

**Paper**

# **The “Balfour Declaration” in International Law**

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## The “Balfour Declaration” in International Law<sup>1</sup>

By Dr. Anis Fawzi Kassim<sup>2</sup>

The so-called “Balfour Declaration” was not issued in a vacuum but had its own political, perhaps even doctrinal—justifications about which much has been written about.<sup>3</sup> This document continues to receive much academic attention and occupies the minds of many academics who still actively work on sifting through British archives to understand the significance of this “promise” and its reasons.<sup>4</sup> Britain at the time the Declaration was issued was the largest and most influential colonial empire. It represented the climax of international arrogance and reflected the highest and most severe levels of racism. Nevertheless, this document has not been given the necessary attention and legal assessment it deserves,<sup>5</sup> especially given that official Palestinian claims have recently been put forward calling for legal action against Britain for issuing this “Declaration.”

At the Arab summit held in Nouakchott on July 25, 2017, President Mahmud Abbas, called on the General Secretariat of the League of Arab States to help prepare a claim against the British government for issuing the Balfour Declaration<sup>6</sup> which resulted in the displacement of the Palestinian people. President Abbas reiterated his demand and added, on several occasions, the need to demand a British apology.<sup>7</sup> His Foreign Minister Riyad al-Maliki reiterated this claim by stating that the British position should be faced with Palestinian counter-measures in the form of legal

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<sup>3</sup> The literature on the Balfour Declaration is ubiquitous, primarily due to the intrigue and contradictions in historians’ narrations and in the correspondence of several personalities at the time of Lord Balfour and Dr. Chaim Weizmann. However, there are some reliable sources, such as:

Leonard Stein, *The Balfour Declaration* (1961); Christopher Sykes, *Cross Road to Israel* (1965); Ronald Saunders, *The High Walls of Jerusalem: A History of the Balfour Declaration and the Birth of the British Mandate for Palestine* (1948); Chaim Weizmann, *Trial and Error* (1966).

And it’s important to refer to: J.M. Jefferies, *Palestine: The Reality* (1939)

<sup>4</sup> Jonathan Schneer, *The Balfour Declaration – The Origins of the Arab- Israeli Conflict* (2010).

<sup>5</sup> May be the best legal analytical study on the Balfour Declaration was done by W.T Mallison & S.V. Mallison, *The Palestine Problem in International Law and Word Order* (1986), pp. 18–78.

<sup>6</sup> See the presidential speech, which was delivered by the Palestinian Foreign Minister on behalf of the president, on the Palestinian Liberation Organization website.

<sup>7</sup> *Annahar* newspaper, Beirut, 27/10/2017, and President ‘Abbas reiterated his demand in his speech at the United Nations General Assembly, on 20/9/2017.

actions filed against the British government, whether in British or European courts, for the crimes committed against the Palestinian people.<sup>8</sup> He stressed that instructions had been issued by President Abbas to trigger legal proceedings in British courts against the Balfour crime.<sup>9</sup> Nabil Sha‘ath joined the campaign calling for the initiation of legal suits against Britain for issuing this declaration before British, European, and international courts, and demanded that compensation be made for its consequences. He confirmed that a legal committee was studying “in detail the legal procedures which could be followed to prosecute the British government.”<sup>10</sup>

The British Prime Minister Teresa May stated in the House of Commons, “We are proud of the role that we played in the creation of the state of Israel, and we will certainly mark the centenary with pride.”<sup>11</sup> They held a festive celebration on this occasion in the presence of Israel’s Prime Minister Benjamin Netanyahu. The British government issued a statement in which it responded to a petition demanding an apology for issuing the declaration, saying “The Balfour Declaration is an historic statement for which HMG does not intend to apologise. We are proud of our role in creating the State of Israel.”<sup>12</sup> It added:

The Declaration was written in a world of competing imperial powers, in the midst of the First World War and in the twilight of the Ottoman Empire. In that context, establishing a homeland for the Jewish people in the land to which they had such strong historical and religious ties was the right and moral thing to do.<sup>13</sup>

However, the government did not explain why it was right or moral to establish a national home for Jews in Palestine in particular, and in that historical period. The British government did not hesitate to remind us, “We recognise that the Declaration should have called for the protection of political rights of the non-Jewish communities in Palestine, particularly their right to self-determination.”<sup>14</sup> However, they did not provide us with an analysis of the reasons why Britain failed to accomplish this protection, especially given that it was the mandate power at that time.

There is no doubt that what we call the “Balfour Declaration” is one of the most blatant colonial documents that completely disregarded the indigenous people.

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<sup>8</sup> *Al-Quds al-Arabi* newspaper, London, 3/11/2017.

<sup>9</sup> *Al-Quds al-Arabi*, 3/11/2017.

<sup>10</sup> *Ibid.*

<sup>11</sup> Site of Hansard Online, House of Commons Hansard, vol. 630, 25/10/2017, <https://hansard.parliament.uk/Commons/2017-10-25/debates/8EFAE28A-BA49-425E-8075-DAB89E86CD5C/PrimeMinister>

<sup>12</sup> Site of Petitions: UK Government and Parliament, 3/5/2017, <https://petition.parliament.uk/archived/petitions/184398>

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



Palestine was not an uninhabited land, nor a British colony, nor was it a land occupied by British forces. The addressed party in that document was not well-defined or comprehensively described.<sup>15</sup> Despite the extreme crudeness of this document, it may have been the cleverest and most subtle, especially given that the process of phrasing this document, and the drafts which were exchanged, took nearly three years.

In order to discuss this document from a legal standpoint, we first begin with the title we designate for it in Arabic: “The Balfour Promise.” This widespread naming is an inaccurate translation of this document’s title “The Balfour Declaration,”<sup>16</sup> which is a more accurate translation. The Palestinian National Charter is probably the only document which uses this accurate translation.

Correcting “promise” to “declaration” is not only a correction in translation, it also holds a legal significance. A promise in law is binding on the one who makes it;<sup>17</sup> it is a commitment imposed by a person on himself/herself in favour of others. It is an action that binds them in the future. The best example of a promise is when an institution or company makes a promise to the public that they will give a sum of money for the best innovation in medicine, engineering, or genetics, or for a book on philosophy or history. This promise is binding on that institution or company when what is required is achieved.<sup>18</sup> If we observe these elements, we notice that none of them apply to what we call the “Balfour Promise,” since the word “promise” is neither mentioned in the document’s title nor in its body. Everything which was stated in the preamble of this document was that “His Majesty’s Government view with favour...” This sentence does not imply any obligation, commitment, or promise.

Chaim Weizmann was the representative of the Zionist movement and chief negotiator with the British government. The first draft proposed by the Zionist movement was worded by Weizmann, Lord Rothschild, and Nahum Sokolow,

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<sup>15</sup> See Jonathan Schneer, *The Balfour Declaration – The Origins of the Arab- Israeli Conflict* (2010), in which he says, on page 342, that Edwin Montagu, the only Jewish minister in the then British Government, stated that “the Government proposes to endorse the formation of a new nation with a new home in Palestine.” He also said, on page 337, that Montagu denied any relation between Today’s Palestine and the Jews.

<sup>16</sup> The Arabic naming will lack any value if the Palestinian leadership wanted to sue Britain in a non-Arab court, because the adopted text is an English one, which uses the word “Declaration” and not “Promise.”

<sup>17</sup> Article 92 of the Jordan Civil Law provides that by futuristic expression in the sense of absolute promise the contract is concluded as a binding promise if the intention of the contractors is departed to. And is mentioned under the Iraqi Civil Law its equivalent Article 78, and under the Egyptian Civil Law its equivalent Article 102. See also Article 106 of the Jordan Civil Law, which upholds the binding of promise in contract, and Article 254, which confirms that the promise is binding to its maker.

<sup>18</sup> Article 255/1 of the Jordan Civil Law states that “Whoever promises a prize to the public for performing a particular act and fixes a time limit for it shall be bound to give the prize to the person who performs that act..,” which is mentioned under the Egyptian Civil Law its equivalent Article 162/1.

who were all prominent leaders of the movement. The draft said that what would be accepted was “the principle of recognizing Palestine as the National Home of the Jewish people and the right of the Jewish people to build up its national life in Palestine...” and that it is “essential for the realization of this principle the grant of internal autonomy to the Jewish nationality in Palestine, freedom of immigration for Jews, and the establishment of a Jewish National Colonizing Corporation for the resettlement and economic development of the country.”<sup>19</sup> It appears from discussions between officials from the British Foreign Office and the Zionist movement that this text was long and contained undesirable details. The Zionist movement proposed other drafts to Lord Balfour, but he rejected them all. Finally, Lord Rothschild sent the following text to Balfour:

1. “His Majesty’s Government accepts the principle that Palestine should be reconstituted as the national home of the Jewish people.
2. His Majesty’s Government will use its best endeavours to secure the achievement of this object and will discuss the necessary methods and means with the Zionist Organisation.”<sup>20</sup>

Upon reading this text, we notice that it implies first Britain’s “acceptance” of the concept of a “national home of the Jewish people.” An acceptance involves both a commitment and a pledge by Britain. Second, the text reads, “Palestine should be reconstituted,” which implies the recognition of the myth that there is a historical relation between Jews and Palestine, which is a religious myth that has nothing to do with history. Third, it implies that “all of Palestine” will be a “national home.” No mention or consideration was made of the effects of the establishment of a “national home” on Palestine’s indigenous people. Fourth, the text indicates Britain’s commitment to working toward achieving this object by realizing the establishment of a “national home.” Finally, researching and elaborating mechanisms to reach the goal were to be discussed and coordinated with the “Zionist Organisation,” which necessarily meant Britain’s official recognition of it.

This draft was submitted to the British Cabinet on 3/9/1917 for discussion. Balfour and Prime Minister Lloyd George happened to miss that meeting. Fortunately, the cabinet included the only Jewish minister in the government, Edwin Montagu, who was known for his animosity toward the Zionist movement. At the cabinet, he expressed his objection to the declaration in a memorandum that was circulated a few days later, explaining his point of view. The summary of Montagu’s views was that there was no “Jewish nation,” and that such a declaration would affect his status as an English Jew because some could argue

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<sup>19</sup> Leonard Stein, *op. cit.*, p. 373.

<sup>20</sup> Jonathan Schneer, *op. cit.*, p. 335.



that he was no longer an English citizen but a citizen of the Ottoman Empire (Palestine was part of the Ottoman Empire during the negotiations at the time).<sup>21</sup> He warned that “Palestine will become the world's ghetto.”<sup>22</sup>

These observations by Minister Montagu had a significant impact on the Cabinet, which led to the adjournment of the session. What strengthened his position was that the US President, Woodrow Wilson, was not prepared to make a commitment to the Zionist project, despite the fact that he sympathized with it, knowing that President Wilson authorized the Jewish Supreme Court Associate Justice Louis Brandeis, to write a detailed letter to the British government. For the record, Brandeis had great influence on Wilson at the time when Brandeis, starting 1916, was President of the Zionist Organization of America (ZOA), as well as the chair of the Provisional Executive Committee for General Zionist Affairs (PEC).<sup>23</sup>

The British Cabinet held two meetings thereafter; the first was on 4/10/1917, and the second at the end of that month, where the text we currently know was adopted. Comparing the text presented by the Zionist movement with the text we currently know, we find that the latter rejected all the Zionist theses, because Britain did not “accept” but rather viewed “with favour,” which is a vague expression that does not imply commitment or acceptance. Britain did not accept the historical relation between Jews and Palestine, as Edwin Montagu explained. The famous British diplomat Lord George Nathaniel Curzon supported him in that position. Britain refused to transform “all of Palestine” into a “Home of the Jewish people,” but viewed with favour the establishment of this home “in Palestine” and not all of Palestine. It also refused to have an operational relation with the Zionist movement. The final text unequivocally stated that the establishment of this “national home” in Palestine will not affect 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.” These two conditions were added to the text at the insistence of those opposed to the declaration in order to safeguard Jews living outside Palestine and to preserve non-Jews in Palestine. It should be noted that these two conditions appeared in a clear and unequivocal statement that “it being clearly understood...” Comparing this text to the preamble of the statement “with favour,” we recognize the foggiess of the first and frankness of the second.<sup>24</sup>

When the Secretary of the British Cabinet came out of the meeting room waving a paper at Weizmann, who had been waiting for the government’s decision in the lobby saying, “Dr. Weizmann, it is a boy.” Dr Weizman records in his memoirs,

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<sup>21</sup> See in detail Montagu’s position in the cabinet in Jonathan Schneer, *op. cit.*, pp. 335–345.

<sup>22</sup> *Ibid.*, p. 338.

<sup>23</sup> Robert Burt, *Two Jewish Justices* (1988), p. 7.

<sup>24</sup> See the detailed explanation of these two conditions in W.T Masslion & S.V. Mallison, *op. cit.*, pp. 55–60.

“I did not like the boy at first. He was not the one I had expected.” He was so disappointed when he read that text, which did not include any of the elements he wanted in the draft.<sup>25</sup>

Thus, it can be said that the Balfour Declaration, as issued on 2/11/1917, lacked any legal weight or value, since it did not include any acceptance, pledge, or promise. It was merely an expression of sympathy, or an emotional feeling, and no judge can discuss this statement as if it implies a legal obligation. This conclusion does not deny or discredit its political and propagandist value, which the Zionist movement has exploited to the maximum.

The text of the Balfour Declaration was included in the preamble of the Mandate for Palestine and not in its body. Therefore, it can be seen that it had become a recognized international document under international law formulated by the League of Nations in the wake of World War I. The declaration as such must be read with the provisions of the Mandate for Palestine, not independently, as it had become an integral part thereof.

The mandate concept, as formulated by English General Jan Smuts, who was supported by American President Woodrow Wilson,<sup>26</sup> was to empower the peoples of the regions which had been detached from the empires defeated in World War I,<sup>27</sup> including the Ottoman Empire, to reach autonomy, , achieve independence, and exercise self-determination. This is what the League of Nations considered “a sacred trust of civilization.” This interpretation was supported by the International Court of Justice in more than one case, including the case of the Separation Wall of 2004.<sup>28</sup> Palestine was a mandate territory, and the Palestinian people must end up exercising the right to self-determination and independence as a “sacred trust of civilization.” Also, it is an established fact that this Mandate, which was specifically made for Palestine, was burdened with the establishment of “a national home for the Jewish people.” However, it was conditional on not prejudicing the civil and religious rights of the Palestinians. It was also conditional on, as stipulated in Article Five of the Mandate, that the “Mandate shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.” In other words, the “Jewish national home”

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<sup>25</sup> Chaim Weizmann, *op. cit.*, p. 208.

<sup>26</sup> In January 1918, the congress approved President Wilson’s proposed 14-point program. Among the concepts suggested in that program was the principle of self-determination.

<sup>27</sup> For more on the mandate system, see Anton Bertram, *The Colonial Service* (1930), chapter 9, pp. 243–282.

<sup>28</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, 9/7/2004, <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>; As for more details on what opinion ICJ gave on the principle of self-determination, please refer to Article 88 in the same document.



must be established within the territorial integrity of Palestine, and it is not permissible, according to—the text of the Mandate, to parcel off a part of Palestine to establish this Jewish home. This means that the “Jewish national home” may be a village, a city, or a province within the Palestinian territory.

Regardless of the legality of the requirement to establish a “Jewish national home” in Palestine, it is undoubtedly an exception to the principle of a “sacred trust of civilization,” since a specific legal definition of the so-called “Jewish national home” is not included in the literature of the League of Nations, the Mandate, or the Jewish Agency for Palestine established under the Mandate.<sup>29</sup> The general principle in the Mandate instrument remained clear and specific, namely the right to self-determination, while the exception, namely the creation of a “Jewish national home,” was ambiguous and undefined. This means that the achievement of the “exception” must be conditional upon the fulfilment of the requirements of the “principle.”

Interestingly, under the Mandate, the British government, violated all the major commitments contained in the Mandate instrument regarding the principle, namely “the territory of Palestine” and the “inhabitants of Palestine,” while safeguarding the exception, the “Jewish national home.” Here lies the legal liability of Britain. That is, its legal liability results from intentional, programmed, and deliberate breach of an international obligation,<sup>30</sup> doing everything that would deprive the Palestinian people of the development of their institutions, and that would prevent them from building their autonomous production capacities to be able to exercise the right to self-determination.<sup>31</sup> Similarly, land laws were amended to facilitate the transfer of real property to European settlers; also, immigration, citizenship and residency laws were introduced to enable settlers to acquire Palestinian citizenship and residency, with the right to property and right to work. Laws were also enacted allowing for the development of their military, economic and administrative institutions, so that they were prepared to leap upon state institutions when the

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<sup>29</sup> See Article 4 of the League of Nations Mandate for Palestine of 1922 stating, “An appropriate Jewish agency shall be recognized 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...”

<sup>30</sup> The renowned British Minister Anthony Nutting said, “the British Government had no intention of allowing ‘self-determination’ for the Arabs of Palestine.” And he adds that “Balfour wrote to Lloyd George in February 1919, ‘...in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination.’ If the existing population were consulted, he added, they would ‘unquestionably’ return an anti-Zionist verdict. Anthony Nutting, “Balfour and Palestine, a legacy of deceit in The Balfour Project,” site of The Balfour Project, 8/7/2013, <http://www.balfourproject.org/balfour-and-palestine/> (accessed on 15/12/2014).

<sup>31</sup> Balfour stated quite categorically that “In short, so far as Palestine is concerned, the Powers have made no statement of fact which is not admittedly wrong, and no declaration of policy which, at least in the letter, they have not always intended to violate.” Ibid. p. 3.



Mandate left the Palestinian territory. The conduct of the Mandate was in contravention of its obligations “that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine.”<sup>32</sup>

The call to sue Britain on the grounds of the Balfour Declaration is not a serious call and does not demonstrate a sound legal assessment, whereas assessing the legal position on the basis of Britain's breach of its obligations under the Mandate is more serious and makes more sense. Britain did not comply with anything stated in the Balfour Declaration, and the Mandate instrument imposed on it specific and explicit legal obligations, all of which were breached with intent and on purpose.

Without prejudice to the above, but to be fair, those who demand Britain to apologize for the issuance of the Balfour Declaration, or even those who want to institute legal proceedings against it, should be asked if they have forgotten that the Palestinian National Charter, upon its formulation, had declared the Balfour Declaration and the Mandate instrument to be invalid. Afterwards the Palestinian National Council relinquished the Charter’s declaration, when they voted to amend it at their meeting in Gaza in 1996, crossing off those articles. Is this position not an acknowledgment that what was stated in the Charter was incorrect, and that the Palestinians, by deleting these articles, have rectified the matter in the Gaza conference? Are the Palestinians now apologizing for this correction and demanding Britain to apologize, and even pursuing a prosecution? Does this position not indicate a clear contradiction, and even an apparent false allegation?

Would it not have been better for the Palestinian people, especially those who have been suffering under the yoke of occupation for 50 continuous years, to spend effort and money on prosecuting Israeli war criminals before the International Criminal Court instead of digging the “Balfour grave” to file claims before amorphous courts that have no clear authority, and which would handle the lawsuits with regard to this declaration?

The oppression suffered by the Palestinian people under occupation is of greater concern, as the suffering is occurring on a daily basis. The court is well defined, and its address and location are well-known. What is needed is a political decision to institute these proceedings without fear that the US administration will withhold its financial aid, which has become more of a bribe than aid.<sup>33</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> See H.R.364 - Defend Israel by Defunding Palestinian Foreign Aid Act of 2015, 14/1/2015, site of Congress.gov, <https://www.congress.gov/bill/114th-congress/house-bill/364/text>



# ورقة عمل

## وعد بلפור في القانون الدولي

د. أنيس فوزي قاسم

