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"An Existing and Indestructible Reality"?
Justice Robert H. Jackson's Thoughts on International Law and a Legal Case Study on the 100th Anniversary of the Balfour Declaration

Jackson on the Importance of International Law

Justice Robert H. Jackson lived in a tumultuous period of American history — he experienced first-hand both the First and Second World Wars and the rise of communism at the end of his life. Through his work in Nuremberg, he was able to witness the utter destruction of the Nazi regime and work closely with the Soviets during the reign of Stalin. Furthermore, given Jackson's lifelong apprehension toward war and admiration for the law, it comes as no surprise that in 1941, he recognized that "the greatest unfinished task of civilization" was to "create a just and peaceful international order," and the "foundations" of this monumental undertaking must "be laid in law."[1] Jackson reaffirmed these beliefs in 1945 just before the end of World War II (WWII), citing that "international law…offers the only hopeful foundation for an organized community of nations."[2] Moreover, in Jackson's mind, the only things standing between the world and "the final catastrophe of our kind of civilization" are "effective sanctions for a rule of law among nations."[3] His statement in 1945 came only a few months after the creation of the United Nations and when the four Allied nations faced the decision of what to do with the remaining Nazi leaders. Several prominent leaders suggested simply executing them, but Jackson "never could understand that philosophy" when international law offered such a clear and just solution.[4] Through his work during the creation and implementation of the International Military Tribunal (IMT) in Nuremberg, Germany, Jackson demonstrated that in his increasingly globalized and violent world, he believed "the dullest mind must now see that our national society cannot be so self-sufficient and so isolated that freedom, security, and opportunity of our own citizens can be assured by good domestic laws alone."[5]

Jackson's Unique Perspective on International Law

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[1] Justice Robert H. Jackson, "Address at the First Conference of the Inter-American Bar Association in Havana, Cuba," (speech, Havana, Cuba, March 27, 1941), Department of Justice, https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf. (2).

[2] Justice Robert H. Jackson, "Rule of Law Among Nations," (speech, Washington, DC, December 2, 1945), Robert H. Jackson Center, https://www.roberthjackson.org/speech-and-writing/rule-of-law-among-nations/ (11).

[3] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (speech, Washington DC, April 24-26, 1952), JSTOR. (203-4).

[4] Justice Robert H. Jackson, "A Country Lawyer at an International Court," (speech, Roanoke, Virginia, August 8, 1947), Robert H. Jackson Center, https://www.roberthjackson.org/wp-content/uploads/2015/01/A_Country_Lawyer_at_an_International_Court.pdf (191).

[5] Justice Robert H. Jackson, "Rule of Law Among Nations," (11).

It is important to note Jackson's own unique perspective on international law. It appears he had very little education in the subject, and one of his first experiences in international law came through his post as Attorney General in 1940 and 1941.[6] In these few years before U.S. entry into WWII, President Franklin Delano Roosevelt began his "Lend-Lease" program with Great Britain, and Jackson was given the task with justifying the program under law. Thus, he turned to both past and current interpretations of international law to justify the concept of neutrality into a position that condoned Lend-Lease.[7] However, this address at the First Conference of the Inter-American Bar Association in Havana, Cuba is one of the first chances to understand Jackson's perspectives on international law and most notably his feelings on aggressive war, even as it is important to recognize Jackson's need to justify his president's foreign policy.[8] During his tenure as Attorney General and first years as a Supreme Court Justice, Jackson continued to encounter matters of international law, but his true legacy in international law did not begin until 1945 with his appointment as U.S. Chief Prosecutor in the Nuremberg IMT. Jackson was instrumental in designing the Trial itself in London during the summer of 1945, which resulted in the London Proclamation and Charter.[9] He then performed his duties in Nuremberg itself, giving the Opening and Closing Statements of the trial as well as cross-examining three of the twenty-one defendants. As a whole, Jackson, in his own words, went from "a country lawyer" to an instrumental figure in the application of international law without very much study in the subject itself, and thus his interpretations offer a unique perspective on this complicated topic.[10]

The Slow, Academic History of International Law

Yet, this lack of academic background may have proven useful to Jackson. International law has long been regarded as a discourse that is easy to debate but very hard to put in practice. Jackson himself noted the "slow and evolutionary nature" of international law and that the subject has long been left for the study of academics rather than the implementation of world leaders and lawyers.[11] In Jackson's words, "there were many sources of international law, but they had never been reduced to an agreement or code; they had never been approved by the different foreign powers."[12] Consequently, when the end of WWII left the Allied powers to decide the fate of the Nazi leaders, Jackson strongly vocalized for the world to further

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[6] Justice Robert H. Jackson, "Address at the First Conference of the Inter-American Bar Association in Havana, Cuba," (7).

[7] Ibid. (14).

[8] Ibid. (4).

[9] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (202).

[10] Justice Robert H. Jackson, "A Country Lawyer at an International Court," (189).

[11] Justice Robert H. Jackson, "Nuremberg in Retrospect: Legal Answers to International Lawlessness," (speech, Banff, Alberta, September 1, 1949), Robert H. Jackson Center, https://www.roberthjackson.org/speech-and-writing/nuremberg-in-retrospect-legal-answer-to-international-lawlessness/ (813).

[12] Justice Robert H. Jackson, "A Country Lawyer at an International Court," (192).

international law in a practical sense. The "inertia" from the war had left the global community "not only an opportunity, but a necessity as well," to implement a more just and peaceful solution to the Nazi regime than that which had been seen at the end of World War I (WWI) with the Treaty of Versailles.[13] Jackson believed that the Allies were "put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct."[14] Of course, due to the slow history of international law, Jackson had "no ruling precedent" by which to conduct the trial.[15] Luckily, he was able to mark this critical time in history with an unprecedented, concrete furthering of international law through the creation of the London Charter and IMT.

Problems Behind the Slow Nature of International Law - Combining Systems of Law

As touched upon in the section above, international law has often been plagued with a stagnant nature for several reasons, all of which center on the "international" aspect. With so many countries, governments, and lawyers contributing to potential ideas for a court and law system, it has been difficult to establish an agreeable scenario for all nations participating. For one, an international law system would need to either select a single system of law by which to try defendants or combine many systems into a format that would satisfy all participants. Jackson experienced this difficulty firsthand in London as he and the other Allied representatives struggled to combine the Anglo-American or common system of law with the continental, civil, or Roman system of law used by the French and the Soviets.[16] Points of contention between the two systems included the role and extent of indictments in the trial, the validity of trials for organizations, and the very structure of international law itself.[17] At the very start of the trial, the Soviets and the rest of the Allied Powers disagreed on the role of the IMT as an "independent judicial trial," for in the Soviet Union system of law, the judiciary is not an impartial body but "an instrument of policy designed to carry out the policy of the executive."[18] Furthermore, in the Soviet system, the judge largely acts as both the judge and the prosecution, very little cross-examination took place in Soviet, French, and German courtrooms, and the defendants in these courtrooms were not typically given a testimony under oath.[19] With so much divergence between the Allied Powers, it is miraculous that the London Proclamation and Charter ever came into existence. At the very start of the trial, Jackson made it clear that the goal of the United States

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[13] Justice Robert H. Jackson, "Rule of Law Among Nations," (12).

[14] Justice Robert H. Jackson, "United States: Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals," *The American Journal of International Law* 39, no. 3 (1945): 188. JSTOR 2213922.

[15] Justice Robert H. Jackson, "A Country Lawyer at an International Court," (189).

[16] Eugene C. Gerhart, *Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate,* (Buffalo, NY: William S. Hein & Company; Jamestown, NY: Robert H. Jackson Center, 2003): 326.

[17] Eugene C. Gerhart, *Robert H. Jackson,* 326-30.

[18] Justice Robert H. Jackson, "A Country Lawyer at an International Court," (193).

[19] Ibid (194-96).

was not "to proceed…according to the American jury trial procedure alone," and instead wanted to incorporate aspects of all four systems of as would create the most fair and swift proceedings possible.[20] It is worth noting, however, that because the United States had possession of most of the notable Nazi war criminals, when faced with an impasse, the aspect from the American judiciary system was often the one selected.[21]

Problems Behind the Slow Nature of International Law - Deciding Charges

Beyond the components and formulation of an international judicial system, founders would need to decide on charges to be prosecuted. Jackson's struggle for the acceptance of aggressive war will be covered later in this paper, but beyond this battle came even more questions surrounding the accusations. Three charges were eventually decided upon at Nuremberg: crimes against the peace, crimes against humanity, and aggressive war; however, when the General Assembly of the United Nations came together to reaffirm these Nuremberg principles in 1952, they faced criticism. For example, in a speech at the American Society of International Law's annual meeting in the same year, Jackson describes how a former chancellor of Great Britain claimed that the Nuremberg definition of crimes against the peace condemned every German citizen rather than solely the Nazi leaders.[22] Jackson goes on to explain that the framers of the London Proclamation and Charter had no intention of denouncing every German and that the language of the document must be strongly construed to reach the former Chancellor's claim.[23] In Jackson's 1945 initial report on the state of the IMT to President Truman he even states "our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan."[24] It is logical to expect that just as the Allied Powers found difficulty in shaping the IMT, they found trouble so narrowly defining the inhuman and encompassing brutality of the Nazi Regime. Consequently, further efforts to define international law and possible charges have suffered the same fate.

Problems Behind the Slow Nature of International Law - The Need for National Recognition

The paragraph above begins to illustrate another facet of international law with which Jackson and others of his time had to acknowledge — the legacy of Nuremberg in the creation of a more permanent international criminal court. When Jackson left Nuremberg, he did not know how Nuremberg would be perceived in the history of international law but hoped that the practical applications of the trial could be put to use as a guide in the future.[25] Of course, he did not believe that the IMT at Nuremberg was "complete or adequate as a permanent international

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[20] Eugene C. Gerhart, *Robert H. Jackson,* 326.

[21] Ibid.

[22] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (197).

[23] Ibid. (198).

[24] Justice Robert H. Jackson, "Report to President Truman," 183.

[25] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (199).

penal statute" since the topic, like law itself, is "constantly called up for reexamination in the process of their application to the conflicts which new conditions stir among men."[26] Nevertheless, Jackson hoped that Nuremberg could be a very pragmatic and tangible example of international law put into practice when it came time to create a more permanent international judiciary system. However, one of the largest obstacles standing in the way of a permanent judiciary was and is the participants themselves — national governments. Going beyond the creation stage, these national governments must continuously recognize the authority of the international law body in order for the system to truly flourish. In the words of Jackson, "it seems to me that much hinges on acceptance of the concept of the Court as an independent body above obligation to any nation or interest."[27] Otherwise, world leaders could simply ignore the judiciary's authority and escape punishment. This impasse of sovereignty continues to be one of the greatest struggles in international law and was extremely evident during the creation of the International Criminal Court (ICC) in 1998. In Jackson's day, the greatest enemy for global reconciliation and peace was the spread of Communism. In fact, Jackson goes as far to say that,

> "we would have every reason to expect the nations to welcome an era of submission to international law if the principal Powers of the world shared our legal philosophy. But the Communist Powers do not share our passion for legality or accept our specific concepts of international law. Marxist materialism leaves little room for the operation of moral forces or legal principles."[28]

The hindrance of the creation of the ICC likely did partially stem from the Cold War (it formed following the end of the war in the early 1990s), and this delay again corresponds with the struggle to merge different legal philosophies in addition to different political and governmental philosophies.

Jackson's Thoughts on International Law - Structure of an International Law Body

Jackson's experience at Nuremberg left him with many convictions surrounding the possible structure and scope of a permanent international law body. As acknowledged above, Jackson firmly believed that the body needs to be an independent organization above all national governments and political leaders.[29] This separation is not just to ensure that all guilty individuals, including major world leaders, are tried fairly and quickly but also to ensure the international judiciary is not involved in matters of political policy — "it is a plain corollary of the principle that courts must not be swayed by policy, that they must not decide matters of policy."[30] Using a supposedly independent international judiciary to carry out or rationalize

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[26] Ibid.

[27] Justice Robert H. Jackson, "Rule of Law Among Nations," (14).

[28] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (203).

[29] Justice Robert H. Jackson, "Rule of Law Among Nations," (14).

[30] Ibid.

previously settled political or military policy" in the form of "farcical judicial trials…will destroy confidence in the judicial process as quickly as those conducted by any other people."[31] Consequently, an international judiciary "must put no man on trial…if [it is] not prepared to establish his personal guilt…[or] hear everything relevant that he has to say in his defense and to make it possible for him to obtain evidence from others."[32] After all, "fair hearings for the accused are, or course, required to make sure that we punish only the right men and for the right reasons."[33] Jackson's legacy at Nuremberg illustrates his commitment to the idea of a fair trial even as intellectuals and leaders throughout the Allied nations called for quasi-show trials that would predetermine the defendants guilty.[34]

Furthermore, it is crucial to again examine Jackson's need to distinguish government and parties leaders from ordinary citizens caught up in the chaos of war. Specifically in Nuremberg, the U.S. Chief Prosecutor was very adamant about separating individuals orchestrating the "grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world" from the "individual barbarities and perversions which occurred independently of any central plan."[35] These independent acts of violence could instead be tried in a national, rather than international, trials.[36] In 1952, Jackson reaffirmed his opinion by stating: "It never occurred to me...to speak of anyone as 'waging' a war except topmost leaders who had some degree of control over its precipitation and policy."[37]

Jackson also believed that certain organizations can and should be put on trial after his experience with groups like SS and the Gestapo.[38] He was careful to ensure that this description of organization did not include typical political parties, such as those found in the United States, but instead referred to "direct action units, and were recruited from volunteers accepted only because of aptitude for, and fanatical devotion to, their violent purposes."[39] Furthermore, additional proof would be necessary in a trial to specify Nazi party members that wholly embraced and went above and beyond the intrinsic violence of the party's savage philosophy.[40] As Jackson said in his 1945 Report to President Truman, "if a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries

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[31] Ibid. (15).

[32] Ibid.

[33] Justice Robert H. Jackson, "Report to President Truman," 182.

[34] Justice Robert H. Jackson, "A Country Lawyer at an International Court," (191).

[35] Justice Robert H. Jackson, "Report to President Truman," 183-4.

[36] Ibid.

[37] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (197).

[38] Justice Robert H. Jackson, "Report to President Truman," 183.

[39] Ibid.

[40] Ibid.

out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders."[41]

Just as it was at Nuremberg, Jackson believed that a permanent international law body must "afford representation to all the different legal systems of the world."[42] As stated above, the reconciliation of vastly divergent law systems is no easy task, but "the relatively small amount of disputation over procedural and technical matters at the trial [Nuremberg] conducted by lawyers of five different legal backgrounds shows the effort [is] not hopeless."[43] Of course, Jackson clarifies that their "initial efforts [at Nuremberg] show the need for vast improvement of international trial technique."[44] While Nuremberg may have been the most famous example of a post-WWII international trial, trials also took place in the Tokyo against the Japanese, as well as within national judiciaries against nationalist Nazi leaders such as Quisling in Norway.[45] These trials, according to Jackson, "did not follow Nuremberg in many and important respects," likely because most were conducted by military leaders rather than lawyers and judges and passed harsher sentences against the defendants.[46] As a whole, Jackson recognized that a reconciliation still needed to be made between the world's exceedingly different legal systems in order to create a permanent judicial body.

As for the type of accusations this international court would try, Jackson fervently believed that the international community, and specifically the United Nations, must come to a more clear consensus of "criminal aggression."[47] The Nuremberg Trials were a singular case where the "aggressors…crudely and blatantly documented" their crimes and the prosecutors had an expansive quota of evidence even after a relatively short time to prepare.[48] Jackson expected that the next cases with possible war crime violations would not be as easy to prosecute, and thus it was imperative to have a predetermined set of crimes for these "borderline cases."[49] Given the move from more blatant and open warfare of the 19th and early 20th centuries to the "behind closed doors," covert operations of the Cold War and later 20th century, Jackson's prediction is extremely apt. During his time as U.S. Chief Prosecutor at Nuremberg, Jackson advocated for the prosecution of crimes he considered to be "not before prosecuted but long considered criminal by

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[41] Ibid.

[42] Justice Robert H. Jackson, "The United Nations Organization and War Crimes," (200).

[43] Ibid (201).

[44] Ibid. (202).

[45] Ibid.

[46] Ibid.

[47] Ibid. (201).

[48] Ibid.

[49] Ibid.

the common sense of mankind."[50] This included acts that violated international law as established by the 1907 Hague Convention and the deliberate infraction of international treaties such as the Treaty of Versailles following WWI.[51] Even so, Jackson had a few offenses in particular for which he strongly advocated in international law.

Jackson's Thoughts on International Law - Aggressive War

The fervency with which Jackson has always advocated for the inclusion of aggressive war in international law crimes designates that the topic be granted its own section. As early as Jackson's justification of Lend-Lease in 1941, the then Attorney General called for a distinction between aggressive and defensive war.[52] Much of Jackson's thoughts on aggressive war and international law stem from the teaching of Grotius, whom he considers to be the "father of international law."[53] Grotius lived in the late 16th and early 17th centuries as a philosopher and political/law theorist.[54] While remembered most for his "contributions to the natural law theories of normativity," Jackson studied Grotius's thoughts on the legality of war as described in two of his works, *De iure praedae commentarius* and *De iure belli ac pacis libri tres.*[55] Grotius recognizes the need for war in response to certain instigators but condemns wars fought for destructive purposes; furthermore, wars must be fought "rightly" and in a just manner.[56] Jackson describes how world leaders largely left this philosophy in the "nineteenth and the early part of the twentieth century" when all wars were considered legal, no matter their cause or manner.[57] This development meant that "both parties to every war [were] regarded as being in an identical legal position, and consequently as being possessed of equal rights;" yet, from a logical and just perspective, this equivalent nature is very rarely transpires — the invasion of Austria, Czechoslovakia, and Poland by the Nazi party constitutes a perfect example of the philosophy's shortcomings.[58] Therefore, in Jackson's mind, the legality of war simply did not make sense: "certainly the work-a-day world will not accept an unrealistic and cynical assumption that aggression, by a state that had renounced war by treaty, rests on the same basis as defense against

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[50] Justice Robert H. Jackson, "The Nurnberg Trial: Civilization's Chief From World War II," (speech, Buffalo, New York, October 4, 1946), Robert H. Jackson Center, https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Nurnberg_Trial.pdf (115).

[51] Justice Robert H. Jackson, "Report to President Truman," 184.

[52] Justice Robert H. Jackson, "Address at the First Conference of the Inter-American Bar Association in Havana, Cuba," (4).

[53] Ibid (4-5).

[54] *Stanford Encyclopedia of Philosophy,* s.v. "Hugo Grotius" last modified July 28, 2011. https://plato.stanford.edu/entries/grotius/#Bib

[55] Ibid.

[56] Ibid.

[57] Justice Robert H. Jackson, "Report to President Truman," 186.

[58] Ibid.

an unprovoked attack in violation of treaty."[59] Throughout his life, Jackson continued to point out the hypocrisy of legal war during the 19th and early 20th century; for example, in 1946, he described how international law of the time "condemned little men when they incited to a local riot but it majestically held aloof from dealing with men of rank who incite to war. It punished a single murder for personal ends, but a million murders for foreign policy ends was unquestioned."[60] Likely, some of this previous bias stemmed from the belief that the state was largely above the law.[61] However, the rise of democracy largely contradicted this philosophy, and Jackson believed it was time for international law to follow suit.

Thus, Jackson entered Nuremberg adamant that aggressive war would be included in the list of crimes.[62] In his 1945 Report to Truman he declared, "Doubtless what appeals to men of goodwill and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war."[63] Just as he did while Attorney General, Jackson cited both the older teachings of theorists like Grotius and more modern treaties such as the Briand-Kellogg Pact of 1928.[64] Nevertheless, this was not enough evidence for some at Nuremberg, including the Soviets. Their delegation believed that these treaties do not articulate clearly that aggressive war is a crime, and that the IMT would be remembered for trying criminals for a crime not illegal at the time when it was committed.[65] Furthermore, some of the British said that the purpose of the trial was to sentence criminals, not to create new international law.[66] Nevertheless, Jackson was able to convince them to include aggressive war in the list of charges; additionally, it is interesting to note that the crimes eventually decided upon by the ICC include crimes of aggression and war crimes in addition to genocide and crimes against humanity.[67]

Jackson's Thoughts on International Law - Minority Rights

While Jackson was against the legality of war both before and after the IMT, it appears that he left Nuremberg much more in favor of minority rights in international law, and this change likely stems from his extensive time spent around evidence of the Holocaust. Jackson gave a speech at the UB Centennial Convocation in 1946 in which he stated "war and dictatorship are so interrelated that I am convinced little progress can be made towards

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[59] Justice Robert H. Jackson, "Address at the First Conference of the Inter-American Bar Association in Havana, Cuba," (4).

[60] Justice Robert H. Jackson, "The Nurnberg Trial: Civilization's Chief From World War II," (114).

[61] Ibid.

[62] Justice Robert H. Jackson, "Report to President Truman," 187.

[63] Ibid. 186.

[64] Ibid. 187.

[65] Eugene C. Gerhart, *Robert H. Jackson,* 340.

[66] Ibid. 341.

[67] "How the Court Works," International Criminal Court, https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess

permanent peace without solving the problem of protecting the elementary right of minorities."[68] Thus, due to the prevalence of dictators throughout the globe during Jackson's life, "one of the greatest problems which the world faces is that of establishing limitations on the absolutism of majorities which will protect the fundamental human rights of minorities."[69] Nonetheless, Jackson recognizes that there are limitations to protecting minority groups. A minority group cannot be championed solely because it is a minority group, and minority groups themselves have gone on to claim power and thus become the majority (ex. the Nazi party).[70] Furthermore, when it is right to intervene on behalf of a minority group in a national conflict? As Jackson says, "in many of its aspects, persecution of minorities is an internal matter between the government and its citizen."[71] Nevertheless, Jackson goes on to say that minority persecution and "tyranny on a sizable scale anywhere is a matter of international concern."[72] Thus, it is for the courts to decide what constitutes "a sizable scale," but it certainly seems as though he is advocating for more intervention on behalf of the global community. Furthermore, Jackson recognized that the issue of minority groups is not a problem that can be solved by redrawing the map of Europe, for redrawing "these boundaries generally puts other minorities at the mercy of newly dominant groups. Every shifting of a frontier means that countless settled people must either accept an alien, and in many cases arbitrary, rule or pick up and move."[73] The helplessness of minorities "in the face of government absolutism [is what] makes the internal politics of many countries so violent and uncompromising...it is this absolutism, and the fear of it, that makes compromise so difficult and a fight to the bitter end so probable."[74] As a result, Jackson firmly believed that minority rights must be protected by international law, and the IMT at Nuremberg had already set the precedent by which to adopt minority rights into practice.[75]

<u>Case Study - The Balfour Declaration - Background</u>

The United Kingdom entered and left WWI as one of the premier powers across the world, in part due to an expansive system of colonies. Thus, it is no surprise that colonial and power interests in the Middle East became entangled in the midst of the war. While the British were continuing to fight in political struggles, another group was fighting for a social cause that would become increasingly political. The Jewish Zionist movement has roots in similar, minority movements from the 19th century, but "Theodore Herzl's work formed the ideological

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[68] Justice Robert H. Jackson, "The Nurnberg Trial: Civilization's Chief From World War II," (115).

[69] Ibid. (117).

[70] Ibid. (116).

[71] Ibid. (117).

[72] Ibid.

[73] Ibid. (116)

[74] Ibid.

[75] Joe Stork, "Understanding the Balfour Declaration," *MERIP* no. 13, (Nov. 1972): 12. JSTOR (3012229).

underpinnings for the movement."[76] With the rise of nationalism in the 19th century came a desire for the Zionists to find their own homeland, as they hoped to escape frequent persecution in Europe and throughout the world. While they initially considered other regions for settlement (including the area that today consists of Uganda), they quickly realized that Zion itself, the land of their religious fathers and the region known as Palestine, would be the only suitable location.[77] These two factions, the British and the Zionists, came together in 1917 through the Balfour Declaration. Due to its concise length, the entire document is typed below:

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

Yours Sincerely,
Arthur James Balfour[78]

The man for whom the Declaration is named is Arthur James Balfour, a British government worker that held several posts throughout his career, including British Foreign Officer in 1917 when the letter was written. For the immediate decades following the Declaration, many scholars, especially those in favor of the Zionist cause, considered its reasoning to be grounded

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[76] Mazin B. Qumsiyeh, "Zionism," in *Sharing the Land of Canaan: Human Rights and the Israeli-Palestinian Struggle,* (Pluto Publishing, 2004), (71).

[77] According to Denis Charbit, in 1905 following the Kishinev Pogrom in Russia, the British wanted to avoid an influx of immigrants into the United Kingdom and instead directed the flow of immigrants toward Africa and hoped for the creation of a Jewish Republic under the supervision of Theodor Herzl. The offer split the Zionist movement into those in favor of a republic in the offered area versus those who wanted their own country in a different location, and preferably Palestine. Eventually, after much dispute within the movement, it was decided that the former Jewish homeland of Zion was the only acceptable option.
Denis Charbit, "The Balfour Declaration and its Implications" in *A History of Jewish-Muslim Relations: From the Origins to the Present Day* (Princeton, NJ: Princeton University Press, 2013), (322-23).

[78] Arthur James Balfour to Lord Rothschild, November 2, 1917, "The Balfour Declaration," in *Israeli Ministry of Foreign Affairs,* http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20balfour%20declaration.aspx

in British philosemitism.[79] However, it is clear that far more political and imperialist factors also drove Balfour and the British to act.

After a century of wars and imperialistic intervention, the Ottoman Empire, also known as the "Sick Man of Europe," was on the verge of collapse during WWI. The defeat and end of the empire meant the possibility for new land opportunities in the Middle East, including around the region of Palestine.[80] As a result, several agreements were negotiated between the British and other parties. The first consisted of a series of letters between Sharif Hussein, the Emir of Mecca, and Egyptian Governor Henry McMahon.[81] In return for an Arab revolt against the Ottoman Empire, who still controlled much of the Middle East at the time, the British would grant Hussein a kingdom following the end of the war.[82] At first, McMahon was hesitant to give specific borders for Hussein's future territory, but in the end he conceded; nevertheless, "rather than sending a specific map, or even designating in writing the regions that would be included, he listed the territories that would be excluded."[83] Palestine itself was not specifically included in the list, but the "zone of Syria" was (Palestine was largely considered within southwestern Syria at the time), and thus, "Pandora's box" was opened.[84] Was Palestine within or outside of Hussein's domain? Since it's creation, "the tortuous ambiguous language of the letter has been studied with painstaking care…Sir Henry McMahon himself, Winston Churchill, and two other Colonial secretaries, all agreed that the letter was not intended to refer to Palestine. Even King Hussein's son, Emir Feisal, accepted this view four years after the letter was written."[85] Nevertheless, the unclear nature of the letter clearly demonstrates that the British were hesitant to part with any land in the Middle East and especially Palestine. This conclusion is further supported by the second agreement mediated just months after the negotiations with Hussein — the Sykes-Picot Agreement. These arbitrations took place between France and Britain secretly in early 1916 as a way to divide their spoils of WWI. The signed agreement included clear maps of the areas to be under British and French control; interestingly, the negotiations also mandated "setting up…an international condominium, mainly Franco-British, over Palestine, Jerusalem, and the Holy Places."[86]

However, as the war was coming to a close, the British found themselves in a much stronger place than when these two agreements were negotiated. The French had lost some creditability after not participating in many battles, and the United Kingdom began looking for a

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[79] James Renton, "Polychronicon: Interpreting the Balfour Declaration: a Marriage of Politics and History?" *Teaching History* no. 143, (June 2011): 50. JSTOR (43260423).

[80] Denis Charbit, "The Balfour Declaration and its Implications," 324.

[81] Ibid. (327).

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] Sol M. Linowitz, "Analysis of a Tinder-Box: the Legal Basis for the State of Israel," *American Bar Association Journal* vol. 43, no. 6, (June 1957): 525. JSTOR 25720028.

[86] Denis Charbit, "The Balfour Declaration and its Implications," 327.

way out of the Sykes-Picot Agreement.[87] They invaded Palestine in early 1917 (it was still under Ottoman control) after success in the Hussein-led Arab Revolt of 1916.[88] Later that same year, the Declaration was released in November. As stated by scholar Denis Charbit, "the accommodation of the British appetite for power, French claims, Jewish national aspirations, and indigenous Arab demands—such were the stakes in that essential decade for the Middle East."[89]

In addition, many scholars write that the British backed Zionism in a hope to better control the Jewish population in Europe and America, and therefore better control the war itself. As a whole, the British government largely overestimated the social and political power of the Jewish populations in Russia and America. In Russia, which was undergoing their Communist Revolution of 1917, many British leaders saw the Zionist movement as the key to "undercutting the strength among Jews of radical socialist political movements such as the Jewish Labor Bund."[90] Winston Churchill himself "regarded Zionism as the Jewish answer to International Communism."[91] Furthermore, the British believed that in both Russia and America, answering the Zionist movement's call for a homeland could prompt both countries to either stay in or enter into the war.[92] Nevertheless, as a whole, the British government greatly overestimated the ability of these small Jewish populations to affect foreign policy.[93]

Finally, the idea of a British-supported, "national home for the Jewish people," may have been more appealing to the United Kingdom than a new colony or new territory due to changing times in the global community. In particular, President Wilson of the United States was leading a charge to end imperialist interests in the post-war period, centered on rights and "respectful self-determination." Nevertheless, a British-supported, Jewish state in the Middle East could prove to be "a convenient manner of obtaining desired territories" while still complying with the anti-imperialist sentiments of the day.[94] Unfortunately, Jackson clearly articulated several decades later just how calamitous the redrawing of boundaries can be, and many of the roots of the Israeli-Palestinian Conflict can be found in the Balfour Declaration and the political maneuverings surrounding it.[95]

Case Study - Legal Questions Surrounding the Balfour Declaration

Many law scholars have questioned the legal precedent of the Balfour Declaration, including Sol M. Linowitz, who stated,

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[87] Ibid.

[88] Joe Stork, "Understanding the Balfour Declaration," 12.

[89] Denis Charbit, "The Balfour Declaration and its Implications," 324.

[90] Joe Stork, "Understanding the Balfour Declaration," 12.

[91] Ibid.

[92] Denis Charbit, "The Balfour Declaration and its Implications," 324.

[93] Ibid.

[94] Sol M. Linowitz, "Analysis of a Tinder-Box," (523)

[95] Justice Robert H. Jackson, "The Nurnberg Trial: Civilization's Chief From World War II," (115).

> "generally overlooked in the refined search for intentions, however, is the paramount and all-important fact that at the time in question England had absolutely no right of disposition and no legal or proprietary interest in Palestine, which was then a Turkish province. Regardless of what commitment England might have made, she was neither sovereign over Palestine herself nor was her action ratified either by Turkey (the then sovereign) or the League of Nations (the later sovereign)" (525).[96]

Consequently, it is first and foremost important to ask one question: was the Balfour Declaration legal under international law, and did the British have any legal right to issue this statement to the Zionist community that involved land outside of their control? The issue was complicated in 1922 when the newly-formed League of Nations created a British mandate in Palestine and incorporated the Balfour Declaration, thereby attaching the idea of a Jewish homeland to Britain's control in Palestine. Subsequently, it "was different from other mandates: bound to the Balfour Declaration, the British could not open up a perspective of independence for the Arabs of Palestine (even a distant one) that would be identical to the one that had been planned for the indigenous Arab populations of neighboring entities."[97] The document recognized the "historical connection" of the Jewish people to Palestine and their right to establish a homeland in this area.[98] As Linowitz further points out, the idea of a mandate itself was "an innovation in international law," and "while President Wilson and General Smuts [a British statesman] had conceived of the mandate as a trust arrangement, the other powers had accepted their mandatory roles as a convenient manner of obtaining desired territories."[99] Therefore, it is crucial to acknowledge that the mandates were "molded" to best fit the political goals of the countries that governed.[100] Furthermore, Linowitz later points out that British control over the region did not come into effect until the signing of the Treaty of Lausanne in 1923, when "Turkey renounced her rights to Palestine" and her "future…to be settled by the parties concerned."[101] This continuously ambiguous language further distorts the already complex situation in Palestine and the question of the legality of the Balfour Declaration.

Nevertheless, it was not only the concept of a mandate that was "novel" to international law, but the idea of a "national home."[102] Consequently, the precise meaning of this phrase was unknown: did it entail a Jewish society coexisting along Palestinians in a single nation, or an entirely separate state from the Palestinian population? Thus, the one-state or two-state argument

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[96] Ibid. (525).

[97] Denis Charbit, "Zionism and the Arab Questions" in *A History of Jewish-Muslim Relations: From Origins to the Present Day,* (Princeton, NJ: Princeton University Press, 2013), (342).

[98] Sol M. Linowitz, "Analysis of a Tinder-Box," (523).

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Ibid.

was born. According to Linowitz, the meaning comes down to "the establishment of Palestine as a place to which Jews could emigrate with the understanding that if such immigration should prove to be large enough, a predominantly Jewish state or common wealth would come into existence."[103] The language of the mandate appears to coincide with this argument for an eventually Jewish-dominated single country in Palestine: "the administration was to facilitate the acquisition of Palestinian citizenship by Jews," "the Jewish agency, which was to advise with the Palestine administration, could itself undertake construction or operation of public works, services and utilities subject to arrangement with the ad ministration."[104] In accordance with the mandate, the population demographics of the region were about to dramatically shift.

Subsequently, the Declaration and Mandate call for an examination of minority rights within Palestine. In the view of many Palestinian Arabs, "the Balfour Declaration remains the most unreasonable expression of Western imperialism, the most manifest negation of their existence, since it is their very identity and their political rights that are being assassinated: they are designated only as non-Jewish populations, unable to claim anything beyond civil and religious rights."[105] Furthermore, if the plans of the one-state solution stated above were to continue, the Palestinians would be reduced to a minority within their own territory. In response, many Palestinians and Jews adopted the mindset of a two-state solution, even if this opposes previous documentation.

The situation of minority rights in Israel and Palestine echoes the words of Jackson when he declared one of the greatest challenges of his day to be finding the harmonious balance between the absolutism of a majority with the fundamental rights of a minority, a task with which today's global leaders still struggle. In terms of the Balfour Declaration, the most important line concerning minority rights is, "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine."[106] When coupled with the mandate's perspective course of action for a Jewish-dominated single state, this sentence becomes a statement of minority rights, and it continues to be considers as much in Israel. Thus some questions surrounding international law and the subject of minority rights in Israel and Palestine include: what tangible actions can international lawyers and international law bodies take to protect minority rights? When should foreign powers become involved in the minority rights of other nations, as opposed to international bodies? In other words, what constitutes "sizable scale" as described by Jackson?

Conclusion

On the 100th anniversary of the Balfour Declaration, it is crucial to examine what this document and the historical events surrounding it have meant for the Israeli-Palestinian Conflict, and how such a small statement of only 132 words has profoundly shaped the political maneuverings in the Middle East for nearly a century. For this reason, it is nearly impossible to

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[103] Ibid.

[104] Ibid.

[105] Denis Charbit, "The Balfour Declaration and its Implications," 322.

[106] Arthur James Balfour, "The Balfour Declaration."

separate out the political, social, and economic causes and consequences surrounding the document and focus on it from a purely legal standpoint. Furthermore, the issue is additionally complicated by the introduction of so many new concepts in international law, including the mandate and the idea of a "national home." Finally, as this paper has already acknowledged, international law has been and continues to be riddled with incompleteness, incompatibilities, and a lack of strong repercussions. Nevertheless, as Jackson stated in 1944, "international law is an existing and indestructible reality and offers the only hopeful foundation for an organized community of nations."[107] The world needs international law to establish a clear definition of criminal aggression, to stop aggressive wars, and to protect minority rights across the globe. Consequently, examining the historical events of this profoundly complex and international conflict through the lens of the law may offer scholars some understanding and guidance for the uncertain future of this seemingly endless struggle. After all, so many of the questions and issues Jackson came across during his tenure in international law are found in the Israeli-Palestinian conflict beyond the Balfour Declaration: additional minority rights for Palestinians in Israel, the role of international governing and law bodies in presiding over the conflict, such as the United States, the UN, and even the ICC, international recognition, specifically regarding Palestine's status as a de jure sovereign state, and aggressive war.

In order to truly understand the actions and decisions of the present, it is often necessary to look to the past and discover the roots of today's repercussions. Imperialism, war, and political maneuvering certainly had a role to play into creating the Israeli-Palestinian conflict as we understand it today. Assuredly, in order to truly understand and perhaps someday "solve" this seemingly endless struggle, it will be necessary to comprehend the political, social, and economic consequences of this conflict. However, it is imperative to also acknowledge the impact of international law in the Middle East for the past century by asking questions on both historical events and the current situation. While it may be naïve to think, perhaps this flawed but worthwhile field of international law can offer steps to a resolution and the path to "an organized community of nations" in the Middle East and throughout the world, just as Jackson hoped it would.

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[107] Justice Robert H. Jackson, "Rule of Law Among Nations," 11.

Bibliography

Balfour, Arthur James. Arthur Balfour to Lord Rothschild, November 2, 1917. In *Israel Ministry of Foreign Affairs*. http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20balfour%20declaration.aspx

Charbit, Denis. "The Balfour Declaration and its Implications" in *A History of Jewish-Muslim Relations: From the Origins to the Present Day,* 320-8. Princeton, NJ: Princeton University Press, 2013.

Charbit, Denis. "Zionism and the Arab Questions" in *A History of Jewish-Muslim Relations: From the Origins to the Present Day,* 340-8. Princeton, NJ: Princeton University Press, 2013.

Gerhart, Eugene C. *"Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate.* Buffalo, NY: William S. Hein & Company; Jamestown, NY: Robert H. Jackson Center, 2003.

How the Court Works," International Criminal Court, https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess

"Hugo Grotius." *Stanford Encyclopedia of Philosophy.* Last modified July 28, 2011. https:/plato.stanford.edu/entries/grotius/#Bib

Jackson, Justice Robert H. "A Country Lawyer at an International Court." Speech. Roanoke, Virginia, August 8, 1947. Robert H. Jackson Center. https://www.roberthjackson.org/wp content/uploads/2015/01/A_Country_Lawyer_at_an_International_Court.pdf

Jackson, Justice Robert H. "Address at the First Conference of the Inter-American Bar Association in Havana, Cuba." Speech, Havana, Cuba, March 27, 1941. United States Department of Justice. https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf.

Jackson, Justice Robert H. "Rule of Law Among Nations." Speech, Washington, DC, December 2, 1945. Robert H. Jackson Center. https://www.roberthjackson.org/speech-and-writing rule-of-law-among-nations/

Jackson, Justice Robert H. "The Nurnberg Trial: Civilization's Chief From World War II." Speech. Buffalo, New York, October 4, 1946. Robert H. Jackson Center. https:/www.roberthjackson.org/wp-content/uploads/2015/01/The_Nurnberg_Trial.pdf

Jackson, Justice Robert H. "The United Nations Organization and War Crimes." Speech, Washington DC, April 24-26, 1952. JSTOR.

Jackson, Justice Robert H. "United States: Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals." *The American Journal of International Law* 39, no. 3 (1945): 178-90. JSTOR 2213922.

Linowitz, Sol M. "Analysis of a Tinder-Box: the Legal Basis for the State of Israel." *American Bar Association Journal* vol. 43, no. 6, (June 1957): 522-525. JSTOR 25720028.

Qumsiyeh, Mazin B. "Zionism," in *Sharing the Land of Canaan: Human Rights and the Israeli-Palestinian Struggle,* 67-84. Pluto Publishing, 2004.

Renton, James. "Polychronicon: Interpreting the Balfour Declaration: a Marriage of Politics and History?" *Teaching History* no. 143, (June 2011): 50-1. JSTOR (43260423).

Stork, Joe. "Understanding the Balfour Declaration," *MERIP* no. 13, (Nov. 1972): 9-13. JSTOR (3012229).