deviate from its Own Principles? The Adjudication by the Israel Supreme Court of House Demolitions in the Occupied Palestinian Territories*, Leiden J. Int. L. 28(1), 31–47 (2015) (same) and D. Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, International Rev. of the Red Cross 94(885), 207–36 (2012) (reviewing cases where the Israeli Supreme Court has ruled both for and against Palestinians and the Israeli government). In one recent case, the Israeli Supreme Court ordered the demolition of Amona, an unauthorized Israeli settlement in the West Bank. See T. Pileggi, "Accepting Palestinian Petition, High Court Rules Amona Settlers Can't Move to Nearby Plot," *Times of Israel* (1 Feb. 2017), www.timesofisrael.com/accepting-palestinian-petition-high-court-rejects-amona-compromise/, accessed 29 August 2019.

49 O. Barghouti, *Upholding International Law, Asserting Palestinian Rights*, The Palestine Yearbook of International Law 2013–2014 at 115–40, Birzeit University Institute of Law (Brill Nijhoff, 2015).

50 *Final Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel since June 1967*, C (2015) 7834 (11 November 2015) (requiring products exported to the EU from Israeli settlements in the West Bank and Golan Heights to be so labelled, to comply with EU consumer protection laws).

51 *See* A. Dershowitz, *Countering Challenges to Israel's Legitimacy*, Jerusalem Center for Public Affairs (2011), http://jcpa.org/wp-content/uploads/2012/02/Kiyum-dershowitz.pdf, accessed 29 August 2019; *see also* E. Alterman, "Does Anyone Take the B.D.S. Movement Seriously?," *New York Times*, 29 July 2019 ("Omar Barghouti, one of the [BDS] movement's co-founders, proclaimed in 2013 that 'no Palestinian – rational Palestinian, not a sell-out Palestinian – will ever accept a Jewish state in Palestine.'").

52 *See* J. Handmaker, *Taking Academic Freedom Seriously: Exploring the Legal and Moral Underpinnings of BDS*, The Palestine Yearbook of International Law 2013–2014 at 101–14, Birzeit University Institute of Law (Brill Nijhoff, 2015); R. Sobel, *The Campaign to Delegitimize Israel with the False Charge of Apartheid*, Jewish Political Studies Review 23 at 18–31 (2011); *see also* M. Cohen & C. Freilich, *War by Other Means: the Delegitimisation Campaign Against Israel*, Israel Affairs 24(1), 1–25 (2018).

53 Even some far left Israelis have endorsed the "from the river to the sea, Palestine will be free" slogan. *See, e.g.* M. Peled, "From the River to the Sea: The Inevitable End of Settler Colonialism in Palestine," MPN News (4 Dec. 2018), www.mintpressnews.com/river-to-the-sea-the-inevitable-end-of-settler-colonialism-in-palestine/252495/, accessed 29 August 2016.

54 O. Kittie, *op. cit.* at 6–7; *see also* J. Trachtman, *Integrating Lawfare and Warfare*, Boston Coll. Int. and Comp. L. Rev. 39(2), 267–82 (2016).

55 *See* W. Werner, *Historical and Semiotic Origins of "Lawfare": The Curious Career of Lawfare*, Case W. Res. J. Int'l L. 43 (1/2), 61–72 (2010).

56 Note, *Recent Resolution: International Law – Israel's Settlement Activities – United Nations Security Council Asserts Illegality – S.C. Res. 2334 (23 December 2016)*, 130 Harv. L. Rev. 130(8), 2267 (2017).

57 *See also* S. Blum, *Between the Lion Cub of Judea and the British Lion: Cause Lawyers, British Rule and National Struggle in Mandatory Palestine*, Comparative Legal History 7(1): 2–36 (2019) (role of Jewish lawyers in defending *Irgun* member sentenced to death in April 1946).

58 *See, e.g.* J. Montell, *Learning From What Works: Strategic Analysis of the Achievements of the Israel-Palestine Human Rights Community*, Human Rights Quarterly 38(4) at 928–68 (2016).

59 *See* n.47, *supra*.

CONCLUSION

The Shaw, Lofgren, and Peel Commission trials provided the Arabs and Jews the opportunity to litigate the two most important issues dividing the parties during the early years of the conflict: the legality of the Balfour Declaration and the portions of the Mandate for Palestine implementing the Declaration; and the rights and claims of the parties to the Wailing Wall and the narrow strip of pavement in front of the Wall. The Arabs and Jews used each of the three trials to attempt to gain leverage against each other and influence international opinion in their favor.

When the British conquered Palestine in late 1917, the local Arabs and Jews had already adopted a practice of using the law as a resource and a tool (especially via the Ottoman petition process) in their early attempts to jockey for position against each other. The British, to a far greater extent than the Ottomans, relied heavily on the law and an elaborate legal infrastructure to govern Palestine. The Mandate itself contained the core legal framework for British rule in Palestine, and the British treated the key provisions of the Mandate, including the Status Quo concept in Article 13, as imposing enforceable *legal* obligations on the local population.

Britain actively supplemented the Mandate's legal foundation, promulgating legislation and Orders-in-Council, establishing a robust, colonial style court system, entertaining petitions from Arabs and Jews at an ever-increasing rate, and forming commissions of enquiry following violent outbreaks. By the time the Shaw Commission had been formed, Britain had cemented the role of law and the rule of law into the growing conflict between Arabs and Jews in Palestine.

One of Britain's motivations in relying so heavily on the law was to establish itself as a neutral arbiter between the parties, enabling it to claim not just to the local population of Palestine but also to its overseers at the Permanent Mandates Commission that its administration of Palestine was based on equal justice. But as early as the Palin and Haycraft Commissions of the early 1920s, Britain's stated desire to dispense justice with fairness and equanimity began creaking under the weight of growing anti-Zionist sentiment.

Officials within the High Commissioner's Office in Jerusalem and the Foreign and Colonial Offices in London began harboring second thoughts about the Balfour Declaration and Zionism, fueled by pockets of governmental anti-Semitism and fears of a Muslim backlash in the Middle East and India, as well as constant Arab and Jewish petitions and counter-petitions to London and Geneva. As time went by, therefore, the British came to rely much less on the law and much more on political considerations and a desire to avoid confrontation with the Muslim populations it ruled not just in Palestine and elsewhere in the Middle East but also in India.

The Jews, for their part, initially viewed the law as providing an opportunity (but not the only one) to advance their position in Palestine and to create sympathy for Zionist aspirations among the international community, especially the Permanent Mandates Commission of the League of Nations. Weizmann, who had no training in the law, expended enormous energy managing the Zionist legal effort before the Shaw Commission, negotiating the Terms of Reference and procedural rules, personally selecting the lawyers, crafting lines of argument and cross-

examination, and insisting the Palestine Government be deemed a party to the proceedings. When this strategy backfired, Weizmann – to his credit – changed course, focusing far more on politics than law as he pursued behind-the-scenes negotiations with the British.

Weizmann's *tour de force* performance as a witness in his multiple appearances before the Peel Commission represented the culmination of this evolving approach. Even though the Jewish side continued relying on legal arguments (presented through the Jewish Agency's pre-hearing memorandum and the testimony of Leonard Stein), it was Weizmann's non-legal advocacy that convinced the Peel Commission to endorse Jewish statehood in a partitioned Palestine.

The Arab approach to the law was marked most prominently by consistency. The Arabs consistently refused to recognize anything other than *Sharia* Court jurisdiction over the Wailing Wall, but nevertheless participated fully in the Shaw and Lofgren trials. The Arab legal arguments regarding the Wall likewise were consistent before and during the Shaw and Lofgren hearings, insisting the Wall and the pavement belonged to them, and denying the Jews any rights beyond mere visitation as ordinary tourists.

The Arabs also maintained consistent positions regarding the legality of the Balfour Declaration and the Mandate in both the Shaw and Peel Commission hearings. They urged Britain to rescind the Balfour Declaration as void *ab initio* because of the alleged conflict with the McMahon pledge; to halt or at least limit Jewish immigration and land acquisition; and to stop Zionism in its tracks before the Jews could overtake the Arabs and become the majority population in the country. The consistency of the Arab position on those issues continued in the Palestine National Covenant of 1964, at the Algiers legal conference in July 1967 after the Six-Day War, and continues to the present day. Other than the early Arab argument that Palestine should be incorporated into Syria rather than granted independence, the Palestinian Arab legal argument and use of the law as a tool to advance their position and influence international opinion has remained remarkably consistent for the past 90 years.

Our examination in this study of those early legal battles of the Arab–Israeli conflict leads inevitably to one question: is there any role for the law to play in helping resolve the ongoing confrontation between the parties today? The way the Arabs, Jews, and British each used the law during those early years to further their positions and influence international opinion, especially during the proceedings before the Shaw, Lofgren, and Peel Commissions, offer several insights for making that assessment.

The Shaw, Lofgren, and Peel trials produced decidedly mixed results. The Shaw Commission exonerated the Mufti and exasperated the Jews. The Lofgren Commission left both parties dissatisfied, but both grudgingly accepted the split verdict regarding the Wailing Wall. The Peel Commission produced the original version of the two-state solution, an outcome the Palestinian Arabs rejected categorically at the time but demand insistently today.

The Shaw Commission represented the first courtroom drama in which the triangular British–Jewish–Arab legal/political dynamic took center stage, especially with the Palestine Government forced to stand in the dock alongside the Arabs as a party to the proceedings. The hearings before the Commission quickly descended into a messy courtroom fight between the overzealous lawyers for all three parties, who sometimes seemed more eager to score petty debating points than to pursue their clients' interests. The Jewish side may have had the best lawyers on paper, but in the courtroom their confrontational style alienated the Commissioners and the British witnesses, and drove the Palestine Government into a tacit alliance with the Arab side. Weizmann's constant micromanagement from his base in London did not help the Zionist cause

in the far-away courtroom.

Shaw's willingness to stray far beyond the authorized Terms of Reference also caught the Jewish side off guard. What was supposed to have been a limited inquiry to assign blame for the August 1929 violence quickly turned into a full-blown trial of Arab grievances against the Balfour Declaration and the Mandate, and against Jewish prayer rights at the Wailing Wall.

The Jewish side emerged from the Shaw Commission experience bitter and disillusioned, losing faith in the law as a resource for addressing their grievances, much less resolving the overall conflict. Nevertheless, the Jews continued using the law, treating the Permanent Mandates Commission as an appellate court, where they persuaded several commissioners to question the British Government's fairness during the Shaw Commission hearings. The Arabs, for their part, emerged victorious from the Shaw experience, but by refusing to compromise any aspect of their position during their March 1930 meetings with the British Government in London, the Arabs failed to leverage the courtroom victory to achieve their political goal of halting Zionism.

The lesson learned from the Shaw Commission, therefore, seems clear: overall peace cannot be achieved through adversarial litigation. The core issues in today's conflict, such as the final status of Jerusalem and the right of Palestinian refugees and their descendants to return to their pre-1948 homes, contain far too many religious, political, and emotional elements to be resolvable through litigation or the legal process, assuming the parties would even consent to such a process. It is, in fact, unimaginable that Israel would ever agree to participate in a trial, no matter under whose auspices, to adjudicate the overall dispute between them and the Palestinians.

But can the law play a more modest role in the modern Israeli–Palestinian dispute, perhaps by addressing discrete issues on a limited basis, rather than attempting to resolve the entire conflict? The experience before the Lofgren Commission offers certain interesting insights regarding this possibility.

As with the Shaw Commission, the Arabs and Jews faced off against each other before the Lofgren Commission in a fully litigated courtroom trial, representing another example of the continuing conflict through the legal process. With the British on the sidelines this time, the Lofgren trial represented much more a direct conflict between Zionism and Arab nationalism. The Jewish side approached the trial with far more care and sophistication, and with far better legal representation. The Arab side, consistent as ever, continued espousing the same maximalist vision it pioneered during the Shaw trial, once again attempting to turn the proceedings into a full-blown attack on Zionism by denying the existence of *any* Jewish rights at the Wall, and demanding nothing short of a complete verdict in their favor on *every* issue. The Jewish side demonstrated far greater flexibility, admitting up front it did not claim ownership of the Wall, urging instead that hundreds of years of custom and practice had given rise to unique and legally cognizable Jewish prayer rights at the Wall.

The Lofgren Commission achieved modest success, conducting a well-run trial and producing a highly specific verdict informing the parties of their precise rights to the Wailing Wall and the pavement in front of the Wall. Despite their refusal to budge on any issue, the Arab side emerged partly victorious, as the Jews lost several of the key issues they had pressed during the trial, such as the right to bring benches, chairs, and a screen to the Wall. Accordingly, neither side reacted favorably to the verdict, but both sides accepted it and seemed willing, albeit grudgingly, to abide by the specific terms. "It is striking," noted one commentator, "that despite the Wall's

strife-ridden history, the Commission's verdict effectively took the issue out of Palestine politics."[1]

Does the Lofgren Commission, therefore, offer a model for a potential role for the law to play in adjudicating at least certain discreet issues in the conflict today? Given the enormous importance of the Wailing Wall at that time, and the Lofgren Commission's relative success in rendering a verdict both sides accepted, could a Lofgren-style approach offer a means of resolving similar issues in today's conflict?

One commentator has offered a cautiously optimistic assessment:

> [A] tribunal commission – as the British carried out in 1929–30 – is a good tool to use as a matter of conflict resolution under a number of conditions: the members should be international and non-biased figures; they should work in cooperation with the leadership of the two contested parties and win their trust; and they should make a sincere effort to mediate between the parties. If this fails, the parties should understand that they have no choice but to accept arbitrary adjudication.[2]

Whether such a model could work today remains open to debate, as much has changed since 1930. The Zionists enjoyed a certain amount of support from the Permanent Mandates Commission and the Council of the League of Nations in the 1920s and 1930s, giving them confidence they could obtain a fair hearing before the Lofgren Commission. Today, however, Israel has little or no support among the international community regarding the Palestinian conflict. Thus, even if Israel were to view the members of a particular international tribunal as genuinely neutral, it seems highly unlikely Israel would agree to a process that, barring a settlement, could end up in a binding and adverse arbitral decision.

The Palestinians, for their part, might also think twice before embarking on a Lofgren-style process today. While the broad support for the Palestinian cause around the world suggests the Palestinians would likely win any arbitration against Israel, they may not be willing to take the "litigation risk" of winning less than their full slate of demands, even if they deemed the risk to be low.

Moreover, the failed settlement negotiations during and after the Lofgren hearings should give pause to any optimistic view of a Lofgren-style platform as offering a potential methodological approach to resolving the conflict. The settlement negotiations failed even though the Jewish side had renounced any claim of ownership to the Wailing Wall, and even though the Jewish side indicated a willingness to agree to strict limitations and/or outright prohibitions on various appurtenances. The Jewish side was even willing to accept language describing their rights at the Wall as involving "devotions" rather than "prayer."

But the negotiations failed because the Mufti refused to compromise. The Mufti derived his popularity and power from the very existence of the conflict itself, and therefore he had *no* interest in pursuing *any* compromise with the Jews regarding the Mandate, the Wall, or any other issue in the conflict.

For the Mufti, therefore, the law represented just another useful tool for perpetuating the conflict rather than resolving it. While the Arab side emerged somewhat strengthened in the short term from the Shaw and Lofgren experiences, in the longer term (and continuing to the present day) their maximalist, no-compromise approach has produced one failure after another for Palestinian aspirations. There is no reason to believe the modern-day version of this approach, including the Palestinian "lawfare" and BDS campaigns, will be any more successful in achieving Palestinian objectives, even taking into consideration the far more receptive

international audience today as compared to the 1920s and 1930s.

Therefore, while the Lofgren model seems somewhat more promising than the Shaw model as providing a role for the law to play in helping resolve the conflict, ultimately neither model offers much chance of success in the modern era.

Perhaps a model based on the Peel Commission could provide a better role for the law. The Peel Commission, unlike the Shaw and Lofgren Commissions, did not allow the parties to use outside lawyers to present their cases, leading to a more dignified and well-managed process, and avoiding the gamesmanship and needless courtroom fights characteristic especially of the Shaw Commission hearings.

The Peel Commission instead allowed the lawyers for the parties to testify as witnesses, giving them a chance to make their legal arguments but without the free rein they enjoyed during the Shaw and Lofgren hearings. The Peel Commissioners more than compensated for the absence of outside lawyers, coming to the hearings well-prepared and subjecting the witnesses to detailed and probing questions.

The Peel Commission also made effective use of its *in camera* sessions, enabling the Commissioners to engage in far more candid and useful exchanges with the witnesses, most especially the Jewish and British witnesses. Although the Commission's heavy reliance on secret testimony contravened Lord Peel's original desire to take as much of the testimony as possible in public sessions, the tactic proved an effective means for the Commissioners to gather essential facts from key witnesses.

The partition proposal represented the Peel Commission's major breakthrough, yet it likely would not have happened without Weizmann's skill and ingenuity. Weizmann's careful yet simple answer – "Let me think on it" – signaled to the Commission a flexibility and willingness to compromise that had been completely absent during the Mufti's irredentist testimony. Weizmann's approach led directly to the Peel Commission's recommendation to transform the ambiguous Balfourian concept of a Jewish "National Home" *somewhere* in Palestine into Jewish *statehood* in a *defined* portion of Palestine, something even Weizmann was reluctant to ask for during one of his earlier appearances before the Commission. But Weizmann soon embraced partition as the best outcome for the Jewish people, who faced an increasingly catastrophic situation in Europe in the mid-1930s.

Churchill's extraordinarily candid *in camera* testimony, including his strong endorsement of Zionism and eventual Jewish sovereignty in Palestine, and his even stronger denunciation of the Palestinian Arabs, also must have made an impact on the Peel Commission. This may explain why the Commission recommended the Arab portion of the partitioned Palestine be merged into Transjordan rather than granted stand-alone statehood. Indeed, one wonders how history might have changed if the British had moved forward immediately to remove the Mufti and implement the Peel Commission's partition plan.

Unfortunately, however, the Peel Commission's vision of a two-state solution for Palestine never became reality. The Peel Commission offered the Palestinian Arabs in 1937 a path to the statehood they so badly want today. But the Palestinians Arabs, ever consistent in their refusal to agree to a Jewish Home or Jewish State in *any* portion of Palestine, rejected the Peel Commission's offer. The Palestinian Arabs likewise rejected the United Nations' offer of partition a decade later, choosing war against the fledgling Jewish state rather than peaceful coexistence.

Those rejections of statehood have haunted Palestinian nationalist aspirations ever since. The

Jews, on the other hand, desperate for some way to salvage the Zionist dream and help those facing the threat of Nazism, took the half a loaf the Peel Commission offered, eventually paving the way for statehood only eleven years later.

Thereafter, from 1948 until 1967, a *de facto* form of partition resembling the Peel formulation took hold, with the Jordanians in control of the West Bank and the state of Israel exercising sovereignty over the remainder of pre-1948 Palestine. Although only Britain and Pakistan recognized Jordanian sovereignty over the West Bank, no one else in the international community or the Arab world pressed for Palestinian statehood during those years. Indeed, no one discussed Palestinian statehood until Israel replaced Jordan as the controlling party in the West Bank as a result of the June 1967 Six-Day War.

Not even the Palestine Liberation Organization demanded Palestinian statehood in the West Bank when it was formed in 1964. The PLO's original goal was to destroy Israel completely and "liberate" *all* of pre-1948 Palestine.[3] Only after the onset of the Oslo process in the mid-1990s did the PLO amend its Covenant to call for the more limited goal of an independent state in the West Bank and Gaza Strip.[4]

The Peel Commission, therefore, also stands as a cautionary tale regarding the potential for a legal-type proceeding to assist the parties in resolving the conflict. Which leads us again to the ultimate question raised by this study: can the law play a constructive role in helping the parties realize, in the words of the Peel Commission, "the inestimable boon of peace?"

Only the parties themselves can answer that question. And therein lies the irony. Despite their century-long custom and practice of resorting to the law and legal procedure to air their grievances and attempt to gain advantages against each other, the parties have not been willing to use the law to achieve a peaceful resolution of their differences. Instead, they have engaged in a nearly century-long effort to use the law as a tool for waging the conflict, rather than resolving the conflict. Until they decide otherwise, the law and the legal process will not help them achieve peace.

But what *would* help, more than anything else, would be for leaders on both sides to demonstrate creativity, courage, and a willingness to compromise for the sake of peace. This study has shown how two people in particular – Chaim Weizmann and Mohamed Ali Pasha – took brave and unprecedented steps to seek light in the fog of conflict and take risks for peace.

We have already made the case for Weizmann, who must be viewed as the person most responsible for the successful creation of the State of Israel, after toiling tirelessly for more than 30 years and using all his charm and powers of persuasion to convince the British to pursue a different path. Weizmann's testimony before the Peel Commission, it is fair to say, saved Zionism.

Prince Mohamed Ali Pasha's August 1929 offer to sell the Wailing Wall to the Jews for £100,000 – strange and Quixotic as it was – nevertheless must be regarded as one of the most daring initiatives ever undertaken for peace by either side, second only to Anwar Sadat's courageous and inspiring decision nearly 50 years later to visit Jerusalem and extend the hand of peace to the Israelis. One can certainly question how Ali Pasha, an Egyptian Prince, thought he had any standing to make a settlement offer to the Jews on behalf of the Wakf authorities in Jerusalem. Ali Pasha may have thought his position as the potential future King of Egypt gave him implied authority to make the offer. But he also must have been aware of the enormous risk he was taking, for if word of his letter were leaked his life surely would have fallen into danger.

But Ali Pasha took the initiative anyway, despite the pitfalls and the risks. We conclude this study, therefore, hoping Ali Pasha's simple words in his 29 August 1929 letter to High Commissioner John Chancellor, a letter that unfortunately ended up buried in a dusty file in London for the next 90 years and never saw the light of day until now, may inspire a modern-day Weizmann or Ali Pasha to offer bold and creative ideas for settling the conflict:

> My proposal for a solution is that, instead of fighting or dealing unjustly by one party or the other, it would be infinitely better to come to an understanding.

Those words remain as true today as they were when written.

Notes

1 Townshend, *op. cit.* at 42.
2 Reiter (2017), *op. cit.* at 18.
3 Palestine National Charter, arts. 14–18 (28 May 1964).
4 1996 Amendment to the Palestine National Charter (Gaza, 22–25 Apr. 1996), www.incore.ulst.ac.uk/services/cds/agreements/pdf/is1.pdf, accessed 3 September 2019.

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Index

Page locators in *italics* and **bold** refer to images and tables, respectively.

Abbas, M. 258
Abdul Hadi, Auni Bey: 1929 riots 119, 122–123; Arabic law/politics 346–347; Balfour Declaration 57–58; Lofgren Commission *217*, **218**, 220–221, 229–239, 240–249; Palestine Mandate 63–64; Peel Commission 275, **282**, 299–302, 305, 311; present legal battles 351, 354; Shaw Commission 152, **153**, 161–162, 173, 177–178, 182–183, 197–198
Abdullah, E. 303
Abdullah I, King 16, *16*, 29, 34
Abu Midian Wakf 125, 225
Acre port 44
Adana *Vilayet* 23
Adler, C. 215, **218**
Adler Memorandum 224, 225–228
Afdal, King 81
agricultural valley of Esdraelon 271
Aksa Mosque 115–116, 123, 147
Aleppo 21, 23, 24–28, 35, 50
Alexandria Israelite Community 126–127
Algiers Conference 350, 351
Ali Pasha, M. 217, **218**, 243–245
Ali Pasha, M. (Prince) 128–131, *130–131*
Allenby, E. 30, 84, 296
Amery, L. 101–102, 104, 273
Antiquities Ordinance of 1920 99
Antonius, G. 45, 302
El Aqsa Mosque 298–299
The Arab Awakening (Antonius) 45
Arab Delegation 37–39
Arab Executive 156
Arab Higher Committee 295–303, 319–320
Arab Revolt 23, 276
Arab/Muslim layer of the Wailing Wall 224–225
Arab–Jewish Conference of 1939 44–45
Arafat, Y. 258
Arbitration, Permanent Court 47
Article 2 of the Mandate 343
Article 13 of the Mandate, Wailing Wall 84–85, 104–107
Article 14 of the Mandate, Shaw Commission 106–107, 157–158
Article 32 of the Vienna Convention 46
Articles 20 and 22 of the Covenant of the League of Nations; early British legal case 342–343; early Jewish legal case 341; Peel Commission 305–306, 315, 320; present legal battles 352
El Asad v. Minister of Interior (1979) 357–358

Baggallay, L. 43–44
Baldwin, S. 273
Balfour, A. (Lord) *51*; Lofgren Commission 212; *see also* Balfour Declaration

Balfour Declaration 15–79, *54*; Arabic law/politics 347; background 51–54; British political tensions 344; codifying 56–59; early Arab legal case 337–339; early British legal case 342–343; early Jewish legal case 340–342; League of Nations 56–58; McMahon-Hussein correspondence 24, 28–29, 32–33, 47–48; Palestine Mandate 59, 62; Peel Commission 273–274, 296–297, 301–306, 311–315, 320; present legal battles 350–354; reactions/legal interpretations 54–56; San Remo Conference 58; Shaw Commission 150, 161–167, 193–194, 196; Treaty of Sevres 58–59; Treaty of Versailles 56–58
banks 30
Barde, C. 214–215, *214*, **218**, 238–239
BDS (Boycott, Divestment, and Sanctions) 358
Beckett, W.E. 44
Beirut 23, 25, 34–35, 37
benches and chairs 84–91, 94–95, 98, 107–108, 111–112, 123–124; Lofgren Commission 218–219, 225, 230, 241, 245–246, 252, 253
Ben-Gurion, D. 56, 277–278, 281, **282**, 310–311, 323–324
Bentwich, N.: Lofgren Commission 219, 248–249; Shaw Commission 154–155, 158, 160; Wailing Wall 84, 102–103
Ben-Zvi, Y. 119–120
Betar (revisionist Zionist organization) 116, 175
Betterton, H. 148, **153**, *156*, 164
Bey Bajaji, M.A. 234
Blau, M. 215, **218**, 242
Bonfils, F. 89
Boustany, W.F. 294–295
Boycott, Divestment, and Sanctions (BDS) 358
Brandeis, L. 55–56
Braude, I. 115, 119–120, 177–179, 183, 345–346
Brewer, A.J. 238
B'rith Trumpeldor (revisionist Zionist organization) 116, 175
British occupation of Syria 24
British War Cabinet 53
Bunsen Committee 24–25
El Burak 167–168, 170
Burak: 1929 riots 115–116; Lofgren Commission 246–247
Buraq: Lofgren Commission 223, 233, 235, 241; *Yom Kippur* 1928 95–96
Al-Buraq Wall 356
Bushe, G. 102, 105–106, 125, 212

Cafferata, R. 121
Cambon, P. 24
Camp David proposals of 2000 258
Carter, M. **281**
Carter, W. 279
Catholics (Maronite) 24–25
Cattan, H. 351–352
chairs *see* benches and chairs
Chamberlain, A. 273
Chancellor, J.: Lofgren Commission 211, 214, 219, 250; Peel Commission 293–294, 319; Proclamation, 1 September 1929 122–123, *122*; Shaw Commission 147–149, 153–155, 169, 173, 183; Wailing Wall 116, 122–123, *122*, 127, 128
charitable areas *see Wakf/Waqf*
Chief Rabbi of Jerusalem 84
Churchill, W.: McMahon-Hussein correspondence 34–35, 37, 38–39; Peel Commission **282**, 285–290, 321
Churchill White Paper 34–35, 38–39, 271–272, 290–291, 308
Cisjordan Palestine 55, 345–346
City of Aleppo *see* Aleppo
Clayton, G. 20, 29, 39–41, 125–126, 290–292
Clerk, G. 129
closing arguments, Shaw Commission 184–187
Cohen, L.L. 52
Colonial Office: aftermath 255; Lofgren Commission 212; McMahon-Hussein correspondence 37, 43–44; Peel Commission 277; Shaw Commission 148, 151–152, 153, 180–181; Wailing Wall 100–104, 128
Command Paper of 1938 (British Government) 322–323

Commission of Enquiry 148
Conferences: Algiers 350, 351; General Moslem 95–96; London 1939 44–45, *217*; San Remo 33, 56, 58; Versailles 31–32, 33, 56–58
Congress, Zionist 113–116, 177–178
Council of the League of Nations: early Jewish legal case 341; Lofgren Commission 213; Palestine Mandate 59; Peel Commission 322–323; Shaw Commission 194
counsel selection: Lofgren Commission 215–218; Shaw Commission 152–155
Coupland, R. 279, **281**, *304*
Covenant of the League of Nations: Balfour Declaration 56–58; early Arab legal case 340; early Jewish legal case 341; McMahon-Hussein correspondence 48; Palestine Mandate 62; Peel Commission 303, 305–306, 315, 320; present legal battles 351–352; Shaw Commission 163–164
cross-examination (Shaw Commission) 151–152, 158–161
curtains *see* screens
Curzon (Lord) 53, 55
Cust, L.G.A. 91, 109, 116, 167–168, 345

Daily Mail newspaper 115, 353
Damascus: McMahon-Hussein correspondence 21, 24–28, 33, 35–36; Peel Commission 301; Sykes-Picot Agreement 50
Daou, J.B. 233
Darwazer, E.E. 161
David, Star of 90–91
Davies, W.A. 153
Davis, S. 248–251
Dawikat et al. v. Government of Israel (1979) 357–358
de Menasce, F. (Baron) 126–127
de Penha, G. 193
districts *see Vilayets*
Doar Hayom (Daily Mail) newspaper 115
Dome of the Rock 81, 90–91, 159, 298–299
Downie, H.F. 43–44
Drayton, R. 153, **153**
Duff, D. 91–92, 97

early legal battles 336–363; Arabic law/politics 346–348; British legal case 342–343; British political tensions 344–346; early Arab legal case 337–340; early Jewish legal case 340–342; Jewish law/politics 348–349; political context 343–349; present legal battles 349–360; summary 337–343
Edward VIII (King) 279
Effendi-Husseini, J. 63
Egyptian Pasha's occupation of Palestine 83
El Burak 167–168, 170
Eliash, M.: Jewish law/politics 348–349; Lofgren Commission 215–216, *216*, **218**, 221–223, 227–228, 232–237, 247, 255–258; Peel Commission 311
Elon Moreh case 357–358
Eretz Israel ("Land of Israel") 63
Erleigh (Lord) 153, **153**, 348
Esdraelon agricultural valley 271
Expropriation of Land Ordinance 1924 96
"extreme Zionist program" 56

Fallodon (Lord) 290–291
al Farouki, M. 19
fasting 116, 196–197, 256, 346–347
"*Fatat al Arab*" Young Arab Party 19
Feinberg, N. 351
Feisal (Iraqi King): McMahon-Hussein correspondence 16, 29–30, *30*, *31*, 32–34, 40–41; Peel Commission 307; Shaw Commission 166
Finlay, W. 341–342
firmans 345
Foreign Office: Lofgren Commission 212; McMahon-Hussein correspondence 21, 43–44

Frankfurter, F. 55–56
French interference 24–25, 48–50

Gaza 55, 324–325, 348, 350, 357
General Assembly of the United Nations 324–325, 353, 357
General Moslem Conference at Jerusalem 95–96
Geneva *see* Permanent Mandates Commission
George, D.L. 62, **282**, 292–293
George, L.: Lofgren Commission 212; Peel Commission 314–315, 323–324; Shaw Commission 183, 189–190
Georges-Picot, F. 48–50, *49*
German Jews 301–302
Golan Heights 358
Goldsmith, G.J. (Yossel) 233
Government House in Jerusalem 34
Grey, E. 20, 24
Guardian newspaper 181–182

Hafez, I.E. 232, 233
Haganah (Jewish Defense organization) 116
Haifa port 44
Haifa riots 275–276
Hailsham (Lord) 273
Hall, J.D. 101
Hama: McMahon-Hussein correspondence 21, 24–28, 35; Sykes-Picot Agreement 50
Hamaz, I.E. 228
Hammad, Haj Tewfik 161–162, 170
Hammond, L. 279, **281**, 316
Haram: 637 A.D. conquest 81; 1929 riots 118; early disputes 84, 90–91; Lofgren Commission 223, 231, 233–234, 243, 254; Shaw Commission 172, 174; *Yom Kippur* 1928 91
Haram al-Sharif Temple 86, 95, 354
Haram esh Sharif ruins 298–299
Haycraft Commission 345–346
Hebron (south of Jerusalem) 121–122
Hedjaz, King of 29
Heidet, L. 235
Henderson, A. 129
Herod (King) 229–230
Herodian layer of the Wailing Wall 224–225
High Commissioner's Advisory Council 63
High Court of Palestine 64
Higher Committee, Arab 295–303, 319–320
Hogarth, D. 29
Holman, A. 126–127
Holocaust 301–302
Holy Days, Lofgren Commission 118, 253
Holy Places/Sites: McMahon-Hussein correspondence 44; Palestine Mandate 59–60; Peel Commission 298–299; Special Commission 212–214; Sykes-Picot Agreement 50; *see also* Order-In-Council; Wailing Wall
Homs: McMahon-Hussein correspondence 21, 24–28, 35; Sykes-Picot Agreement 50
Hoofien, S. 115
Hope Simpson Report 197, 270–275
Horowitz, S. 115, 153, 311
hospice *see Zawiyah*
House of Commons: McMahon-Hussein correspondence 41; Peel Commission 276; Shaw Commission 183; *Yom Kippur* 1928 101–102
House of Lords: McMahon-Hussein correspondence 40–41; Peel Commission 290–291, 318; *see also individual Lords*
Hughes, R. 245–246
Hurvah synagogue 221–222
Hussein (Sherif) *17*; *see also* McMahon-Hussein correspondence
al-Husseini, Haj Amin 94, 163, **282**, 295–299

Husseini, J. 119–120, 231–232, 303
Husseini, J.E. 237–238

Ibn Saud (King) 295–296
Institute for Palestine Studies 353
"Instructions regarding Use of Wailing Wall" 1929 123–124
International Criminal Court (ICC) 357, 359
Iraq, Peel Commission 315
Isaacharoff, Z. 235–236
Isaacs, G.R. (Lord Erleigh) 153, **153**, 348
Iskafi, S.S. 233
Israeli Occupation of Gaza/West Bank 55, 324–325, 348, 350, 357
Israeli Supreme Court 357–358
Israelite Community in Alexandria 126–127

Jabotinsky, V. (Zev) 115, 313, 322
Jaffa port 44
Jaffa riots 118, 119, 275–276
Jaffa Zionist Bank 30
Jamiart El Islamyeh society 125–126
Jeffries, J.M.N. 353
Jerusalem: Chief Rabbi 84; General Moslem Conference 95–96
Jerusalem District Electricity Co. v. Minister of Energy et al. (1980) 357–358
Jerusalem Government House 34
Jerusalem *Nebi Musa* riots 36
Jerusalem, Old City of 1931 *81*
Jerusalem *Sanjaks* 34–35, 37
Jewish Daily Bulletin 93
Jewish Defense organization 116
Jewish Quarters of the Old City 221–222
Jewish right of access, Lofgren Commission 228–230
Jewish Sabbath 253
Jordan 55; River 290
Judicial Committee of the Privy Council in London 64
"The Juridical Basis of the Arab Claim to Palestine" Secret Memorandum 43

al Kadra, S.B. 162, 165–166
Karminiski, S.E. 153
Kawasme et al. v. Minister of Defense (1980) 357–358
Kedourie, E. 32
Keith-Roach, E. 91–93, 97, 116, 256–257, 345
Kennard, H.W. 251
Kenworthy, J.M. 101, 104
Khadra, S.B. 119–120
King-Crane Commission 56
Kirschner, N. 321–322
Kisch, F.: Jewish law/politics 348; Lofgren Commission 218–222, 248–250, 255; Peel Commission 273; Wailing Wall 126
Kives, Y. 174–175
Klausner, J. 115, 116
Kook, A.I. 109–110, 174, 223
Koran 96, 233
Kotel Ha'Maaravi see Wailing Wall

Land Ordinance (1924), Expropriation of 96
Latif Bey Salah, A. 303
Lausanne Treaty 340, 351–352, 354
Law Officers of the Crown: Lofgren Commission 219–220, 240; Shaw Commission 152–153, 157–158; *Yom Kippur* 1928 98–110
lawfare models 358–360

League of Nations: Shaw Commission 151–152; Wailing Wall 89, 95; *see also* Council of the League of Nations; Covenant of the League of Nations
Lehrer, M. 63
Levy, Y. 119–120
Liberation Organization of Palestine 350
Library of Congress, Wailing Wall *87*, *88*
Lidyen, Abu F. 164–165
Lindsay, R.C. 33–34
Lipsky, L. 152
Litani River 290
Lloyd (Lord) 56, 173–174
Lloyd, T.I.K.: Lofgren Commission 212; Shaw Commission *156*, 197; Wailing Wall 102, 103
Lofgren Commission 211–268; Adler Memorandum 225–228; aftermath 255–257; Arabic law/politics 347–348; assessment 257–259; background 211–215; Balfour Declaration 57–58; closing arguments 239–247; controversy 237–239; counsel 215–218; early Jewish legal case 340; formation 211–215; Jewish law/politics 348; key players **218**; Opening Session 219–222; opening statements 222–225; Palestine Mandate 62, 63; Peel Commission testimony 298–299; present legal battles 354–355; reactions 251, 254–255; report/verdict 251–254; settlement negotiations 248–251; trial 222–248; witness testimony 228–237
Lofgren, E. 214–215, *214*, **218**, 247–248; *see also* Lofgren Commission
Lolas, A. 235
London: Conference 1939 44–45, *217*; Privy Council 64; Zionist leadership 344–345
lower layer of the Wailing Wall 224–225
Lugard (Lord) 155
Luke, H.: 1929 riots 114, 116, 118–121; Lofgren Commission 250–251; Shaw Commission 161, 168–170, 196; *Yom Kippur* 1928 93–94, 100–104, 114

MacDonald, R.: Peel Commission 274–275; Shaw Commission 146–147, 183, 190; Wailing Wall 127
MacDonald White Paper 44–45, 197, 346
McDonnell, M. 46
McMahon, H. *22*, 301–302, 303, 315, 320; *see also* McMahon-Hussein correspondence
McMahon-Hussein correspondence 15–48; Arab reaction/legal interpretation 28–36; Arab/British arguments and legalities 45–47; British legal interpretation 36–45; British political tensions 345–346; early Arab legal case 337–338; early British legal case 342; early Jewish legal case 341; exclusion of Palestine 28–32; inclusion of Palestine 32–36; letters 18–24; Lofgren Commission 246; Peel Commission 282, 304; present legal battles 350–353; Shaw Commission 158, 161–167; subsequent developments 47–48; Sykes-Picot agreement 49–50
"Magna Carter of the Jewish People" (Weizmann) 306
Magnus, P. 52
Manchester Guardian newspaper 181, 190
Mandate/Mandatory Government 59–65; British political tensions 344; early Arab legal case 339; early British legal case 343; early Jewish legal case 341–342; early legal arguments 62; early litigation 62–64; Lofgren Commission 226; McMahon-Hussein correspondence 33; Peel Commission 272, 277, 300, 303, 311, 313, 315–316; present legal battles 350–354; Shaw Commission 157–158, 168–169, 175–183, 191–193, 195–197; Wailing Wall 84–85, 118; *see also* Permanent Mandates Commission
Margaliot-Kalvarisky, H. 225, 248
Maronite Catholics 24–25
Matson Photograph Collection of the Library of Congress *88*
Maugham, F. 28, 44
Mazzawi, M. 352
Meinertzhagen, R. 149
Melchett (Lord) 147, 276
Memoranda: Adler Memorandum 224, 225–228; Balfour Declaration 51–56; Lofgren Commission 224, 225–228; McMahon-Hussein correspondence 40–41, 43; Peel Commission 295–303, 304–306; Shaw Commission 191; *Yom Kippur* 1928 94–95
de Menasce, F. (Baron) 126–127
Merriman, B. 346; Jewish law/politics 348; Lofgren Commission 239; Shaw Commission 152–153, **153**, *154*, 157–162, 165–169, 172–179, 184–186, 196
Mersina *Vilayet* 23
middle layer of the Wailing Wall 224–225
Midian, A. 81–82, 125, 225

Mizrachi, A. 119
Moghannam, M.E. **153**
Moghrabi inhabitants 82–83, 226, 356
Moghrabi Quarter 81–82; aerial view *82*; Lofgren Commission 243; present legal battles 354–355; South view/Wailing Wall *85*; view of *83*
Moghrabi *Wakf* 126, 170, 172–173, 251–252
Mohamed (Prophet) 118, 170, 233
Moroccan Quarter (Moghrabi Quarter) 81–82, *82*, *83*, *85*, 243, 354–355
Morris, H. *156*, 157–158, 185, 189–190, 279, **281**
Morris, R.H. 148, **153**
Moslem Supreme Council 90–91
Mosque of *Aksa* 115–116, 123, 147
Mosque of Omar 81, 90–91; Peel Commission 298–299; Shaw Commission 159
Mozzakir, A.K. 234
Muezzin (call to prayer) 86, 99, 108–109, 223
Muslim Law *see Sharia* Law
Muslim Sabbath 118

Nablus riots 275–276
el-Nahas, M. 320–321
National Council of the Jews in Palestine (*Va'ad Leumi*) 110, 116, 122, 127
National Home legality 15–79; Arab reaction/legal interpretation 28–36; Arab/British arguments and legalities 45–47; Balfour Declaration 15–79, *54*; British legal interpretation 36–45; British political tensions 346; codifying of Balfour Declaration 56–59; early British legal case 343; exclusion of Palestine 28–32; inclusion of Palestine 32–36; letters 18–24; McMahon-Hussein correspondence 15–48; Peel Commission 271–272, 290, 300, 303, 310, 315–316; present legal battles 354; reactions/legal interpretations 54–56; subsequent developments 47–48; Sykes-Picot agreement 49–50
Nazi extermination of Jews 301–302
Nebi Musa riots in Jerusalem 36
New Door incident at the Wailing Wall 86, 98–99, *99–100*, 106, 109–110, 115, 124; Lofgren Commission 223, 253; Shaw Commission 167–168, 177
newspapers: 1929 riots 115; Balfour Declaration 51; Lofgren Commission 212, 254; McMahon-Hussein correspondence 42; Peel Commission 273, 278, 279, 318; present legal battles 353; Shaw Commission 168, 181–182, 183, 190; *Yom Kippur* 1928 93, 109
Newton, F. 319

Old City of Jerusalem (1931) *81*
Old City, Jewish Quarter 221–222
Olmert proposals of 2008 258
Omar Mosque 81, 90–91, 159, 298–299
"one-state solution" 323
Opening Session: Lofgren Commission 219–222; Peel Commission 282–283; Shaw Commission 155–157
Opinion of the Law Officers *see* Law Officers of the Crown
Order-In-Council: British political tensions 344; Lofgren Commission 255–257; Wailing Wall 88–89, 100–101, 105–106
Ordinance of Antiquities 1920 99
Ordinance of Land 1924 96
Ormsby-Gore, W.: McMahon-Hussein correspondence 29–30, 41–42; Peel Commission 277–280, 295–296, 322
Osman, Salah al Din Bey 234
Ottoman regime/influence: Administrative Districts *26*, 27–28; Balfour Declaration 54–55, 56–57, 62, 354; British political tensions 344–345; early Arab legal case 338, 339; lawfare models 359–360; Lofgren Commission 218–219, 223, 230–233, 238–239, 243–245, 251–254; McMahon-Hussein correspondence 16, 24–25, *26*, 27–28, 35–36, 37; Mandate legitimacy 354; Peel Commission 296–297, 301; present legal battles 354; Shaw Commission 166–167, 170, 193; Sykes Picot agreement 48; Wailing Wall 82–83, 84, 86, 98, 102, 106–113
ownership of the Wailing Wall 239–241

Pakover, M.H. 231
Palestine Arab Delegation 37–39
Palestine Arab Executive 156
Palestine Arab Executive *see* Arab Executive
Palestine High Court 64

Palestine Liberation Organization 350
Palestine Mandate *see* Mandate/Mandatory Government
Palestine Zionist Executive *see* Zionist Executive
Palin Commission 36
Parkinson, A.C. (Cosmo) 277–278
partitioning of states 309, 316–318
Pasha, R.T. 238–239
Passfield (Lord) 147–149, 254
Passfield White Paper 197, 270–275
Passover 1922 86–88
pavement access (Wailing Wall) *85*, 123–128; early legal battles 340, 345; Lofgren Commission 213–215, 218–228, 233–241, 244, 248–259; Shaw Commission 157–158, 161, 167–177, 180
Peel Commission 269–335; 1933 disturbances 275–276; aftermath 322–323; appointment 276–283; Arab Higher Committee Memoranda 295–303; Arab reaction 319–321; Arab Revolt 276; Arab testimony/written confessions 294–295; Arabic politics 347; assessment 323–325; Balfour Declaration 53–54, 55; British political tensions 345–346; British reaction 318–319; British testimony 283–294; "deadlock" 314–316; early Jewish legal case 340; Hope Simpson report 270–275; Jewish reaction 321–322; Jewish testimony/written submission 304–313; key players **181**–**182**; key testimony 283–313; MacDonald letter 274–275; McMahon-Hussein correspondence 35, 40–41, 45; Opening Session 282–283; Palestine Mandate 62, 63–64; partitioning of states 309, 316–318; Passfield White Paper 270–275; procedure **181**–**182**, 281; reactions 318–322; Royal Commission 277, 279–281, 313–322; Shaw Commission assessment 197; Terms of Reference 276–283
Peel (Lord) 279, **281**, 290–291, 347; *see also* Peel Commission
de Penha, G. 193
Permanent Court of Arbitration 47
Permanent International Court of Justice 308–309
Permanent Mandates Commission (PMC): 1929 riots 114; British political tensions 344–345; Lofgren Commission 212; Peel Commission 319–320, 322; Shaw Commission 191–194; Wailing Wall 89–90, 96, 110–113, 114, 128; *Yom Kippur* 1928 96, 110–113
Picot (Sykes Agreement) 48–50, *49*
Poincare, R. 24
ports 44
Preedy, K. 153–160, **153**, 174, 177–182, 187, 196–197, 348
present legal battles 349–360
Prints and Photographs Division of the Library of Congress *87*
Privy Council of London 64
protest *see* riots
Protocols of the Elders of Zion 171
provinces *see Vilayets*
Pro-Western Wall Committee 115, 116

Qadi (Islamic Judge) 82–83

Rabbinical Courts 311
ben Rahamim Meyuhas, R. 231
Rappard (Commissioner) 193–194
Reading (Lord) 127, 128
religious buildings and sites *see* Holy Places/Sites
Rendell, G.W. 42–43, 126–127
Resolution 181 of the United Nations 33, 324–325
Resolution of San Remo 33
revisionist Zionist organizations 116, 175
right of access 228–230
riots: Arabic law/politics 346–347; McMahon-Hussein correspondence 36; Peel Commission 275–276; Wailing Wall 1929 114–125
ritual prayer 227
Roman layer of the Wailing Wall 224–225
Rosenberg, M. 232
Rosh Hashana: 1929 instructions 123–124; Lofgren Commission 253
Rothschild (Lord) 51–53, 351

Royal Commission (Peel Commission) 277, 279–281, 295–303, 313–322
Royal Warrants 279
Rumbold, H. 279, **281**, 301–302, *304*, 311–312
Rutenberg, P. 115, 127–128, 175–177

Sabbath 118, 253
Sacher, H. 106–107, 115, 160, 179–183, 345–346
sacred shrines 59–60
Samara v. Regional Commander of Judea and Samaria (1979) 357–358
Samuel, H. 192, **282**, 290–292; McMahon-Hussein correspondence 32, 34, 40, *41*; Palestine Mandate 63; Peel Commission 323–324
San Remo Conference/Resolution 33, 56, 58
Sanjaks (*Vilayet* subdivisions) 25, 27, 34–35, 37
Saunders, A., Shaw Commission 120, 157–160
Schatz, B. 229–230, 232
Schorr, A. 231, 232, 245
Scott, C.P. 190
screens 84, 86, 91–95, 97, 101, 108, 110, 113, 116, 124; early legal battles 345; Lofgren Commission 218–219, 225, 230–231, 241, 246, 253, 256–257; Peel Commission 256–257; Shaw Commission 193
settlement negotiations: Lofgren Commission 248–251; Wailing Wall 125–131
Sevres Treaty 56, 58–59, 354
Sharia Law: British political tensions 345; Lofgren Commission 213, 228–229, 232, 233, 244–245, 250, 258
Shaw Commission 146–210; aftermath 191–194; Arab/British reaction 189; Arabic law/politics 346–347; assessment 195–198; Balfour Declaration 57–58, 150, 161–167, 193–194, 196; British political tensions 345–346; British reaction 189; closing arguments 184–187; counsel selection 152–155; cross-examination 151–152, 158–161; early Jewish legal case 340; formation 146–149; Jewish case against Mandatory Government 175–183; Jewish reaction 189–191; key players **153**; Lofgren Commission closing arguments 243; Lofgren Commission formation 212–213; Lofgren Commission trial 223; McMahon-Hussein correspondence 31–32, 35, 158, 161–167; Mandate/Mandatory Government 157–158, 168–169, 175–183, 191–193, 195–197; opening hearing 155–157; Opening Session 155–157; Palestine Mandate 62, 63; Passfield White Paper 273–274; Peel Commission Terms of Reference 279; Peel Commission testimony 298–299; reactions 187, 189–191; report 187–189; Terms of Reference 149–151, 157, 158, 161, 170, 183, 188, 192; testimony under oath 151–152; trial 157–187; Wailing Wall 84, 118–121, 128, 157–158, 167–175
Shaw, W. 148, **153**, *156*, 189–190; *see also* Shaw Commission
Sherif Hussein *17*; *see also* McMahon-Hussein correspondence
Shertok, M. 280, 310–311
Shiels, D. 194
Shofar (horn) 86, 124, 176, 218–219, 231, 253, 256–257, 258
shrines 59–60; *see also Zawiyah*
Shuckburgh, J.: Lofgren Commission 212; McMahon-Hussein correspondence 32, 37–38, 47; Shaw Commission 169, 183; Wailing Wall 103, 104
Silley, R. 152, 162–163
Simchat Torah celebration 256–257
Simon, J. 273
Six-Day War 324–325, 356, 357
Sixteenth Zionist Congress 113–114
Smuts (General) 183
Smuts, J. 53, 322
Snell, H. 148, **153**, *156*, 189, 273, 318–319
Society for the Protection of the Mosque of *Aksa* and the Moslem Holy Places 123, 147
Solomon, C. 234
Solomon (King) 298–299
Solomonic layer of the Wailing Wall 224–225
“Southern Syria” 63–64
Special Commission of Holy Places 212–214
Star of David 90–91
Statehood of Palestine 353
Status Quo Law: 1929 riots 115–116; British political tensions 344–345; early British legal case 343; Lofgren Commission 221, 222–223; Shaw Commission 157, 170, 176–177, 179, 193; Wailing Wall 84–91, 94–95, 99, 104–111, 115–116, 125; *Yom Kippur* 1928 94–95, 106–111

Stein, L.: Peel Commission 273–274, 280–281, 305–306, 311–313; Shaw Commission 94–95, 153, 191–192
Stoker, W.: Arabic law/politics 346–347; Jewish law/politics 348; Peel Commission 307–308; Shaw Commission 155–171, 180, 186–187, 196–197
stools *see* benches and chairs
Storrs, R. 125
strikes *see* riots
Supreme Council, Wailing Wall 90–91
Supreme Council at the Versailles Conference 31–32
Supreme Court of Israel 357–358
Supreme Court of Palestine 63, 255
Supreme Moslem Council: Lofgren Commission 213, 256; Wailing Wall 108
Sykes-Picot Agreement 48–50, *49*
Symes, G.S. 90
synagogues 221–222, 246–247
Syria: McMahon-Hussein correspondence 24–25, *26*, 27–28, 35–36, 37; Peel Commission 301, 315; "Southern Syria" 63–64

el Taftazani, G. 229
Technical Commission chaired by Sir John Woodhead 322–323
temples: Lofgren Commission 231; Peel Commission 298–299; present legal battles 354; Wailing Wall 86, 95
Terms of Reference: Peel Commission 276–283; Shaw Commission 149–151, 157, 158, 161, 170, 183, 188, 192
testimony: Lofgren Commission 228–237; Peel Commission 283–313; Shaw Commission 151–152, 157–158
Thomas, J.H. 276
et Tiby, T. 229
The Times newspaper: Balfour Declaration 51; Lofgren Commission 212, 254; McMahon-Hussein correspondence 42; Peel Commission 273, 278, 279, 318; Shaw Commission 168, 183; *Yom Kippur* 1928 109
Tisha b'Av fast 116, 196–197, 256, 346–347
Torah (Hebrew Bible): Lofgren Commission 218–219, 231, 241, 245–247, 253, 256–257; Shaw Commission 174; Wailing Wall 85–86, 118, 123–124
Toynbee, A. 36–37
Transjordan 55
Treasury, Shaw Commission 151–152
treaties, McMahon-Hussein correspondence 46
Treaty of Lausanne 340, 351–352, 354
Treaty of Sevres 56, 58–59, 354
Treaty of Versailles 31–32, 33, 56–58
trial of the Lofgren Commission 222–248; Adler Memorandum 225–228; closing arguments 239–247; controversy 237–239; opening statements 222–225; witness testimony 228–237
trial of the Peel Commission 283–313; Abdul Latif Bey Salah written submission 303; Arab Higher Committee Memorandum 295–303; Arab testimony/written confessions 294–295; British testimony 283–294; Emir Abdullah written submission 303; Jewish testimony and written submission 304–313
trial of the Shaw Commission 157–187; Balfour Declaration 161–167; closing arguments 184–187; cross-examination 158–161; evidence 158; Jewish case against Mandatory Government 175–183; McMahon-Hussein correspondence 161–167; Mandate/Mandatory Government 175–183; Saunders testimony 157–158; Wailing Wall rights/claims to 167–183
tripartite division of Palestine 309, 316–318
Tulkarem *Sharia* courts 229
Turkey *see* Ottoman regime/influence

United Nations (UN) 33, 324–325, 353, 357
upper layer of the Wailing Wall 224–225
Urtas village 64
Uziel, B.Z. 230–231

Va'ad Leumi (National Council of the Jews in Palestine) 110, 116, 122, 127
Van Kempen, C.J. 214–215, *214*, **218**
Van Rees, D.F.W. 59, 112–113, 193–194
Versailles Conference/Treaty 31–32, 33, 56–58
Vickery, C.E. 44
Vienna Convention 46
Vilayets (provinces) 23, 25, 33, 35–36, 37; *see also* Aleppo; Beirut; Damascus; Syria

Wailing Wall 80–144; 1929 riots 114–125; aerial view *82*; counter-demonstrations 1929 118–119; dispute settlement 125–131; early Arab legal case 340; early disputes/British rule 84–91; Hebron 121–122; Lofgren Commission 212–213, 218–240, 245, 250–251; new door incident 86, 98–99, *99–100*, 106, 109–110, 115, 124, 167–168, 177, 223, 253; pavement access *85*, 123–128, 157–158, 161, 167–177, 180, 213–215, 218–228, 233–241, 244, 248–259, 340, 345; photographs 1910 *111*; photographs 1929 *112*; PMC 89–90, 110–113; present legal battles 354–355; proclamations/new instructions 122–125; Shaw Commission 84, 118–121, 128, 157–158, 167–175, 176–177; South view *85*; *Tisha b'Av* fast day 116; typical crowd for *Yom Kippur* *92*; under Muslim rule 81–84; *Yom Kippur* 1928 91–114
Wakf Abu Midian 125, 225
Wakf/Waqf: 1929 riots 118; early disputes/British rule 84, 86; Lofgren Commission 223, 226, 228, 233, 234–235, 241, 249–252, 258; Shaw Commission 170, 172–173; Wailing Wall 81–82, 84, 86, 118, 125, 126
War Cabinet of Britain 53
War Office Memoranda 51–52
Warburg, F. 160–161, 176, 190
warrants, Peel Commission 279
Wauchope, A. 276–277, 278, 283–285, 295–296
Wedgewood, J. 279–280
Weizmann, C.: Balfour Declaration 52–53, 55; Jewish law/politics 348–349; Lofgren Commission 213, 215–216; McMahon-Hussein correspondence 29–30, *30*, 32; Peel Commission 270, 274–275, 277–281, **282**, *305*, 306–310, 321–324; Shaw Commission 146–147, 155, 160–161, 166, 173–174, 189–191, 192, 197; Weizmann-Feisal Agreement 30
Wellesley, W.R. (Lord Peel) 279, **281**, 290–291; *see also* Peel Commission
West Bank 55, 324–325, 336, 348, 350, 356–358
White Papers: 1929 riots 115–116, 122; British political tensions 346; early British legal case 343; McMahon-Hussein correspondence 34–35, 37, 38–39, 44–45; Peel Commission 270–275, 308, 323; Shaw Commission 161–162, 171, 193, 197; *Yom Kippur* 1928 97–98, 109, 110
Williams, O.G.R. 101
Wilson, W. 50, 53, 56
Woodhead, J. 322–323
World Zionist Organization *see* Zionist Organization

Yasmini, H.D. 236–237
Yellin, D. 215, **218**, 220–221, 242
Yom Kippur 1923 86
Yom Kippur 1925 89, 95
Yom Kippur 1928 incident 91–114, 230–231; British political tensions 345; early British legal case 343; Jewish/Arab legal reactions 94–96; law officers of the crown 98–110; PMC 96, 110–113; White Papers/British legal reaction 97–98
Yom Kippur 1929, instructions 123–124
Yom Kippur/Lofgren Commission 253, 256–257
Young, H. 37

Zaki Pasha, A. **218**, 243
Zawiyah: Lofgren Commission 223; Shaw Commission 167–168, 177, 193; Wailing Wall 85, 98–99, *99*, *100*, 104–110
Zikr ceremony: Lofgren Commission 223, 241–242; Shaw Commission 167; Wailing Wall 86
Zionism: Balfour Declaration 51–52, 55–56; British political tensions 344–346; Lofgren Commission 215–217, 246, 247; McMahon-Hussein correspondence 29–32; Peel Commission 270–271, 272, 290, 301–302, 306–307, 310, 319, 322; Shaw Commission 155, 161–162, 180–181, 196–197
Zionist Congress: 1929 riots 114–116; Shaw Commission 177–178; *Yom Kippur* 1928 113–114
Zionist Entity, Peel Commission 324–325
Zionist Executive: 1929 riots 114–115, 120–121; Lofgren Commission 218; Shaw Commission 152, 156, 158, 175, 177–178, 179–180; *Yom Kippur* 1928 100–101, 108–109
Zionist leadership in London 344–345
Zionist Organization: 1929 riots 116; *B'rith Trumpeldor* 116, 175; McMahon-Hussein correspondence 34; Shaw Commission 152, 180–181; *Yom Kippur* 1928 94–95, 113; *see also* Weizmann
Zurich, Zionist Congress 113–116, 177–178