



# THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### Transforming (Private) Rights through (Public) International Law:

**Citation for published version:**

Burgis-Kasthala, M 2011, 'Transforming (Private) Rights through (Public) International Law:: Readings on a 'Strange and Painful Odyssey' in the PCIJ Mavrommatis Case1' *Leiden Journal of International Law*, vol 24, no. 4, pp. 873-97., 10.1017/S0922156511000410

**Digital Object Identifier (DOI):**

[10.1017/S0922156511000410](https://doi.org/10.1017/S0922156511000410)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher final version (usually the publisher pdf)

**Published In:**

*Leiden Journal of International Law*

**Publisher Rights Statement:**

© Burgis-Kasthala, M. (2011). Transforming (Private) Rights through (Public) International Law:: Readings on a 'Strange and Painful Odyssey' in the PCIJ Mavrommatis Case1. *Leiden Journal of International Law*, 24(4), 873-97. 10.1017/S0922156511000410

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



# Leiden Journal of International Law

<http://journals.cambridge.org/LJL>

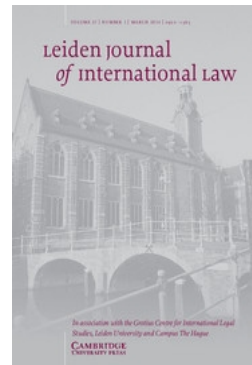
Additional services for *Leiden Journal of International Law*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



---

## Transforming (Private) Rights through (Public) International Law: Readings on a 'Strange and Painful Odyssey' in the PCIJ *Mavrommatis* Case

MICHELLE BURGIS

Leiden Journal of International Law / Volume 24 / Issue 04 / December 2011, pp 873 - 897

DOI: 10.1017/S0922156511000410, Published online: 03 November 2011

**Link to this article:** [http://journals.cambridge.org/abstract\\_S0922156511000410](http://journals.cambridge.org/abstract_S0922156511000410)

### How to cite this article:

MICHELLE BURGIS (2011). Transforming (Private) Rights through (Public) International Law: Readings on a 'Strange and Painful Odyssey' in the PCIJ *Mavrommatis* Case. *Leiden Journal of International Law*, 24, pp 873-897 doi:10.1017/S0922156511000410

**Request Permissions :** [Click here](#)

# Transforming (Private) Rights through (Public) International Law: Readings on a ‘Strange and Painful Odyssey’ in the PCIJ *Mavrommatis* Case<sup>1</sup>

MICHELLE BURGIS\*

## Abstract

Straddling both the centres of (European) power and the shifting dynamics of the post-Ottoman world in a quest to guarantee private rights through public international legal redress, the PCIJ *Mavrommatis* case provides a rich resource for interrogating the extent to which international law during the League period could speak for voices on the edge of empire. In this article, historical consideration of the regimes of empire and Mandate form the backdrop to an exploration into how international legal discourse (re)configured the relationship between the core and the periphery, especially for those peoples awaiting the promise of self-determination and sovereignty. The figure of a lone Greek investor and his dashed hopes in the newly created Palestine Mandate is the backdrop to this tale of ever-shifting interpretations of public and private rights, of speech as well as silence before and beyond the Peace Palace.

## Key Words

League of Nations; Mandate; Palestine; Permanent Court of International Justice; public/private distinction

## I. INTRODUCTION

Few international lawyers are familiar with the jurisprudential legacies bequeathed by the three judgments of the Permanent Court of International Justice (PCIJ) in the *Mavrommatis* affair.<sup>2</sup> If invoked at all, the case is most often used as authority for the ability of states to represent the (private) rights of their nationals through

\* Dr, BA (Hons)/LL B(Hons) (Sydney), PhD (ANU), School of International Relations, University of St Andrews, Scotland [mb107@st-andrews.ac.uk]. This paper emerged out of a workshop held at Harvard Law School on 9 October 2010 called ‘The League of Nations and the Construction of the Periphery’. I would like to thank all of my co-presenters as well as the invaluable comments from the participants. Thanks also to the comments of two anonymous reviewers, as well as Sarath Kasthala, Gurchathan Sanghera, and Shogo Suzuki.

1 Perhaps because of his nationality, the travails of Euripides Mavrommatis with the British authorities in London and Palestine are likened to the wanderings of the Greek hero Odysseus. Mavrommatis’s adventures were far more mundane, but at times verged on the mythical in the face of British obfuscation. Quoted in First Speech by Mr H. Purchase, Counsel for Greece, Part II, Speeches and Documents Read before the Court, Series C, No. 7, 1925, at 41.

2 *The Mavrommatis Palestine Concessions Case* (Greece/Britain), PCIJ Rep., (1924) Series A No. 2, (hereafter, *Mavrommatis* (1924)); *The Mavrommatis Jerusalem Concessions Case* (Greece/Britain), PCIJ Rep., (1925) Series A No. 5 (hereafter, *Mavrommatis* (1925)); *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction) (Greece/Britain), PCIJ Rep., (1927) Series A No. 11 (hereafter, *Mavrommatis* (1927)).

diplomatic protection as a wrong incurred under state responsibility.<sup>3</sup> More sustained scholarship has provided detailed excursions into the innovative grounds used to establish jurisdiction in the Court's first judgment as well as dicta on the nature of treaty interpretation and definitions of 'dispute'.<sup>4</sup> This paper acknowledges such contributions, but seeks to ask broader questions from this story of one frustrated Greek investor, Euripides Mavrommatis.

Granted numerous concessions by the Sublime Porte to develop water supply and electricity in Jerusalem on the eve of the Great War,<sup>5</sup> Mavrommatis eventually turned to his government to preserve these contracts under British rule in Mandate Palestine. In its 1924 decision, the PCIJ determined that there was a dispute between Greece (on behalf of its national) and Britain relating to interpretation of Article 11 of the Mandate. Greece alleged that a British grant of concessionary rights under Article 11 conflicted with Mr Mavrommatis's Ottoman-granted rights. In its second judgment, the Court examined whether there was a conflict between the two concessionary interests and found this to be the case, holding that Britain must continue to recognize Mr Mavrommatis's concessionary rights, even if in a modified form under changed circumstances. Despite this determination, Greece initiated a third hearing in pursuit of compensation for Britain's alleged failure to readapt Mavrommatis's contract and the loss resulting from this. Perhaps in a bid to prevent any further litigation, in its 1927 decision, the PCIJ reversed its 1924 position to hold that Mavrommatis's readapted concessions were strictly *private* in nature and beyond its jurisdictional remit, which required a link with the notion of *public* power under Article 11. Mr Mavrommatis thus gained the PCIJ's assurance of his *formal* contractual rights, but these were to mean very little in the *informal* world of British policies and politics in Palestine.

We can understand the shifting dynamics of this relationship between Mavrommatis and the British authorities as well as the Court's discretionary intercession through the notion of core, periphery, and semi-periphery. This paper regards the binary opposition of core and periphery as a fundamentally *relational* one, where the self – or the core – gains awareness and identity through a contrast with its other, the periphery. In the context of the League period, there are many possible

- 
- 3 *Mavrommatis* (1924), *supra* note 2, at 12. In 1995, the International Law Commission turned its attention to the matter of diplomatic protection with the aim of reaching agreement on a treaty text. According to the Commission, 'the customary origin [of diplomatic protection] was shaped by the dictum' in the 1924 *Mavrommatis* case, *United National Yearbook of the International Law Commission* (1998), Part II, at para. 62. After much debate on the viability of the 'Mavrommatis fiction', a modified definition of diplomatic protection appears in Art. 1 of the 2006 Draft Articles on Diplomatic Protection. See, in particular, A. Pellet, 'The Second Death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection', (2008) 7 *The Law & Practice of International Courts & Tribunals* 33. For an overview of the relationship between diplomatic protection, state responsibility, and the *Mavrommatis* case, see J. Crawford, 'The ILC's Articles on Diplomatic Protection', (2006) 31 *S.Afr. YIL* 19. Also see R. Portmann, *Legal Personality in International Law* (2010), 66; and R. L. Astorga, 'Nationality of Juridical Persons in the ICSID Convention in Light of its Jurisprudence', (2007) 11 *MPYUNL* 419, at 427.
- 4 H. Lauterpacht, *The Development of International Law by the International Court* (1958), especially at 34–5; O. Spiermann, *International Legal Argument in the Permanent Court of Justice: The Rise of the International Judiciary* (2005), 191–206.
- 5 Concessions over Jaffa granted during the war to Mavrommatis were not recognized as valid by the PCIJ. See N. Bentwich, *England in Palestine* (1932), 74.

cores and peripheries. Following on from their overwhelming triumph across the Middle East and playing the role of predominant League powers, Britain and France take centre stage in this story of colonial continuity and change during the interwar years. The core, then, is synonymous with the concentration of military, economic, and discursive power that profits at the expense of those on the periphery and this paper tracks how the various readings of international law by the PCIJ were central to the construction of the core/periphery relationship. In the following story, we see that the further one moves – either geographically or discursively – from the centre, the less able is one to be heard in the main League institutions, including the PCIJ. The periphery is silenced by the centre through a number of techniques, but here I trace how reliance on the public/private distinction provides an avenue for the Court at various times to engage or deny a multitude of voices on the periphery and semi-periphery. Under the new Mandate System, Mavrommatis straddles the periphery and the core in an ambivalent, semi-peripheral posture. The Court's initial endorsement of his private rights allows him significant discursive and potentially economic power over and beyond most subjects in Palestine. Mavrommatis in this instance is permitted to profit from the periphery but within the context of British predominance. This article highlights how Mavrommatis's tightrope dance becomes ever more difficult under the terms of the Mandate, which ultimately push Zionist groups within Palestine into the position of the semi-periphery. With its 1927 judgment, the Court displaces Mavrommatis onto the geographical and discursive limits of international law by its characterization of the dispute as wholly private.

A close and critical reading of the case thus provides us with a lens through which to see better the underlying dynamics of wealth and power at the core and on the periphery as conceived by the Court and the League in Mandate territories. In particular, this case spins a tale about the extent to which international law at this time could *listen to* and then *speak for* individual (European) private rights in the twilight of empire.<sup>6</sup> This is the only PCIJ case that considered the nature of Mandate administration and thus these three judgments will be examined as much for their treatment of legal doctrine as for the Court's construction of the Mandate regime. Being therefore the only case exploring the responsibilities of British rule in Palestine, the case can also be read simultaneously as a narrative about the recognition and denial of Mavrommatis's rights set against the backdrop of a larger and silenced story of those peripheral people in whose interests the Mandate was supposed to act – the indigenous population of Palestine.

How can and how should international lawyers understand the legacies of the PCIJ within the interwar context? General appraisals of the period's international institutional framework tend to straddle progressivist and conservative postures, provoking many to underplay or overemphasize narratives of continuity and change.<sup>7</sup> Were the League of Nations and its impetus new? Did the PCIJ embody a more

6 It must be noted here that a remarkably similar story is found in the *Phosphates in Morocco* case, which would have concerned allegations of French bias against the interests of an Italian investor in the French Protectorate had it been heard on the merits. *Phosphates in Morocco* (Italy/France), PCIJ Rep., (1938) Series A/B No. 74.

7 Generally, see D. Kennedy, 'When Renewal Repeats: Thinking against the Box', (1999–2000) 32 NYUJILP 335.

lasting and positive approach to adjudication?<sup>8</sup> Did the advent of the Mandates signal the end of colonialism or simply European domination in a more subtle and yet all-pervasive form? A wealth of scholarly material on the implications of international legal discourse within Europe during the time of the PCIJ enables us only to begin to answer such questions. Recent critical writings focusing on the periphery have sought to shift our gaze away from adjudicative fora to concerns about the governance and management of ‘backward’<sup>9</sup> peoples by Mandatory powers before the Permanent Mandates Commission (PMC).<sup>10</sup> Such work has highlighted the importance of developmentalist discourses in the era *before* the United Nations in a bid to reacquaint us with postcolonial technologies of intervention that were developed during the interwar period. Supportive of a narrative that demonstrates international law’s ineluctable evolution from formalism to pragmatism, such scholarship looks to legal technologies deployed in those spaces supportive of flexibility and sociological jurisprudence, such as the PMC.

Seemingly trapped in a jurisdictional bind that silenced those voices of ‘protected’ natives, it is easy to understand why a close reading of one of the PCIJ’s most famously ‘doctrinal’ cases is best overlooked in the critical quest to bring the periphery back in. This paper attempts to resurrect PCIJ jurisprudence, however, to highlight its utility in answering not only formalist queries of doctrine, but also critical enquiries into the continuities of colonialism. Here, I suggest that a close reading of this PCIJ case indirectly concerned with the periphery deepens and supports recent critical scholarship on the League period outside the Peace Palace. As in the case of the PMC, here we can explore how new techniques for managing non-European peoples were incubated and consolidated. Can we distinguish League ideals of ‘sacred trust’ from earlier practices of ‘protection’ and colonialism? What were the jurisdictional hooks used by the PCIJ to ‘internationalize’ disputes and what facts and which people were recognized as being worthy of judicial oversight and especially international legal redress?<sup>11</sup> In particular, how were notions of development and ‘domestic’ public authority constructed by the Bench and the Bar in this era of the ‘open (or only slightly ajar) door’?

The central concern in this paper, then, is to chart the ways in which public and private power are recognized (and thus legalized) within the courtroom. The main methodological tool I apply to historical and legal debates as well as the case itself is the public/private device. I seek to trace how various interpretations of public and private power, law, and rights generate central and peripheral positions both

8 Flagged by Skouteris in the wake of the Hague Conferences: T. Skouteris, *The Notion of Progress in International Law Discourse* (2010), 3.

9 Here, I draw inspiration from the title of Lindley’s classic treatise, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926).

10 Especially A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), Chapter 3, at 114–95; and B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), Chapter 3, at 50–72.

11 Of course, this idea of a matter’s *international* nature was the central issue confronting the PCIJ in the *Nationalities Decrees* case: *Nationalities Decrees Issued in Tunis and Morocco (French Zones) on November 8th, 1921*, PCIJ Rep., (1923) Series B No. 4 (hereafter, *Nationalities Decrees*). For a critical rereading of the case, see N. Berman, ‘The *Nationality Decrees Case*, or, of Intimacy and Consent’, (2000) 13 LJIL 265.

within the discipline of international law and within the narrative I construct about *Mavrommatis* and Mandate Palestine. Although cognizant of the polarizing and simplifying tendencies of the public/private distinction, I also remain aware of its illusive quality, as captured by Chinkin, because such concepts:

are complex, shifting . . . [to] reflect political preferences with respect to the level and quality of government intrusion. Since there is no constant, objective basis for labelling an activity or actor as 'private', the judiciary regularly resorts to this as a device to avoid ruling on political issues. This in turn obscures the ways in which government policy regulates the so-called private sphere.<sup>12</sup>

By tracing the way in which the public/private distinction is used in these matters, the following discussion explores what we can learn about the reach of international adjudication for peoples in the periphery. What alternative narratives emerge between the lines of debate over the limits of jurisdiction and contractual agreements? How was international law as forged within the PCIJ both enabling and disabling for competing public and private rights (or international and domestic spheres) in non-European territories? To what extent were the Mandate ideals of 'sacred trust' respected and affirmed by proxy through the claims of *Mavrommatis*?

This paper will begin with an overview about the nature of colonial rule in the Middle East and the establishment of the Mandate System to interrogate depictions of Palestine's exceptionality. It then moves on to the *Mavrommatis* proceedings in light of British rule. I read the case in light of the picture that emerges about the international development project for peoples on the periphery. In particular, I trace the way European international lawyers in the period flexibly (re)interpreted the boundaries between 'international' and 'domestic', 'formal' and 'contextual', and 'public' and 'private' in the pursuit or denial of legal redress. Despite its limited jurisdictional reach, international law did not simply cease to matter on the periphery. On the contrary, the *Mavrommatis* case highlights the ubiquity and complexity of international law's constraining or enabling qualities, whether for those at the centre or on the periphery.

## 2. AFTER EMPIRE YET BEFORE INDEPENDENCE: THE INTERNATIONALIZATION OF DEVELOPMENT FOR MIDDLE EASTERN MANDATES

With hindsight inevitably at our side, it is hard to step back into the shoes of those participants of the Arab Revolt in Damascus between 1918 and 1920 and see their aspirations for independence after Ottoman rule as little more than hopeless naivety. As international lawyers, it is not our task to envisage the joy followed by the disappointment resulting from French and British betrayal.<sup>13</sup> Historical narratives

12 C. Chinkin, 'A Critique of the Public/Private Dimension', (1999) 10 EJIL 387, at 389.

13 Here, I am particularly referring to the promises contained in the Hussein–McMahon correspondence and their denial by the Sykes–Picot Agreement. Exchange of Letters between France and Great Britain respecting the Recognition and Protection of an Arab State in Syria, 9/6 May 1916, 221 CTS 323 (The Sykes–Picot Agreement); and Exchange of Notes between France and Great Britain modifying the Agreement of 9/6 May



tend to characterize the creation of the Mandate regime for Arab peoples as a relatively simple continuation of colonialism under another name, whereas mainstream legal accounts tend to hail this era as a welcome break from colonial prejudice. Critical scholarship within international law has sought to draw more on historical studies while simultaneously reflecting on the self-image of a discipline dedicated to notions of its own progress. Thus, critical work has tended to highlight *continuities* over change with a note of caution about the extent to which League projects can be seen as distinct – and better – than their predecessors. According to Berman:

You simply can't tell whether the Berlin Act [of 1885] is better than the Mandate System by asking which has more sovereignty and which has more community – all such regimes contain all the elements. The question is to what ends they have been put – and to what extent the framework *allows challenges to prevailing distributions of power and wealth*.<sup>14</sup>

We will see later on how the Mandate regime in Palestine did in fact augur in certain new opportunities for power and wealth in the changing dynamic of centre–periphery relations. Before considering this specific case, however, I ask how international law was deployed in the region to integrate and subordinate peoples in the (Middle Eastern) periphery. Can we identify continuities of control across the region at the dawn of the First World War and, if so, what were these?

Applying critical insights to the case of the Arab world in the late nineteenth and early twentieth centuries allows us to explore dynamics of wealth and power through the project of internationalization.<sup>15</sup> In particular, we must interrogate the extent to which integration into the expanding international system both enabled and constrained possibilities for self-rule. Moreover, we need to problematize notions of 'self', too, as the states that would come to house peoples of the former Ottoman Empire failed to reflect national sentiments. For many Arabs, it was the simultaneous emasculation and 'inclusion' of the Ottoman Empire that first introduced modes of European control into their daily lives. As had been the case for various Islamic empires, Ottoman rule relied on flexible approaches to control over territory that derived much of their legitimacy from the Sultan occupying the position of Khalifa, or successor to the Prophet.<sup>16</sup> Shrinking capacity in

1916, 25/30 May 1916, 222 CTS 13. On the legal effects of the former agreement, see V. Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab–Israeli Conflict, 1891–1949* (2009), Chapter 4.

14 N. Berman, 'In the Wake of Empire', (1999) 14 AUJLR 1515 (First Annual Grotius Lecture, American Society of International Law), at 1544 (emphasis added).

15 Here, I am particularly referring to scholars loosely linked through the Third World Approaches to International Law (TWAAIL) and/or general postcolonial sensitivities. For example, see Anghie, *supra* note 10; A. Anghie et al. (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003); D. P. Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment, and the Standards of Liberal, Globalized Civilization', (2000) 35 Texas ILJ 387; T. Gathii, 'Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory', (2000) 41 Harv. ILJ 263; K. Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', (1998) 16 Wisc. ILJ 353; C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2006); V. Nesiiah, 'Placing International Law: White Spaces on a Map', (2003) 16 LJIJ 1; S. Pahuja, 'The Postcoloniality of International Law', (2005) 46 Harv. ILJ 459; A. Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law', (1995) 6 *Law and Critique* 38.

16 The word 'sultan' (سلطان) is derived from the Arabic verb to rule or dominate over (سَطَط), whereas 'Khalifa' (خليفة) derives from the verb meaning to succeed or follow (خَلَف) (the Prophet).



Istanbul was mirrored by greater European imperial appetites that sought either the creation of protectorates or increasingly aggressive capitulation agreements across Ottoman lands. Both techniques flourished at the height of positivist international law that promised sovereignty while eroding multicultural expressions of statehood.<sup>17</sup> Being variously identified as an Ottoman subject or Greek national, Mavrommatis's fortunes exemplify this shift from ethnic diversity to more narrowly defined 'nation'-states after the First World War. This would play out especially in Palestine where relative inter-communal harmony under the Ottomans gave way to division and concomitant inequality under British rule. Membership in international society would thus require radical reshaping of former Ottoman lands along territorial, political, economic, and cultural lines.

Behind a myriad of cession and protection agreements at this time were the dynamics of politics that allowed elastic applications of sovereignty to draw in and ensnare various non-European peoples in an impossible civilizing dance.<sup>18</sup> For example, whether protectorate agreements were (private) contractual agreements or constitutive of international (public) effects was something open to contention. Within the jurisprudence of the PCIJ itself, we find no clear position on the legal nature or the legal effects of protectorates; instead, 'they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development'.<sup>19</sup> It is for this reason that Baty characterizes the very idea of protectorates as 'juridical monsters' requiring never-ending reinterpretation of their international legal capacities.<sup>20</sup> In this way, such institutions were permanently unstable<sup>21</sup> and permanently open to international interpretation and, often, interference. 'The protectorate regime brought non-Europe into the system, while simultaneously leaving it "au dehors"'.<sup>22</sup>

Perhaps the most important reason for creating agreements such as this was not to define indigenous capacities publicly and internationally, but to ensure that other European powers would be prevented from exploiting a given territory. Legally speaking, this amounted to protection not for the local population so much as for the European power against potential (European) interlopers. Anghie suggests we read this period, then, as one of fluid personality,<sup>23</sup> in which non-European powers were

17 Generally, see Anghie, *supra* note 10, at Chapter 2.

18 In general, see my discussion in *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (2009), Part II Introduction.

19 *Nationalities Decrees*, *supra* note 11, at 27. We can also regard the status of the City of Danzig as possessing certain qualities of both mandates and protectorates. Although such terminology was not used, the Court's consideration of indigenous *internal* control, Polish control of *foreign* relations, and the difficulty of separating them captures one of the standard definitions of protectorates. The fact that this arrangement was created under treaty for the League echoes a mandatory relationship. See *Free City of Danzig and International Labour Organization*, PCIJ Rep., (1930) Series B No. 18. Also see Judge Anzilotti's discussion of the city's 'self-governing' capacity in his separate opinion, at 22.

20 T. Baty, 'Protectorates and Mandates', (1921-22) 2 BYIL 109, at 114.

21 Berman, *supra* note 11, at 282.

22 *Ibid.*, at 294.

23 'European states adopted different views of native personality, depending on their own interests. The problem was that native personality was fluid, as it was created through the encounter with a European state which would inevitably "recognize" the capacity of the non-European entity according to its own needs', Anghie, *supra* note 10, at 79.

sometimes afforded the limited capacity to form contracts at the *private*-law level but not at the *public* international-law level.<sup>24</sup> ‘The non-European states thus existed in a sort of twilight world; lacking personality, they were nevertheless capable of entering into certain treaties and were to that extent members of international law.’<sup>25</sup> These agreements acted as *private* contracts (often resulting from coercion) whose international legal effects would only apply amongst *public* international law’s subjects – European states.<sup>26</sup>

We see a shift, however, in this practice of *private* agreements to *public* international agreements in the Arab world first for the protectorate of Morocco and later in relation to the ‘A’ Mandates. Continuities between these regimes demonstrate how the regime of the Mandate was not so new, whether for those at the colonial centre or the ‘protected’ periphery. In a 1922 article exploring the intellectual origins of Mandate principles, Potter links ‘open-door’ notions and even the word ‘Mandate’ itself to correspondence between Germany and the United States regarding the 1906 Treaty of Algeciras.<sup>27</sup> Keen to ensure a space free from French or Spanish preponderance vis-à-vis trade concessions, the United States invoked the right of most-favoured nation for foreign nationals in Morocco as contained in Article XVII of the 1880 Madrid Convention.<sup>28</sup> In a letter to the German emperor, the US Secretary of State, Elihu Root, surmised that:

If this arrangement is made, the Conference [of Algeciras] will have resulted in an abandonment by France of her claim to the right of control in Morocco answerable only to the two Powers with whom she had made treaties and without *responsibility to the rest of the world*, and she will have accepted jointly with Spain a *mandate* from all the Powers, under responsibility to all of them for the maintenance of equal rights and opportunities. And the due observance of these obligations will be safeguarded by having vested in another representative of all the Powers a right to have in their behalf full and complete *reports of the performance of the trust*, with the further right of *verification and inspection*.<sup>29</sup>

The terms of the resulting Treaty of Algeciras were cited in a 1915 work read by General Smuts,<sup>30</sup> one of the central instigators of the Mandate regime.<sup>31</sup> The internationalization of the Moroccan protectorate would allow other European

24 According to Grewe, ‘the protagonists of colonial expansion in the nineteenth century did not deny non-civilized peoples the *dominium civile*, but rather only political *imperium*; not the capacity to hold private, civil rights, but rather legal personality as a subject of international law. They did not deny that every human being had innate rights which were held independently of the stage of culture and civilisation they had achieved’, W. H. Grewe, *The Epochs of International Law* (translated by M. Byers) (2000), 548.

25 Anghie, *supra* note 10, at 76. This sense of twilight is captured by Andrews in his observation of a two-tier international law of the nineteenth century between members and non-members of international society. Shaw further divides the system into three: full members and states in the Concert of Europe, non-European states, and non-European peoples not recognized as states. J. A. Andrews, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’, (1978) 94 *Law Quarterly Review* 408, at 419; and M. N. Shaw, *Title to Territory in Africa: International Legal Issues* (1986), 45.

26 J. Castellino and S. Allen, *Title to Territory in International Law: A Temporal Analysis* (2003), 91.

27 P. B. Potter, ‘Origin of the System of the Mandates under the League of Nations’, (1922) 16 *APSR* 563.

28 *Ibid.*, at 580.

29 Letter of Secretary Root to Baron Speck von Sternberg, 7 March 1906, cited in *ibid.*, at 579 (emphasis added).

30 J. A. Hobson’s *Towards International Government*, discussed in *ibid.*, at 574.

31 Generally, see M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009), Chapter 1.

powers greater access to its markets and a far more robust (public) legal apparatus for enforcing (private) rights.<sup>32</sup>

As the greatest imperial power at the end of the Great War, Britain had to balance its own imperialist designs on Ottoman lands with emerging notions supportive of both the 'open door' and wardship for Arab governments-in-waiting. Although some recognition can be given to humanitarian ideals in conceiving of the Mandate System of tutelage,<sup>33</sup> we must not forget that much of the non-European world remained under various forms of 'protection' or colonialism that neither France nor Britain was ready to relinquish. Although Britain had favoured an informal – and thus cheaper<sup>34</sup> – approach to empire in much of the Arab world, we still need to understand the relationship between Britain and various peoples under her authority as an unequal one. Diplomatic dealings during the Great War<sup>35</sup> and the emergence of the Mandate idea should not mask the fact that, often, Britain regarded its approach to Mandatory, colonial, or protectorate territories in a similar light.<sup>36</sup> According to Prime Minister Lloyd George in 1919, '[t]here was no large difference between the principles of the Mandate System and those of the Berlin Conference' of 1885.<sup>37</sup>

As in the case of the Moroccan protectorate, the United States also played an important, if ultimately indirect, role in shaping the framework applicable to British formerly Ottoman territories.<sup>38</sup> Best known, of course, is the influence that Wilsonian ideals of self-determination had on curtailing imperial appetites, acting as a compromise between the colonizer and the colonized.<sup>39</sup> Britain was aware of the need to appear respectful of an emerging strand in public opinion that regarded dominion over foreign peoples as more than an exercise in aggrandisement.<sup>40</sup> The dividends of rule would have to be balanced by the interests of other potential Western economic interests (the 'open' door) as well as wardship of the native economy and society.

32 For a discussion on the nature of the French Protectorate over Morocco, see Judge Van Eysinga's dissenting opinion in the *Phosphates in Morocco* case, which he argues is not a standard protectorate. Instead, 'the case we have to consider is that of a State, whose international status is in a large measure determined by collective conventions and which is under the protection of one of the States parties to these conventions', *supra* note 6, at 32.

33 M. C. Mills, 'The Mandatory System', (1923) 17 AJIL 52.

34 E. B. Haas, 'Conflicting Colonial Policy Aims: Acceptance of the League of Nations Mandate System', (1952) 6 IO 521, at 528.

35 On this, see especially D. K. Fieldhouse, *Western Imperialism in the Middle East 1914–1958* (2006), Chapter 2.

36 For example, Darwin quotes Lord Balfour in 1918 as saying that 'We will have a Protectorate [over former Ottoman lands] but not declare it', J. Darwin, 'An Undeclared Empire: The British in the Middle East, 1918–1939', (1999) 27 *Journal of Imperial and Commonwealth History* 159, at footnote 1.

37 Quoted in Berman, *supra* note 14, at 1526.

38 Generally, see Haas, *supra* note 34.

39 R. Heacock, 'Le système international aux prises avec le colonialisme: Les délibérations sur la Palestine dans la commission permanente des mandats de la société des nations', in N. Méouchy and P. Sluglett (eds.), *The British and French Mandates in Comparative Perspective* (2004), 129–42, at 130.

40 According to Mazower, '[b]ridging the gap between Washington and the Dominion was crucial. As it was, the idea of turning former German and Ottoman possessions into League mandates turned out to be an ingenious way of squaring the circle between the British Dominions' demand to annex former German colonies and the need to pay lip service to Wilsonian idealism', Mazower, *supra* note 31, at 45.

We can note this sense of *quid pro quo* between the United States and Britain in exchanges that occurred in the lead-up to the creation of the Mandates. Motivated by designs over Iraqi oil as well as concern for peripheral populations, the US government repeatedly requested that Britain would ‘assure equal treatment in law, and in fact to the commerce of all nations’.<sup>41</sup> The United States would accept the British presence in former Ottoman lands because of its ‘recognition of the justice and far-sightedness’ of the Mandate System. The United States had tolerated (private) British use and development of natural resources during the period of its military occupation. The Mandate regime, however, would require that all interests in oil and commerce be equally indulged in a display of public oversight. Thus, the United States requested and was given British assurances that, before the establishment of the Mandates, no monopolistic concessions would be granted and that all concession and exploration grants would be publicized. Furthermore, Britain agreed to respect the private rights arising from concessions granted by the Ottomans before the outbreak of war. These assurances were reinforced in the Anglo-American Convention of 1922, which, in Article 3, stated that ‘Vested American property rights in the mandated territory shall be respected and in no way impaired’.<sup>42</sup> These very issues formed the core of Mavrommatis’s grievances before the Court and will be discussed in the next section. They are also strikingly similar to the Treaty of Algeciras protectorate regime for Morocco.

Before exploring how these principles would be realized in the case of Palestine, we must first come full circle in the final part of this section and explore the extent to which the Mandate regime can be regarded as distinct from its colonial predecessors, such as protectorates. Often, this issue has been approached through the lens of ‘sovereignty’, which, with its elastic meaning,<sup>43</sup> has allowed a raft of arguments to be made about the non-imperial nature of nations in a state of abeyance.<sup>44</sup> For Lauterpacht, sovereignty of the Mandate territory lay with both the League and the Mandatory power, and, consequentially, Mandate territories could not simply be subsumed under the territory of the Mandatory, as was often the case with protectorates.<sup>45</sup> Crawford’s discussion of mainstream opinion affirms Lauterpacht’s position. Crawford shows that the dominant narrative distinguished colonial rule from the Mandates; France and Britain, for example, did not possess sovereignty over these territories.<sup>46</sup> Instead, sovereignty was held ‘in trust’ by the League, especially

41 Letter to Lord Curzon from US Ambassador in London, John Davis, 12 May 1920, *Correspondence between His Majesty’s Government and the United States Ambassador Respecting Economic Rights in Mandated Territories*, British Government Document, Miscellaneous No. 10 (1921), at 1.

42 ‘Convention between the United States and Great Britain respecting Rights in Palestine’, (1926) 20 AJIL 65, at 72.

43 In particular, see M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), Chapter 4.

44 Especially see N. Berman, ‘Sovereignty in Abeyance: Self-Determination and International Law’, (1988–89) 7 Wisc. ILJ 51.

45 H. Lauterpacht, ‘The Mandate under International Law in the Covenant of the League of Nations’, in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 3 (1977), 29–84, at 49. Cf. Hales, who argues that ‘sovereignty is not vested in any single body’, J. C. Hales, ‘Some Legal Aspects of the Mandate System: Sovereignty–Nationality–Termination and Transfer’, (1937) 23 *Transactions of the Grotius Society* 85, at 94.

46 J. Crawford, *The Creation of States in International Law* (2006), 573.

in relation to 'A'-class mandates of the former Ottoman Empire at the highest stage of 'native' development.<sup>47</sup> Such accounts are seminal for a discipline grounded in notions of international legal 'progress': we can look to the Mandates System as a break from the colonial past and as a prelude to the exercise of self-determination in the period of decolonization.

For critical authors, the Mandates continued the trend of European domination through international law, but in a far more interventionist form, highlighting simultaneous ruptures *as well as* continuities in the configurations of domination.<sup>48</sup> It was:

precisely because sovereignty over the mandate territory could not be located in any one entity that agents of the Mandate (for example, the Mandatory, the PMC and perhaps the PCIJ) could have complete access to the interior of that territory.<sup>49</sup>

As in the case of flexible interpretations of the nature of 'sovereign' territories in the Middle East before the Great War, we also see in this period new ways of shaping and speaking of sovereignty to serve the interests of empire and the 'development' of non-European peoples on the periphery. Although cut off from any direct contact with political machinations through its own institutional confines, we will see below how the PCIJ supported and reinforced these prevailing inequalities in Palestine and beyond.

### 3. NEITHER EXCEPTIONAL NOR PERIPHERAL: THE CLAIMS OF MAVROMMATIS IN THE CONTEXT OF 1920S MANDATE PALESTINE

#### 3.1. Tracing patterns of continuity and change in early Mandate Palestine

As in the case of scholarship exploring the (un)exceptional nature of the League of Nations, ambivalence lies at the heart of historical and legal accounts of the Palestine Mandate, torn as they often are in trying to marry the undeniable specificities of the case with broader trends about the nature of colonial rule.<sup>50</sup> Wedged between hundreds of years of former Ottoman rule and the creation of the state of Israel in 1948, this period tends to be characterized as a transitional (or even peripheral) one with little enduring significance for understanding more contemporary legal or political developments.<sup>51</sup> Because Israel's establishment affirmed the presence of

47 Generally, see Art. 22, Covenant of the League of Nations, 28 June 1919, 225 CTS 188. Norman Bentwich goes so far as to characterize the Mandate system as a form of '*noblesse oblige* in the national as well as in private affairs', N. Bentwich, 'Mandated Territories: Palestine and Mesopotamia (Iraq)', (1921–22) 2 BYIL 48, at 49.

48 'Whereas previously the internal character of the sovereign European state was immune from scrutiny, in the inter-war period it was precisely through the Mandate System that international law and institutions had complete access to the interior of a society. It was in the operations of the Mandate System, then, that it became possible for law not merely to enter the interior realm, but also to create the social and political infrastructure necessary to support a functioning sovereign state', Anghie, *supra* note 10, at 135–6.

49 *Ibid.*, at 148–9.

50 For a good example of the Palestine-as-exception narrative, see W. E. Rappard, 'Mandates and Trusteeships with Particular Reference to Palestine', (1946) 8 JP 520, at 520–6.

51 A. Likhovski, 'Between "Mandate" and "State": Re-Thinking the Periodization of Israeli Legal History', (1998) 19 *Journal of Israeli History* 39, at 41.

a Jewish nation-as-state, scholarship especially within Israel has tended to overlook non-Jewish institutions and actors in this period or to place them on the periphery of academic analysis.<sup>52</sup> I argue in this section that it is crucial to understand the experiences not only of one individual straddling the semi-periphery, Mavrommatis, but of the rulers and the ruled in Palestine as part of complex and often contradictory local and international events.<sup>53</sup> It is all too easy to read history backwards here and plot out a determinist narrative, but, as we cannot simply speak of two nationalist narratives – Israeli and Palestinian – so we cannot reify two national groups in the Mandate period. Factors of class, gender, religious affiliation, the urban/rural divide, and language all muddied the waters between the Mediterranean and the Jordan.<sup>54</sup> Here, I consider the legal and economic context in which Mavrommatis tried in vain to conduct his business, the League of Nations' Mandate of Palestine.

To situate the case within its ideational milieu, I draw on some writings of key British officials in the period, which all display a number of themes common to general Mandate goals, including an idealistic zeal to 'develop' 'primitive' peoples through the introduction of economic efficiency and integration into the market. In particular, I interrogate these documents for the way they construct images about the core/periphery relationship in Mandate Palestine. How were allocations of wealth and power understood and justified by these individuals? How did their orientaling discourse create as well as destroy relations between the Mandatory and the Mandated as well as between Jews and Arabs themselves?

The Palestine Mandate's founding document was confirmed by the League Council in 1922 and came into force a year later, combining general League goals for 'A' Mandates as well as the particular dynamics of British aspirations for this territory carved out of *bilaad as-shaam* (Greater Syria). Although Britain would be holding the territory on trust for the League, the realities of its physical presence there since December 1917 meant that the 1922 document did not simply mark a break with dynamics created during its military occupation.<sup>55</sup> Throughout this 'interim' period of civil administration under High Commissioner Samuel and despite assurances

52 Ibid.

53 For Bunton, in his study of land policies in Mandate Palestine, the 'need for a broader, comparative approach has not generally been recognised in the literature on the land in Palestine which instead has shown a tendency to accentuate the uniqueness of the period' (at 4). Throughout his study, he argues that 'British land policies in Palestine were constantly in flux, and are best understood in terms of wider frames of reference which recognize property as a fluid social construction, informed as much or more by structures and patterns inherited from the Ottoman past and by assumptions about changing realities on the ground, than by those idealized and imported from London. This may be little more than the established historical practice of balancing continuity and change, but it has not always been brought to bear in the study of land in mandate Palestine', M. Bunton, *Colonial Land Policies in Palestine 1917–1936* (2007), 5–6.

54 On all of these points regarding historical method, see 'Introduction', I. Pappé, *A History of Modern Palestine: One Land, Two Peoples* (2006), 1–12.

55 Palestine's Chief Justice between 1921 and 1927 thus related this transition period in the following terms: 'The Government Departments were developed. Although the Government was in form a civil one, Palestine was still held by the power of the sword. There had been no cession of the territory by Treaty. That state of things went on until September 11, 1922, when Sir Herbert [Samuel] took the Oaths of Office and Allegiance at a ceremony of some historical interest, when the King's Proclamation was read and His Majesty assumed control, not as conqueror of Palestine, but as having accepted authority under the Mandate. The conquest was a fact. His acceptance of authority under the Mandate was the realization in formal terms of a political idea. The Mandate was a sort of constitution, conferring limited powers of government; *but under the shadow of the sword the King had already set up a government in civil form in July, 1920*', T. W. Haycraft, 'Palestine under



to the United States of not making significant changes, Britain did indeed set to work on reshaping the legal, political, and economic landscape of the territory. The British froze all land transfers in the first three years of control to ensure that future development would take place within the framework of a more robust and manageable form of land ownership than that bequeathed by the Ottomans.<sup>56</sup> This was not, however, a wholesale break with the past, in spite of the desires of Palestine's first Attorney-General, Bentwich, who, in 1921, wanted to discard the '*damnosa hereditas*' of the Ottoman Empire, which had 'clogged . . . reforming activity' since Britain's occupation.<sup>57</sup> Recent scholarship has highlighted how Britain drew on extant Ottoman laws in sometimes innovative ways to achieve its policy aims of 'developing the local people off the land'.<sup>58</sup> The complex system of Ottoman land tenure was reconfigured so that smallholders often lost their access to communal lands, while cadastral mapping allowed greater domination over and taxation of lands that could then be integrated into the market economy.<sup>59</sup> Earlier laws were not removed so much as reworked so that it is best to 're-imagine British rule over Palestine not as a *rupture* with, but rather in many areas a *continuation* of, the dynamics of Ottoman rule'.<sup>60</sup>

According to Likhovski, one 'major inconsistency in colonial policy was the contradiction between development and status quo, modernization and tradition'.<sup>61</sup> The contemporaneous writings of British officials are drenched in classic colonial imagery, evocative of 'undeveloped and under-populated'<sup>62</sup> lands just 'waiting to be developed'<sup>63</sup> by the industry and effort of the settler colonialist.<sup>64</sup> High Commissioner Samuel regarded the agricultural practices of the largely Arab local population as generally 'primitive' and the words of Haycraft deepen such cultural stereotypes

---

the Mandate', (1928) 15 *Journal of the Central Asian Society* 167, at 170 (emphasis added). For background on Sir Herbert Samuel as first High Commissioner, see B. Wasserstein, 'Herbert Samuel and the Palestine Problem', (1976) 91 *English Historical Review* 753.

56 M. LeVine, 'Land, Law and the Planning of Empire: Jaffa and Tel Aviv during the Late Ottoman and Mandate Periods', in H. İslamoğlu (ed.), *Constituting Modernity: Private Property in the East and West* (2004), 100–46, at 115; N. Bentwich, 'The Legal Administration of Palestine under the British Military Occupation', (1920–21) 1 BYIL 139, at 146. See also W. Stein, *The Land Question in Palestine, 1917–1939* (1987), Chapter 1 and especially 39–47.

57 Bentwich, *supra* note 47, at 53.

58 LeVine, *supra* note 56, at 104.

59 Generally, see Bunton, *supra* note 53; M. Bunton, 'Inventing the Status Quo: Ottoman Land-Law during the Palestine Mandate, 1917–1936', (1999) 21 *International History Review* 28; and R. Shehadeh, 'The Land Law of Palestine: An Analysis of the Definition of State Lands', (1982) 11 *Journal of Palestine Studies* 82.

60 LeVine, *supra* note 56, at 102 (emphasis added). According to Likhovski, there were many elements at play during this period of legal reform, which reveal 'the importance of paying attention to affinities and similarities, fissures and gaps that undermine the colonizer/native dichotomy' (at 7). Much of Ottoman law had been codified along French civil-law lines and, under the British, a common-law system was strengthened through a policy of 'Anglicization' of the legal system, A. Likhovski, *Law and Identity in Mandate Palestine* (2006), 23.

61 *Ibid.*, at 55.

62 H. Samuel, 'An Interim Report on the Civil Administration of Palestine during the period of 1st July, 1920–30th June, 1921', London: British Government Document, at 4.

63 Haycraft, *supra* note 55, at 186.

64 In this section, I particularly rely on the writings of Norman Bentwich, the first Attorney-General in Palestine, 1922–31; Sir Thomas Haycraft, Chief Justice in Palestine, 1921–27; and Herbert Samuel, first High Commissioner in Palestine, 1920–25.



in warning that 'it should be kept in mind that in the Near East racial and religious passions are elemental'.<sup>65</sup> To keep these forces at bay:

[the] ultimate success of the colonial experiment would seem to depend on the physique and temperament of the [European] colonists, [rather] than ability to maintain with patience a persistent industry, for . . . remuneration . . . in relation to the requirements of European habits of life, in a climate which, except in the hill country does not encourage persistent physical activity.<sup>66</sup>

For British policymakers, then, it was not simply the creation of the Balfour Declaration in 1917 that impelled racist and discriminatory rule in Palestine; 'anti-Semitism'<sup>67</sup> at home along with colonial prejudices about the nature of the local Arab population produced the framework for rule in Palestine that married the Mandate model with settler colonialism as well as development with the status quo.<sup>68</sup> For Fieldhouse, this was 'unique in British imperial history', as, for the first time, the models of colonies of settlement and colonies of occupation were combined with the additional adage that most of these settlers were not British subjects.<sup>69</sup> The Jews of Palestine straddled colonized and colonizing discourses that spoke to Jewish otherness vis-à-vis the 'British' core, yet superiority in relation to the Palestinian Arabs on the periphery. At times it made sense for Zionists to link themselves with their Semitic siblings in 'sentimental idealization of the [Bedouin] noble savage'.<sup>70</sup> At other times, the backwardness and ignobility of the Arab were to be lamented in tones very much akin to that of classic colonizing rhetoric:

These blended feelings of familial affinity and paternalist superiority were embodied in the Zionist claim that the Palestinian Arabs, or 'Arabs of the Land of Israel', as they were called, were the descendents of ancient Hebrews who had been cut off from Jewish civilization and slowly developed, preserving shards of ancient Hebrew customs and language.<sup>71</sup>

Thus, the Yishuv would act as a civilizing instrument for the British through its unique cultural link to the indigenous population of Palestine in a semi-peripheral position. In addition and in contrast to the British preference elsewhere for indirect rule via co-optation of local rulers, the direct rule of the Colonial Office was required

65 Samuel, *supra* note 62, at 4; and Haycraft, *supra* note 55, at 179.

66 Haycraft, *supra* note 55, at 181. It must be noted that the main population centres of new Jewish immigration were not in the hills as much as the coastal plain around centres such as Haifa and Tel Aviv.

67 It is important to note that both Arabic and Hebrew are Semitic languages and thus it seems strange to speak of Arab-instigated 'anti-Semitism'. We need to understand the progeny of this term within the context of nineteenth-century Europe and various nationalisms incapable of respecting a place for Jews in the polity. According to Shimoni, it 'is not a coincidence that the code-word for Jew-hatred that became current from . . . the mid-1870s was "anti-Semitism", as it has remained to this day. So-called "Semitism" was an invented image related to the occidental construction of the so-called "Orient"', G. Shimoni, 'Postcolonial Theory and the History of Zionism', (2007) 13 *Israel Affairs* 859, at 861.

68 For a discussion on the links between Britain's support for Zionism and anti-Semitic prejudices within policy circles, see Kattan, *supra* note 13, at Chapter 1.

69 Fieldhouse, *supra* note 35, at 117. This is noted in the 1925 *Mavrommatis* pleadings: 'one would not wish to be thought that we were here by reason of any desire to benefit ourselves or to benefit our own nationals', Speech by Sir D. Hogg, Counsel for Britain, Part II, Speeches and Documents Read before the Court, Series C, No. 7, February 1925, at 101.

70 D. J. Penslar, 'Zionism, Colonialism and Postcolonialism', (2001) 20(2-3) *Journal of Israeli History* 84, at 86.

71 *Ibid.*, at 87.

to undergird the pledge of support for a 'Jewish national home'.<sup>72</sup> Thus, according to the under-secretary of the Colonial Office in 1922, 'in all matters relating to Palestine, we stand under the shadow of the Balfour Declaration'.<sup>73</sup>

The terms, then, of the League's Palestine Mandate must be understood as expressing both *unique* qualities resting on the Balfour Declaration and *general* Mandate principles of well-being and development. The Balfour Declaration was included in the Preamble and its premise can be traced throughout the Treaty, especially in relation to support given for the *public* role of the Jewish Agency in administering the territory.<sup>74</sup> As a whole, the text rests on a bifurcated view of development – one reliant on the public/private distinction: political participation and enterprise for the (European) Jewish<sup>75</sup> people in contrast with passive Palestinian Arab 'inhabitants'.<sup>76</sup> A different relationship with the land itself is even constructed in the document so that the Palestinian Arab population is expected to maintain age-old customs while the administration is to encourage the '*close settlement* by Jews on the land, including *State* lands and *waste lands* not required for *public* purposes'.<sup>77</sup> This public-law document endowed certain subjects with private-law rights over and above claims of the majority. Thus:

once it came into force [The Mandate] institutionalized . . . inequality in the status of the Jewish and Arab communities: the British Administration was given the positive obligation to 'facilitate' the Jewish National Home but was obligated only to 'safeguard' the civil and religious rights of the rest of the population.<sup>78</sup>

The nature of these policies can be understood through the lens of settler colonialism, which Smith defines as resting on the pillars of immigration, a land base, and laws providing for special treatment.<sup>79</sup> The third provision here is particularly important, as Britain initially interpreted its general obligations of development as

72 Bentwich states that a 'national home connotes a territory in which a people, without receiving the rights of political sovereignty, has nevertheless, a recognized legal position and receives the opportunity of developing its moral, social, and intellectual ideals', N. Bentwich, 'The Mandate for Palestine', (1929) 10 BYIL 137, at 139.

73 Evelyn Shuckburgh, quoted in B. J. Smith, *The Roots of Separatism in Palestine: British Economic Policy 1920–1929* (1993), 118.

74 The Preamble in part reads: 'Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor 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; and Whereas 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' (emphasis added). Also see Arts. 2, 4, 6, 7, 11. Note the differing nature of rights recognized to Jews (political, national, and historical) and Palestinian Arabs (civil and religious). Also note the quintessentially *private* image evoked by the term 'national *home*' placed within a (public) treaty text.

75 The extent to which European (or Ashkenazi) Jews were seen and saw themselves as agents of European development is significant. Non-European (or Mizrahi, Sephardi, 'Oriental') Jews were often regarded as a threat to the Zionist project because of their 'backward' cultural tendencies. See E. Shohat, 'Sephardim in Israel: Zionism from the Standpoint of Its Jewish Victims', (1988) 19/20 *Social Text* 1.

76 J. Strawson, *Partitioning Palestine: Legal Fundamentalism in the Palestinian–Israeli Conflict* (2010), 48–9.

77 Art. 6, Palestine Mandate (emphasis added). This notion of 'close settlement of the land' is repeated in Art. 11, discussed below.

78 Smith, *supra* note 73, at 13.

79 *Ibid.*, at 116.

being fulfilled through its support of Zionist industry and agriculture, as exemplified by the figure of Mavrommatis's rival, Pinhas Rutenberg.<sup>80</sup> Until 1925, it was assumed that the Palestinian population could simply learn by Zionist example.<sup>81</sup> Although Bentwich, Samuel, and Haycraft maintained a deep-seated faith in the potential for all peoples to flourish under the terms of the Mandate,<sup>82</sup> ever more pronounced economic and political divisions and inequalities<sup>83</sup> would coalesce into violence and then civil war under Britain's tutelage.<sup>84</sup>

### 3.2. Investing in the private and appealing to the public: the *Mavrommatis* proceedings

The fortunes of Euripides Mavrommatis provide a striking example of how these particular Mandate ideals played out in their domestic and international legal dimensions. Mavrommatis, variously identified as a Greek or Ottoman subject on the eve of the First World War, was granted a number of concessions by the Sublime Porte to undertake infrastructure projects in Jaffa and Jerusalem. The outbreak of hostilities forced a halt to all construction, but, soon after the war's end, Mavrommatis planned to resume work and so he made various communications with the newly established British authorities regarding his subsisting private rights. Over the course of a decade, Mavrommatis tried various avenues of redress in the face of many obstacles, sometimes seeking compensation and sometimes seeking to realize and readapt the terms of the contracts in the shifting environment of Mandate Palestine.<sup>85</sup> We can understand his place within the Mandate context as simultaneously both central and peripheral to the configurations of wealth and power. When able to speak the language of (public) international law, Mavrommatis commanded a central position in negotiating his claims. When unable to convince the Court about the international and public nature of (private) grievances, however, we see that, very quickly, Mavrommatis was flung out to the peripheral reaches of the

80 For part of the intertwined story of these two investors, see M. Naor, 'An Electrifying Story', *Ha'Aretz*, 25 January 2004, available online at [www.haaretz.com/print-edition/features/an-electrifying-story-1.111974](http://www.haaretz.com/print-edition/features/an-electrifying-story-1.111974).

81 Smith, *supra* note 73, at 7–8.

82 In the words of Bentwich, 'Industries hitherto unknown in Palestine found here a new home, obtaining their motive power from the electric station of Rutenberg, their capital from the bourgeois [European, Jewish] immigration, and their human power from the settlers who brought with them a new skill and new crafts', Bentwich, *supra* note 5, at 118–99.

83 For a consideration of the differences that developed between the two communities in this period, see R. Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (2007), 9–22.

84 Notably, the riots of 1920, 1921, and 1929; the Arab Revolt of 1936–39; and the war of late 1947–May 1948. In relation to the conflict of 1947–49, revisionist authors define the period until May 1948 as a civil war between Palestinians, the Yishuv and British forces before turning *international* with the withdrawal of British troops, the declaration of the state of Israel, and the intervention of Arab states in the fighting. For example, see A. Shlaim, *The Iron Wall: Israel and the Arab World* (2000), Chapter 1.

85 According to Politis, 'la readaptation . . . n'est pas pratiquement possible. Elle ne l'est pas, car, comme il a été expliqué dans l'exposé des faits, comme j'ai essayé de le faire moi-même, par suite de la politique adoptée par le Gouvernement britannique en Palestine – dont les concessions accordées à M. Rutenberg, en 1921, constituent la principale et la plus caractéristique manifestation –, il s'est créé dans ce pays une telle situation de fait que, malgré la meilleure volonté du Gouvernement britannique, dont je ne doute pas, M. Mavrommatis se trouve dans l'impossibilité matérielle de faire aujourd'hui ce qu'il aurait pu faire au lendemain de la guerre', Mr N. Politis, Counsel for Greece, Part II, Speeches and Documents Read before the Court, Series C, No. 7, February 1925, at 74.

silenced majority. Confronting Mavrommatis in his venture were the conflicting (and antecedent) claims of Pinhas Rutenberg, who had been granted extensive concessions for the development of hydroelectricity across Palestine even before the inauguration of the Mandate and in the face of British undertakings to the contrary.<sup>86</sup> The new political and cultural context of the Mandate would mean that, increasingly so, it was Rutenberg who was able to steer a course from the semi-periphery into the central chambers of power.

Not only would the granting of these rights provide us with three PCIJ cases, but they were instrumental in the reconfiguration of power and wealth in the Mandate context. According to Smith:

the Rutenberg concession, which granted extraordinary monopolistic rights to exploit . . . natural resources and to operate public utilities, was an important milestone in the politics of the economic policy, not only in the prestige it accorded the Zionist movement but also in the violent opposition it provoked.<sup>87</sup>

Harking back to our discussion of the Balfour Declaration, Shuckburgh of the Colonial Office declared that:

The Rutenberg concession has always been regarded as the most practical example of the policy of setting up a National Home for the Jews. It is so regarded by the Zionists themselves. We are always trying to divert the attention of the Zionists from [public] political to [private] industrial activities, and preaching to them from the text that their best chance of reconciling the Arabs to the Zionist policy is to show them the practical advantages accruing to the country from the Zionist enterprise. For these reasons we have supported and encouraged Mr Rutenberg's projects and I submit that we must continue to support and encourage them, so far as circumstances permit.<sup>88</sup>

To understand how British Mandatory rule reconfigured the distribution of wealth and power for Mavrommatis as well as Palestine nationals, I compare and contrast the strategies of argument used at the Bench and the Bar throughout the three proceedings. In particular, I explore how the public/private dichotomy was deployed in variously formalist and contextualist manoeuvres both to limit and to expand the scope of PCIJ, and thus League, oversight of the territory. What was the extent of international legal intervention here? How did the PCIJ interpret and affirm Mandate constructions of development and well-being? Whether within the confines of the Peace Palace or Palestine, who were the winners and the losers in the discursive boundaries constructed through the shifting notions of core and periphery? Although the PCIJ was confined by the particular claims brought by Greece and

86 Generally, Greece, in its pleadings, argued that the policies of the British were formulated before the Mandate as soon as it assumed control there. See *ibid.*, at 57. Bentwich, the first Attorney-General in Mandate Palestine, even mentioned a meeting between Mr Churchill, Secretary of State for the Colonies, and Rutenberg in 1921, where it 'was decided in principle' that Britain would grant extension concession rights to develop electricity in Palestine to Rutenberg. According to Bentwich, the 'scheme opened possibilities of irrigation on a large scale, and also of industrial development; and it was to become the symbol of the struggle between the demand for *progress* in Palestine and the sentiment for maintaining the Holy Land in its pristine *simplicity*', Bentwich, *supra* note 5, at 64. For a consideration of Rutenberg's connection to Palestine, see S. Reguer, 'Rutenberg and the Jordan Valley: A Revolution in Hydro-Electricity', (1995) 31 *Middle Eastern Studies* 691, at 709.

87 Smith, *supra* note 73, at 118.

88 Quoted in *ibid.*

Britain in each of the three proceedings, the case as a whole was united by the contest over when and how international law can guarantee the interests of individuals situated at the interface between core, colonialist institutions, and peripheral subordination. This, of course, is the classic, textbook account of the *Mavrommatis* case, but we will see that, rather than providing a comforting formula, this dispute highlights the ever-changing and contingent nature of rights and responsibilities at the national and international level.

The central question in the 1924 case turned on the Court's jurisdiction. It was alleged that Mavrommatis's rights had been frustrated by the British grant of concessions to Rutenberg. Mavrommatis invoked British undertakings to maintain Ottoman contracts as ensuring the continuing validity of his concessionary rights to develop water and electricity works in the territory. Despite Mavrommatis's status as a (private) individual, the Court characterized the matter as sufficiently international (and public) through its well-known formula:

By taking up the case of one its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law.<sup>89</sup>

As the Rutenberg concessions were granted by the British under the powers conferred by the Mandate in respect of public works (Article 11), jurisdiction could be founded in relation to disputed interpretation of this provision.<sup>90</sup> Article 26 provided:

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.

Under these two provisions, the Court could not consider the *Mavrommatis* concessions per se. Instead:

[the] question before the Court is whether by granting the Rutenberg concessions – which cover at least a part of the same ground – the Palestine and the British authorities have disregarded international obligations assumed by the Mandatory, by which obligations Greece is entitled to benefit.<sup>91</sup>

Although a formalist interpretation of 'public control' in Article 11 might have suggested that all activities not carried out by the government itself were private, the Court instead opted for a more expansive understanding of 'public': Rutenberg's interests were characterized as a 'public utility body'.<sup>92</sup> This then provided a sufficient link between notions of 'public control' in Article 11 of the Mandate and the

89 *Mavrommatis* (1924), *supra* note 2, at 12.

90 *Ibid.*, at 11.

91 *Ibid.*, at 19.

92 'But it does not appear to be correct to maintain that the English expression "public control" only covers cases where the Government takes over and itself directs undertakings of one kind or another. The expression is also used to indicate certain forms of action taken by the State with regard to otherwise private undertakings', *ibid.*, at 20. Cf. Judge Finlay, who argued that Art. 11 required direct public control by the state and not simply the granting by the state of a concession for public utilities. *Ibid.*, Judge Finlay, Dissenting Opinion, at 49.

jurisdictional requirements of Article 26 and opened the dispute up to the Court's consideration on the merits in its 1925 and 1927 judgments.

Unsurprisingly, Britain argued in all three hearings that negotiations had not been exhausted and that the dispute was not directly related to the application or interpretation of the Mandate.<sup>93</sup> Sir C. Hurst also employed the public/private dichotomy to argue that the Court could not concern itself with matters relating to a (private) individual.<sup>94</sup> Sir C. Hurst cautioned against rashly rushing to the PCIJ for all manner of disputes; instead, the 'arbitration movement is one which is bound to make progress slowly'.<sup>95</sup>

In contrast to the formalist and realist tone employed by the British, Greece adopted a flexible and contextual reading of the Court's jurisdiction as well as its role in the League system. Appealing to the Court's sense of justice and idealism, the arguments of Greece's Politis were a call to context as well as the creative application of the law. While recognizing Britain's overweening position in world affairs, Politis asked the Court to rise above power politics and entertain the claims of 'un petit pays'.<sup>96</sup> In reaction against British formalist overtures to deny jurisdiction, Greece characterized international law as a field free from the constraints found, for example, in Roman law.<sup>97</sup> The Court was persuaded by Politis's stance and therefore assigned no jurisdictional significance to either the contested nationality of Mavrommatis or the fact that one of the key treaties had not entered into force when proceedings were initiated. As was the case with the speedy transformation of Mavrommatis's claims from the private to the public realm, so, too, was the Court unconcerned with a raft of technical obstacles identified by Britain and the minority.<sup>98</sup>

93 Speech by Sir C. Hurst, Counsel for Britain, Part II, Speeches and Documents Read before the Court, Series C, No. 5, 4 September 1924, at 33; British Plea to Jurisdiction, at 439–40.

94 According to Douglas Hogg, 'Few things can be worse for the dignity of the Court than that it should find itself involved in trying a multitude of causes which are, in effect, claims by private persons such as are dealt with in the ordinary *municipal* courts but which are diverted to this tribunal because it happens that the respondent is a *sovereign State* and that the claimant is a subject of some other Power', Speech by Sir D. Hogg, Counsel for Britain, Part II, Speeches and Documents Read before the Court, Series C, No. 13, September 1927, at 20. In his separate opinion of 1924, Judge Bustamante also used the public/private device well to argue that the case at hand was not of concern to the League at all. The matter of Rutenberg concessions was strictly private, not only because it rested on a relationship between Britain and an individual. Furthermore, Judge Bustamante questioned the public and sovereign capacity of Britain in Palestine and drew a sharp distinction between its powers as a Mandatory compared to full public control as enjoyed by sovereign states. *Mavrommatis* (1924), *supra* note 2, Judge Bustamante, Dissenting Opinion, at 81–2.

95 Sir C. Hurst, *supra* note 93, at 41. Cf. Greece's position in the 1925 hearings, where the Court's involvement in the *Mavrommatis* affair is lauded as 'one further step up the hill of progress'. Also see Speech by Mr H. Purchase, Counsel for Greece, Part II, Speeches and Documents Read before the Court, Series C, No. 7, February 1925, at 22.

96 Speech by Mr M. Politis, Counsel for Greece, Part II, Speeches and Documents Read before the Court, Series C, No. 5, 4 September 1924, at 43. Also see Speech by Mr H. Purchase, Counsel for Greece, Part II, Speeches and Documents Read before the Court, Series C, No. 7, February 1925, at 155.

97 Politis, *supra* note 96, at 50. This argument reflects that of Lauterpacht in his consideration of private-law analogies in international law. Although the mandate conjured up ideas of the (private-law) trust, its creation through 'international legislation' and its remit transported it into the public realm. Generally, see H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927), 156–9, 191–202.

98 Especially that the Protocol attached to the Treaty of Lausanne entered into force after Greece's application. *Mavrommatis* (1924), *supra* note 2, at 33. Cf. *Mavrommatis* (1924), *supra* note 2, Judge Moore, Dissenting Opinion, at 57.



Greece's approach at the jurisdictional stage, however, cannot simply be read as a mirror opposite to Britain's strictly positivist, formalist stance. Greece, too, turned to classic positivist arguments when it called for the recognition of subsisting rights as created by contract between the Ottoman government and Mavrommatis.<sup>99</sup> Such undertakings, however, created not only legal effects, but moral ones: 'Ces contrats, comme tous autres droits acquis, le nouveau souverain doit les respecter non seulement par obligation légale, mais aussi par devoir moral.'<sup>100</sup> Greece's quest to 'internationalize' its dispute with Britain then simultaneously endorsed positivism's penchant for sovereign consent yet denied positivism's disavowal of morality: 'non d'après la volonté d'un souverain, mais sur la base du droit international, de l'équité et la morale des nations'.<sup>101</sup> Thus, we can see how varied and somewhat contradictory were the methods of argument in ultimately convincing the Court to found its jurisdiction.

Here, in the first set of hearings, the Court was keen to exercise its role as legal interpreter of the Mandate System and, throughout the three proceedings, the central issue revolved around the nature of Britain's *public* control and ownership of Palestine's resources. Throughout the three hearings that traced the fortunes of Mavrommatis in trying to affirm his concessionary rights, the Court read the requirements of Article 26 of the Mandate in light of Article 11:

The Administration of Palestine shall take all necessary measures to safeguard the interests of the *community* in connection with the *development* of the country, and, *subject to any international obligations accepted by the Mandatory*, shall have *full power* to provide for *public ownership* or *control* of any of the *natural resources* of the country or of the *public* works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the *close settlement and intensive cultivation of the land*.

The Administration may arrange with the Jewish agency mentioned in Article 4<sup>[102]</sup> to construct or operate, upon fair and equitable terms, any *public* works, services and utilities, and to develop any of the *natural resources* of the country, in so far as these matters are not directly undertaken by the Administration.<sup>103</sup>

For the majority in the 1924 and 1925 decisions, the matter was straightforward: subsisting international obligations to preserve valid Ottoman contracts would override later concessions that had been granted under the exercise of 'public control'. The Court chose not to take a restrictive view of 'public control' here, stating

99 'Le fait que la Palestine a cessé d'être une province ottomane pour être érigée en Etat sous le mandat de la Grande-Bretagne et avec un foyer national pour le peuple juif ne modifie pas la situation juridique créé avant la guerre au profit de M. Mavrommatis', Greek Memorial, Part II, Speeches and Documents Read before the Court, Series C, No. 5, 4 September 1924, at 105.

100 Ibid.

101 Ibid., at 107.

102 Art. 4 reads: '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'.

103 Emphasis added.



that the formation of policy, rather than direct control, was sufficient to transform the granting of a private contract into a public act.<sup>104</sup>

The validity of Mavrommatis's various concessionary rights was assessed by the Court in light of Britain's undertaking to maintain Ottoman contracts under Protocol XII of the Treaty of Lausanne ('the Protocol'). Under Article 1 of the Protocol, the contracting parties acknowledged that:

Concessionary contracts and subsequent agreements relating thereto, duly entered into before the 29th October, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals (including Companies) of the Contracting Powers, other than Turkey, on the other hand, are maintained.

As mentioned above, the fact that this instrument had not entered into force when proceedings were commenced was not of import to the Court. Here, it chose a flexible approach to establish its jurisdiction in contrast to the formalist tones employed especially by Judges Finlay, Moore, Oda, and Bustamante. As opposed to its decision in the *Lighthouses Case between France and Greece* in which the formalities of Ottoman ratification were overlooked to uphold subsisting rights under Article 9 of the Protocol,<sup>105</sup> the Court at least required the fulfilment of all formalities before being able to consider a claim as attached to Article 11 of the Mandate. Those concessions granted after the outbreak of war carried unspecified rights that could not be considered under the Court's limited jurisdictional remit. For the concessionary rights duly compliant with Britain's international obligations, the Court then considered in its 1925 judgment whether the *Mavrommatis* case was more amenable to Article 4, with its right of readaptation, or Article 6, which only allowed for the dissolution of contracts and compensation.<sup>106</sup> Mavrommatis could only make a case for readaptation if he could show that the concessions had been put into operation before 1923 and, despite strong British evidence of Mavrommatis's inaction, the Court chose to distinguish between the *commencement* of application of contracts versus their *execution* so that Mavrommatis's more expansive rights could be preserved.<sup>107</sup>

104 *Mavrommatis* (1924), *supra* note 2, at 19–24. At 20, the Court stated that 'it does not appear to be correct to maintain that the English expression "public control" only covers cases where the Government takes over and itself directs undertakings of one kind or another. The expression is also used to indicate certain forms of action taken by the State with regard to otherwise private undertakings'. Cf. Findley, who calls for a strict interpretation of the provision, arguing that it requires actual direct public control by the Mandatory. *Mavrommatis* (1924), *supra* note 2, Judge Findley, Dissenting Opinion, at 49. Also see *Mavrommatis* (1925), *supra* note 2, at 27.

105 *Lighthouses Case between France and Greece* (France/Greece), PCIJ Rep., (1934) Series A/B No. 62. It is interesting to compare Judge Anzilotti's dissenting opinion in this case, where he argues for a strict interpretation of Art. 9 of Protocol XII before any subsisting rights can be recognized.

106 Art. 4 of the Protocol states: 'Subject to the provisions of Article 6, the provisions of the contracts and subsequent agreements referred to in Article 1 shall, by agreement, and as regards both parties, be put into conformity with the new economic conditions'. Art. 6 provides: 'Beneficiaries under concessionary contracts referred to in Article 1, which have not, on the date of this Protocol, begun to be put into operation, cannot avail themselves of the provisions of this Protocol relating to re-adaptation. These contracts may be dissolved on the request of the concessionaire made within six months from the coming into force of the Treaty of Peace signed this day. In such case the concessionaire will be entitled, if there is ground for it, to such indemnity in respect of the survey and investigation work as, in default of agreement between the parties, shall be considered equitable by the experts provided for in this Protocol.'

107 *Mavrommatis* (1925), *supra* note 2, at 47–8.

In contrast to its flexible approach to jurisdiction and the meaning of ‘public control’, however, in its 1925 judgment, the Court remained deaf to Greece’s narrative of the increasingly difficult conditions faced by Mavrommatis; the Court was only prepared to consider context so far and could not abandon the formalist requirement of direct proof of the investor’s loss.<sup>108</sup> While Britain was at pains to paint its dealings with Mavrommatis as conforming to strict legal standards, Greece evoked a more nuanced and complex tale of colonial mismanagement and favouritism that reconfigured the allocation of wealth and power for the core as well as the periphery. In particular, the changes brought about through the Mandate regime led to a situation that precluded Mavrommatis from implementing his concessions, with even the bank withdrawing its backing in the knowledge of British preferences for Rutenberg’s concessions.<sup>109</sup> The story narrated by Greece highlighted how the quest for *continuity* was ultimately dashed by the *changes* wrought under the Mandate. Here, we see how public power could be used to thwart private rights.

Again, in the last hearing of 1927, one of the main devices employed by both sides was the public/private dichotomy, especially in relation to the contested public role played by Rutenberg and his relationship with the Jewish Agency.<sup>110</sup> Britain tried to bury the international legal significance of the Rutenberg concession grants under a layer of *private* interests. The Rutenberg concession was simply an agreement with not only an individual, but an individual with no official connections to the Jewish Agency. The details of Rutenberg’s relationship with the British and the Jewish Agency are not important here.<sup>111</sup> What is far more important, however, is the way in which the disadvantageous position Mavrommatis confronted was denied as being of any public, and thus *international legal*, significance, despite the fact that these conditions were instituted through the Mandate regime itself.<sup>112</sup> While Greece’s pleadings at times verged on the melodramatic, Britain’s invocation of the public/private dichotomy to distinguish the actions of the Jewish Agency, the Palestine Administration, and the Colonial Office in London contradicted many of its official statements and tried to shift responsibility elsewhere.<sup>113</sup> In relation to the Mandate-sanctioned relationship between the Palestine Administration and the Jewish Agency, the Court appreciated its special nature and thus characterized the

108 Ibid., at 42–5.

109 Ibid., at 17.

110 By reading the terms of Art. 4, the Court characterized the Jewish Agency as a ‘public body’. *Mavrommatis* (1924), *supra* note 2, at 21.

111 Britain repeatedly argued that Rutenberg was not a representative of the Jewish Agency, which was strictly true, but denies how his close connections facilitated the granting of his concession. Speech by Sir D. Hogg, Counsel for Britain, Part II, Speeches and Documents Read before the Court, Series C, No. 7, February 1925, at 128.

112 ‘The fact that a number of circumstances have combined to lessen the value of the concessions does not give M. Mavrommatis any claim against the British Government. The fact even that the *political* situation in Palestine has been so altered since 1914 that the concessions are likely to be less profitable – if it be a fact – does not give *legal* claim to damages against the British Government’, *ibid.*, at 100 (emphasis added).

113 For example, in the 1925 pleadings, Sir Hogg declared that ‘it is not the British government which has acquired the territory of Palestine. But the territory has been acquired by the Administration of Palestine, and the position of the British government arises only under Article 22 of the Covenant of the League of Nations’, Speech by Sir D. Hogg, Counsel for Britain, Part II, Speeches and Documents Read before the Court, Series C, No. 7, February 1925, at 101.

latter as a public body. In relation to the unfavourable investment climate, however, for those individuals lacking the backing of the Jewish Agency like Rutenberg,<sup>114</sup> the Court was unable to grant any specific relief in relation to the ‘hostile’ actions of the British government.<sup>115</sup>

Perhaps eager to free itself of the matter, by its third and final judgment, the Court employed an especially formalist reading of Mavrommatis’s rights regarding his readapted concessions and found that it no longer had jurisdiction. As in the first two hearings, the Court focused on whether Britain had exercised its power of ‘public control’ under Article 11 in relation to new contracts created with Mavrommatis. Unlike the Rutenberg concessions considered before, here, the Court determined that Mavrommatis’s concessions were the result of a purely ‘administrative’ decision with a *private* individual and did not amount to an exercise of full *public* power under Article 11.<sup>116</sup> Such a stance conflicted with a number of judges in the minority who took a more expansive reading of the nature of ‘public control’ as well as the ‘public’ role of the Jewish Agency in the development of the Mandate.<sup>117</sup> In addition, Judge Caloyanni in dissent cautioned against relying on traditional notions of ‘public authority’, arguing instead that the Court needed to be flexible in the face of the *sui generis* nature of the Mandate system.<sup>118</sup> Because of the special *international* character of the Mandates, it was crucial for the PCIJ to ensure a degree of conformity in the exercise of the total power granted to Mandatories.<sup>119</sup> He called for a ‘general’ interpretation of the Court’s jurisdiction so that it could continue to ensure respect for the terms of the Mandate as was affirmed in its 1924 decision.<sup>120</sup>

Ultimately, through a flexible deployment of formalist or contextualist methods, the Court had a significant degree of discretion in deciding when and how it would or would not intervene in the running of Mandate Palestine. Although the Bench and the Bar were anxious to examine certain aspects of Article 11’s terms, such a focus came at the cost of a broader reading of the Mandate’s underlying dynamics. For example and in relation to Article 11, no consideration was given to the meaning of ‘community’ or ‘needs of the country’ and even ‘development’ was treated

114 Described by Politis as ‘Je pretends que le Gouvernement britannique a exproprié, en fait, M. Mavrommatis parce qu’il a créé, par les concessions accordées à M. Rutenberg et par la politique inaugurée en Palestine à l’égard des Sionistes, une situation de fait qui rend impossible aujourd’hui à M. Mavrommatis la jouissance de ses droits’, Speech by N. Politis, Counsel for Greece, Part II, Speeches and Documents Read Before the Court, Series C, No. 7, February 1925, at 76.

115 *Mavrommatis* (1927), *supra* note 2, at 22.

116 *Ibid.*, at 19–20.

117 For example, see *ibid.*, Judge Altamira, Dissenting Opinion, at 37. It is interesting to note how Judge Altamira adopts a similar line of reasoning later in the 1934 *Oscar Chinn* case, which considered whether a de facto monopoly created by the Belgian government in the Congo had infringed on the rights of a private investor and businessman, Mr Chinn. As in the case of its 1927 majority judgment, the Court chose to disavow a broader, contextual reading to hold that there was no conflict between the Belgian policy and Belgium’s international obligations vis-à-vis freedom of commerce and navigation on the Congo River. In contrast, Judge Altamira looks at the substantive effects of the policy to hold that conditions of inequality amount to a conflict. *The Oscar Chinn* case (Britain/Belgium), PCIJ Rep., (1934) Series A/B No. 63.

118 *Mavrommatis* (1927), *ibid.*, Judge Caloyanni, Dissenting Opinion, at 52–4.

119 *Ibid.*, Judge Nyholm, Dissenting Opinion, at 26.

120 *Ibid.*, at 30–1.

uncritically – this despite the fact that the Jewish Agency was accorded a ‘public’ role as well as public recognition in the context of the Mandate document. As for the majority of the population concerned, the Palestinian Arabs and, in contrast to Mavrommatis’s (indirect) standing, the public/private distinction created in the Mandate document prevented their perspectives from being heard by the PCIJ. Thus, we see that, although the PCIJ precluded “‘private” lives from the sphere, the international legal system strongly influences the spheres it deems private’.<sup>121</sup> As was the case for ‘native’ concerns before the PMC,<sup>122</sup> the PCIJ was institutionally blocked from any direct engagement with Mandate populations. Substantively, though, even when given the chance to consider how wealth and power were reconfigured in the territory, the Court ultimately chose to remain silent. In failing to question inequalities at the heart of the Mandate system, then, the PCIJ was complicit in denying not only Mavrommatis’s broader claims, but also the economic *and* political rights of those ‘peripheral’ populations in Palestine.

#### 4. CONCLUSION

In tracing the fortunes of Mavrommatis within the context of the Mandate system, a number of themes have emerged that broadly support recent critical work on the ruptures and continuities for peoples in the periphery during the era of the League. Here, I sought to show how Arab peoples under either protectorate or Mandatory regimes remained excluded from formal participation in the international system. Although, of course, the Mandate framework brought with it new guarantees for native populations, we have seen how in fact such dividends were far from liberating. Various terms of the Palestine Mandate did indeed allow the Court more grounds on which to base its jurisdiction, but such provisions can also be read as simply allowing for greater judicial endorsement of underlying inequalities in the distribution of wealth and power under British rule. Situated between the terms of the Mandate and the Court as well as between Britain and Palestine’s subject population, Mavrommatis’s fortunes encapsulate the ways in which international law as spoken within the PCIJ constructed and reconstructed membership within the core, the periphery, and the semi-periphery during the interwar period. Mavrommatis’s odyssey to various locales of the core, such as London and The Hague, would ultimately end on the fringes of the former Ottoman world, somewhere between Jerusalem and the Aegean.

Within the confines of the courtroom, those at the Bench and the Bar drew on a number of innovative devices to support their arguments, whether through a reliance on the public/private distinction or through formalist/contextualist readings of the relationship between law and fact. The use of these tools allowed each speaker to configure her own particular vision of the role of international law

121 H. Charlesworth, ‘Worlds Apart: Public/Private Distinctions in International Law’, in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (1995), 243–60, at 250.

122 Anghie, *supra* note 10, at 175.

vis-à-vis the governance of 'backward' peoples. We saw that, despite these many rhetorical possibilities, time and again, the periphery remained very much a silent interlocutor in the proceedings. This did not mean, however, that peripheral peoples were not deeply affected by the legal arguments endorsed and validated within the PCIJ. Judicial oversight combined with structural inequalities at the heart of the Mandate for Palestine would have enduring effects past the dawn of decolonization.