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## ON SETTLEMENT OF DISPUTES\*

*By Walter Zander\*\**

ON THE SETTLEMENT OF DISPUTES ABOUT  
THE CHRISTIAN HOLY PLACES\*

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*Preamble*

Disputes about the Christian Holy Places have played a major part in the history of the Middle East and indeed of Europe for many centuries. The main issues of these conflicts are still unsolved, and the fact that the Sanctuaries are now under the control of the State of Israel has added a new dimension to the problems.

This study tries to investigate the question of the jurisdiction over the Christian Sanctuaries as it presents itself today. It does not deal with the Holy Places of Judaism and Islam since their treatment, in spite of many common elements, requires different considerations.

*The Religious Basis of the Disputes*

The disputes about the Christian Holy Places are essentially disputes among Christian communities, and not, as might be assumed, controversies between Christians on one side and members of other religions - Moslems or Jews - or the government of the country, on the other. They spring ultimately from the divisions of the Church, and although political and national interests frequently played a part, they must be seen first and foremost in the context of the religious issues involved.

Divisions of the Church go back to the early centuries of the Christian era. Thus the Council of Chalcedon (451 C.E.) left the Christian world divided between the Latino-Byzantine Churches and the Eastern Churches of the Copts, Jacobites, Nestorians, and Armenians. But the history of the Christian Holy Places in and around Jerusalem has been determined for nearly a thousand years mainly by the conflict between the Roman Catholic and the Greek Orthodox Churches. An exact date at which the schism between Rome and Byzantium came into existence cannot be ascertained. The alienation was a slow and gradual process. But it is usually associated with the year 1054 when Cardinal Humbert, as Ambassador of Pope Leo IX, placed on the altar of the Hagia Sophia, the Bull of excommunication of Patriarch Michael Cerelarius, and the latter in turn, condemned the Ambassador and his associates. Since then communion between Rome and the Orthodox Churches has been interrupted, each claiming to be the true Catholic Apostolic Church, and this conflict lies at the root of the disputes about the Christian Holy Places.

During the crusades great efforts were made by the West, not only to liberate the Christian Sanctuaries from Islamic rule, but to establish Western influence in the liberated areas.

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Thus, in 1099, immediately after the conquest of Jerusalem by the crusaders and for the first time in history, a Latin was made Patriarch of Jerusalem. Roman predominance continued, as long as the Latin Kingdom maintained itself in Jerusalem. When, after less than a hundred years, Jerusalem fell again to the Moslems in 1187, Saladin re-established the pre-eminence of the Greeks. But soon, by purchase, missions and diplomatic action, a new Western movement began to recreate a Latin presence in the country.

During the 730 years of uninterrupted Moslem rule - from Saladin to Allenby the Christian communities in the Holy Land lived in an uneasy relationship of almost continual tension which from time to time burst into conflict and even violence. After the conquest of Jerusalem by the Turks in 1517, jurisdiction naturally rested with the Ottoman Government, and Catholics and Orthodox vied with each other in petitioning the Sultan for decrees (firmans), favourable to their cause. It was natural that in this struggle the Latin Christians in the Ottoman Empire could largely count on the support of Catholic States, such as Venice, Genoa, France, Austria and Poland, whilst the Orthodox - until the emergence of Russia at the end of the 18th century - had to rely on the strength of the indigenous population and their influence at the Court in Constantinople. As a result, pre-eminence in the Holy Places changed time and again according to the power of the contending parties and their allies. For the Foreign Powers the protection of the Christian communities and their rights gradually became a political issue and a means of increasing their prestige and influence. France, the traditional protectress of Catholic interests in the East, reached the high water mark of her influence in the Treaty of 1740 which, among numerous privileges of a commercial or political nature, confirmed the position of the Franciscans in the Church of the Holy Sepulchre. This Treaty has often been considered as a *Magna Carta* of Catholic rights; but the clauses concerning the Holy Places did not prevail for long against the opposition of the local Christian communities. There was fighting within the Church, and in 1757 a new firman re-established the pre-eminence of the Orthodox, creating the state of affairs which in fact has continued up to the present day.

#### *Jurisdiction in the Treaties of Paris and Berlin*

During the crisis which preceded the Crimean War, France renewed her demands for the restitution of Catholic rights in accordance with the Treaty of Capitulations of 1740, whilst Russia made known that she would not tolerate an expulsion of Orthodox monks from the Sanctuaries. Attempts to settle the issue by a mixed Commission failed; and the Sultan, having appointed a purely Turkish Commission of lawyers and other experts, exercised his right of jurisdiction by promulgating on February 8, 1852 what was to become the last firman on the issue of the Christian Holy Places. It contained some minor modifications, but in essence confirmed the state of affairs which had existed since 1757.

Soon afterwards the Crimean War broke out. When peace was restored by the Treaty of Paris<sup>1</sup> (March 30, 1856) all territories which had been occupied during the fighting were mutually restored. As for the Christian Holy Places which had played so great a part at the outbreak of the war, the situation remained unchanged. In fact, the Sanctuaries are not mentioned in the Treaty at all.

<sup>1</sup> Accounts and Papers (24) Vol. LXI (1858) 1 *et seq.*

The sovereignty of the Sultan, who had been the ally of Britain and France, remained untouched. The signatories even renounced all rights to interfere “collectively or separately in the relationship between the Sultan and his subjects, nor in the internal administration of his Empire” (Article IX). The jurisdiction of the Sultan over the Christian Holy Places was not questioned.

A new era, however, began with the Treaty of Berlin<sup>2</sup> (July 13, 1878) in which for the first time in history an agreement about the Christian Holy Places was reached among the major European Powers and the Ottoman Empire. Russia, after her victorious campaign of 1877/78, had imposed on Turkey in the Preliminary Treaty of Peace of San Stefano<sup>3</sup> (March 3, 1878) the surrender of large territories both in Europe and Asia, and in addition had secured for herself a number of rights and privileges in the religious sphere. This expansion of Russian influence aroused determined opposition in the West and the proposal was made to call a Congress of all signatories of the Treaty of Paris. France was willing to attend but anxious that no question should be raised which might affect her interests in the East. She therefore made her acceptance dependent on the condition that Egypt, Syria and the Christian Holy Places were excluded from the discussions.

The issue of the Holy Places came up, however, in the 12th meeting of the Congress held on July 4. The discussion was based on Article XXII of the Treaty of San Stefano, the relevant clauses of which read, as follows:

Les ecclésiastiques, les pèlerins, et les moines Russes voyageant ou séjournant dans la Turquie d'Europe et d'Asie jouiront des mêmes droits, avantages, et priviléges que les ecclésiastiques étrangers appartenant à d'autres nationalités.

Le droit de protection officielle est reconnue a l'Ambassade Impériale et aux Consulats Russes en Turquie tant à l'égard des personnes sus-indiquées que de leurs possessions, établissements religieux, de bien-faisance et autres dans les Lieux Saints et d'ailleurs.

Les moines de Mont Athos d'origine Russe seront maintenus dans leurs possessions et avantages antérieurs, et continueront à jouir dans les trois couvents qui leur appartiennent et dans les dépendances de ces derniers, des mêmes droits et prérogatives que ceux qui sont assurés aux autres établissements religieux et couvents de Mont Athos.

The demand for equality of rights for Russian Christians did not provoke objections. The whole trend of the Congress had been to abolish the privileges of individual Christian communities and to replace them by the rights of Christendom as a whole. This had been the particular concern of Lord Salisbury and had been strongly supported by Bismarck. But great difficulties arose in connection with the “possessions, religious, charitable and other establishments of Russian ecclesiastics in the Holy Places”.<sup>4</sup> In fact, the Russians had no such establishments within the Sanctuaries, although they owned much ecclesiastical property in the country as a whole. The Orthodox rights within the

2 Accounts and Papers Vol. LXXXIII (1878) 353 *et seq.* (contains text of Treaty and Minutes of all Meetings).

3 *Ibid.*, at p. 241 *et seq.*

4 Francis Waddington, “La France au Congrès de Berlin” (1933) 156 *Revue Politique et Parlementaire* 481-82.

Holy Places especially in the Church of the Holy Sepulchre and the Basilica of the Nativity, were vested in the Greeks. The issue therefore touched on the delicate internal relationship between Greeks and Slavs within the Orthodox Church in the Holy Land; and there was some uneasiness that Article XXII aimed indirectly at a deposition of the Greek monks, who were Ottoman subjects, and at replacing them at a given moment by Russians.

But even more important was the demand that Russia was to be granted “*un droit de protection officielle*”; i.e., a protectorate over all Russian Christians in the Holy Places; for this brought her - within the Sanctuaries - face to face with France who maintained similar rights as protectress of the Latins.

Before, however, the French and Russian claims concerning their respective protectorates were confronted in the deliberations, the situation was made still more complicated - and from the French point of view more difficult - by an intervention of Lord Salisbury. As Protestant and “*toujours préoccupé de considérations humanitaires*”, he was not interested in exclusive religious protectorates, whether they concerned Roman-Catholics or Orthodox. He was convinced that complete equality should be given to all Christian denominations in the Holy Land and that the protection of the different nationalities be left to their respective diplomatic representations and Consulates. He therefore proposed to amend Article XXII as follows:

Les ecclésiastiques, les pèlerins et les moines de toutes les nationalités voyageant ou séjournant dans la Turquie d'Europe et d'Asie jouiront d'une entière égalité de droits, avantages et priviléges.

Le droit de protection officielle est reconnu aux représentants diplomatiques et aux agents consulaires des Puissances en Turquie tant à l'égard des personnes sus-indiquées que de leurs établissements religieux, de bienfaisance et autres dans les Lieux-Saints et ailleurs. Les moines du Mont Athos seront maintenus dans leurs possessions et avantages antérieurs et jouiront sans aucune exception d'une entière égalité de droits et prérogatives.

For France this move was most embarrassing. For centuries she had considered herself the exclusive protectress of all Latins whatever their nationality might be; and this protectorate with its inherent diplomatic, ceremonial, and liturgical privileges had been a major source of prestige and political power in the East. All this - according to Lord Salisbury - was now to be abolished. This was bad enough in relation to Russia and the Protestant Powers. But worse, even among Catholic States, French pre-eminence was no longer uncontested.<sup>5</sup> Italy, above all, had openly tried after the French defeat in the Prussian war of 1870-71 to take over France's position. Austria had taken similar steps, and also Germany claimed the right to protect her Catholic subjects herself, wherever they were. In this predicament the French representatives saw but two alternatives: either to refuse any discussion of the article in accordance with the terms under which the invitation had been

<sup>5</sup> J. Valfrey, *Histoire de la Diplomatie du Gouvernement de la Défense Nationale, Deuxième Partie* (Paris, 1872) 145-46; B. Collin, *Le Problème juridique des Lieux-Saints* (Paris, 1956) 56.

accepted - a move which had to be directed against Lord Salisbury and therefore could hardly be recommended - or to take the opposite line and boldly claim the recognition of the rights of France. M. Waddington,<sup>6</sup> the French Foreign Minister, wrote to the President of the Council:

Quant aux Plénipotentiaires français, se plaçant au point de vue des priviléges de la France en Orient, ils avaient le choix entre deux solutions: ou bien réclamer la suppression du paragraphe tout entier qui pouvait mettre dans l'avenir la protection officielle des agents étrangers en opposition avec celle que nous exerçons spécialement sur les Latins, ou bien saisir cette occasion de constater nos droits en les réservant expressément et de stipuler le maintien du statu quo dans les Lieux-Saints.

He chose the second way, agreeing to the English text and proposing the addition of the following clause:

Les droits acquis à la France sont expressément réservés et il demeure entendu qu'aucune atteinte ne saurait être portée au statu quo dans les Lieux-Saints.

Prince Gorchakov, on behalf of Russia did not object. He felt that the status quo should be maintained for all Powers. Thus the French suggestion was accepted. Waddington in his despatch to the President reported: "*Cette disposition sera inserée dans le Traité général*", and he continued almost triumphantly: "*et des droits que les Puissances catholiques nous disputent depuis quelques années aussi bien que la Russie, vont se trouver consacrés par un acte européen*". Accordingly Article LXII paras. 5-8 of the Treaty of Berlin received the following formulation:

Ecclesiastics, pilgrims, and monks of all nationalities travelling in Turkey in Europe, or in Turkey in Asia, shall enjoy the same rights, advantages, and privileges.

The right of official protection by the Diplomatic and Consular Agents of the Powers in Turkey is recognized both as regards the above-mentioned persons and their religious, charitable and other establishments in the Holy Places and elsewhere.

The rights possessed by France are expressly reserved, and it is well understood that no alterations can be made in the status quo in the Holy Places.

The monks of Mount Athos, of whatever country they may be natives, shall be maintained in their former possessions and advantages, and shall enjoy, without any exception, complete equality of rights and prerogatives.

The way in which the representatives of Britain and France reported to their governments on the contents of the agreement, is an example of how many-sided a thing truth can be. Lord Salisbury stressed the equality of rights for all denominations which had been established:

<sup>6</sup> *Ministère des Affaires Étrangères, Documents Diplomatiques Français (1871-1900) 1re Série, Tome second, (Paris, 1930)* 349-50.

The special protection which had been stipulated for ecclesiastics of the Russian religion and for Russian monasteries on Mount Athos ... have been entirely abandoned. The Treaty contains large provisions for securing religious liberty to all persons, nations or foreigners, living within the Ottoman dominions, but no special privileges are created for the members of any single nation.<sup>7</sup>

M. Waddington on the other hand hailed the preservation of the privileges of France:

Nous avons maintenu avec succès les priviléges de jurisdicition nationale et de patronage religieux que la France tient d'une longue tradition, et nous avons réussi, dans un moment où ils nous sont disputés, à les faire consacrer pour la première fois dans un Traité que toutes les grandes Puissances de l'Europe ont signé.<sup>8</sup>

The agreement on the Christian Holy Places which had been reached concerned, in the first instance, the protectors of the religious communities involved. The rights of these communities themselves, and in particular the ancient conflict between the Latins and the Greeks about their respective positions in the Sanctuaries - according to the minutes of the Congress had not been mentioned in the deliberations. But the formulation of the clause was so wide that it covered all aspects of the issue, protectors and protected alike. The seven Signatories of the Treaty (Great Britain, France, Germany, Austria-Hungary, Italy, Russia .and Turkey) had pledged themselves to maintain the existing order. For the Christian Powers this meant not to *demand*, and for Turkey, not to *grant* any change of the *status quo*. Turkish jurisdiction over the Christian Sanctuaries was no longer free, but by international agreement suspended; and no investigation into substantive rights and claims concerning the Christian Holy Places was in future to take place.

Many greeted this result with relief, because the precarious balance of power in Europe seemed no longer threatened by the division of the Church. But the Churches themselves were no party to the agreement, and Catholic writers time and again protested that they did not consider the status quo as binding. "For the Catholic Church", wrote Bishop Collin, "the status quo is no solution ... It is not founded on mutual consent and any attempt to base the solution of the problem of the Holy Places upon it, is doomed".<sup>9</sup>

### *The Christian Holy Places and the War Aims 1914-1918*

The chance to break the deadlock came in November 1914 with the entry of Turkey into the war on the side of the Central Powers; an event which not only led to momentous changes in the political structure of the Middle East, but opened the way to a new and powerful initiative of the Catholic Church in the struggle about the Sanctuaries, and brought the issue of the jurisdiction over the Christian Holy Places to the forefront of international controversy.

7 Supra n. 2 at p. 355-6

8 Supra n. 6 at p. 359

9 B. Collin, op. cit. supra n. 5 at p. 186.

The first act was the *Constantinople Agreement*<sup>10</sup> of March-April 1915 by which Great Britain, France and Russia agreed that in case of a successful outcome of the war, Constantinople should become Russian. The agreement itself was not expressly concerned with Palestine nor with the Christian Holy Places. But on the Russian side it had strong religious associations. The liberation of Constantinople from Islamic rule and the restoration of the Hagia Sophia to the Orthodox Church had been in the Russian mind for centuries. Dostoevsky, in his famous article “Sooner or Later Constantinople Must Be Ours”<sup>11</sup> had proclaimed that it was “not only the famous harbour and the way to the seas and oceans ... but the future of Orthodoxy on earth” which were here at stake. To some Russians Constantinople, as it were, even included the Holy Land; Palestine, in some mystical way, was claimed as an extension of Holy Russia; and such convictions were shared by many of the Russian peasant-pilgrims who until 1914 annually flocked to Jerusalem in their thousands.

According to Maurice Paléologue, who at that time was French Ambassador to Petrograd, the question of the Christian Sanctuaries was discussed between him and the Tsar as early as November 1914,<sup>12</sup> and it moved to the forefront of the conversations in March 1915.<sup>13</sup> On March 16 Paléologue explained to the Tsar and to Sazonov, the Russian Foreign Minister, the French interest in and historical links with Palestine. According to his published Memoirs the Tsar agreed. But Poincaré, on the strength of Paléologue’s official report on March 18, entered into his diary: “*Le Tsar et son Ministre des Affaires Etrangères ont déclaré à notre Ambassadeur... que la Russie n’abandonnerait jamais au protectorat d’une puissance catholique (ni évidemment d’une puissance protestante) Jérusalem, la Galilée, le Jourdain, le lac de Tibériade*”.<sup>14</sup>

Paléologue himself on the day of their conversation handed to Sazonov two alternative drafts of an agreement on the Holy Places, both of which were based on Article LXII of the Treaty of Berlin:<sup>15</sup>

As for the Holy Places, the Russian and French Governments referring to Article LXII of the Treaty of Berlin agree in no way to violate the existing order.

As for the Holy Places, the Russian and French Governments will enter into an agreement on the basis of the existing order (Article LXII of the Treaty of Berlin).

The respective protectors of Eastern and Western Christendom therefore agreed that in the new order of things the relationship of the Churches in the Sanctuaries should be determined, as before, by the *status quo*. Jurisdiction over the Holy Places was to remain in abeyance.

10 Documents on British Foreign Policy (1919-39) Series I, Vol. IV, p. 635.

11 Feodor Dostoevsky, Diary of a Writer (March, 1877).

12 Maurice Paléologue, *La Russie des Tsars pendant la Grande Guerre* Vol, I (Paris, 1921) 200.

13 Ibid., p. 322.

14 Raymond Poincaré, *Au Service de la France* Vol. VI (1930) 118.

15 E. Adamov, *Die Europäischen Mächte und die Türkei während des Weltkrieges, Die Aufteilung der Asiatischen Türkei* (Dresden, 1932) 29, (Document No. 30).

The same line of thought was pursued in the *Sykes-Picot Agreement* by which Britain and France defined their respective spheres of interest in Asiatic Turkey. In this respect Russia had left her Western allies a free hand, but had drawn their attention to her own interests in the Christian Sanctuaries. These interests were stressed even more when, in February 1916, both Sir Marc Sykes and M. Picot came to Petrograd for the final negotiations, Sazanov submitted a memorandum to the Tsar assuring him that Palestine would form “a special autonomous province under international control”.<sup>16</sup> Likewise the Russian Minister of War confirmed solemnly that “Palestine will be put under the general protectorate of the European Powers”;<sup>17</sup> and Sazanov in a communication to Paléologue declared<sup>18</sup> that “Russian interests covered all Holy Places and territories where Orthodox institutions existed. All these towns and places must be put under an international administration, with free access to the harbours of the Mediterranean, and the Russian Government would never recognize exclusive sovereign rights of any Power in the country”. In accordance with these wishes the following clause was incorporated in the Agreement of May 16, 1916:

With a view to securing the religious interests of the Entente Powers, Palestine, with the Holy Places, is separated from Turkish territory and subjected to a special regime to be determined by agreement between Russia, France and England.<sup>19</sup>

Both, the Constantinople Agreement and the Sykes-Picot Agreement, therefore envisaged an international regime for the Christian Holy Places which was to maintain the *status quo* in the Sanctuaries and to exclude any judicial investigation into its legal foundations.

Soon afterwards the Revolutionary Government in Russia repudiated all annexations and formally renounced all rights arising from the treaties with the Allies, whilst British Forces conquered Palestine.

With Russia’s support of internationalization gone, a new situation had been created, and in December 1918 Clémenceau, on behalf of the French Government, agreed that Palestine, instead of being subjected to an international rule, should become a British Mandate. New legal concepts had now to be worked out. Technically the arrangements were part of the proposed Peace Treaty with Turkey, the Fifth Chapter of which dealt with Palestine. A number of drafts were produced in the Foreign Office, and the clause concerning the Holy Places and the jurisdiction over them, in the course of time underwent considerable changes.<sup>20</sup>

<sup>16</sup> *Ibid.*, p. 62.

<sup>17</sup> *Ibid.*, p. 83.

<sup>19</sup> *Ibid.*, p. 72.

<sup>19</sup> H. W. V. Temperley, *A History of the Peace Conference of Paris* Vol. VI (London, 1924) 16.

<sup>20</sup> Public Record Office, (hereafter referred to as P.R.O.) FO 608/116 and 117.

### *Three Drafts of the Foreign Office Concerning the Holy Places*

The earliest draft, headed “Sketch of a Draft Treaty of Peace between Turkey and the Allied Governments” (without a date but commented upon in the files of the Foreign Office on March 1, 1919)<sup>21</sup> followed, regarding the Holy Places, the line of thought of the Constantinople and Sykes-Picot Agreements. It laid down that the Sanctuaries should be transferred by the Mandatory to a “suitable religious organisation” which was to be in the exclusive charge of the total administration and jurisdiction:

The Holy Places of the Christian religion specified in Annex 2 to this Chapter will be transferred to the permanent possession, control, and administration of a suitable Christian organisation appointed or selected by the British Government, and the Holy Places of the Moslem religion specified in Annex 3 will be transferred to the permanent possession, control, and administration of a suitable Moslem organisation similarly appointed or selected. The Governor of Palestine, under the instructions of the British Government, will within twelve months of the exchange of ratification of this Treaty take the necessary steps to effect these transfers, including the precise delimitation of the transferred areas. Thereafter the transferred areas will be completely withdrawn from the administration and jurisdiction of the Government of Palestine, which shall exercise no authority of any kind therein, and they will be exclusively controlled and administered by the organisations to which they are respectively transferred. The Palestine Courts of justice will have no jurisdiction within the transferred areas, and Palestinian taxation will not be levied therein. The local government, the preservation of order, and the administration of justice in each of the transferred areas will be provided for by the organisation to which it is transferred ...

Annex 2 listed the following Sanctuaries: (1) The Christian Quarter of the walled city of Jerusalem, including the whole of the Via Dolorosa; (2) The Gardens of Gethsemane and the Church of the Tomb of the Virgin; (3) The Church of the Nativity in Bethlehem and a sufficient area surrounding it; (4) The village of Nazareth.

A second draft,<sup>22</sup> dated April 1919, greatly modified the clause concerning the transfer of the Holy Places to an international body. It provided that the list of Sanctuaries to be transferred was not to be a part of the Treaty, but that the selection was to be made by the British Government. The time limit for the transfer was abolished; and whilst the first draft had stipulated that “the transferred areas will be completely withdrawn from the administration and jurisdiction of the Government of Palestine”, it was now laid down that “the transference shall not affect the right and duty of the British Government to maintain order and decorum in the transferred places” and the buildings and sites concerned were to be subject to the laws relating to public monuments. Lastly, the provision that “the Palestine Courts of justice will have no jurisdiction within the transferred areas” was omitted:

<sup>21</sup> P.R.O. FO 608/116 p. 168 ss. 174.

<sup>22</sup> Ibid., p. 330

14. The British Government will be responsible for providing that certain Holy Places, religious buildings or sites regarded with special veneration by the adherents of one particular religion, are transferred to the permanent possession and control of suitable bodies selected or appointed by it and representing the adherents of the religion concerned. The selection of the Holy Places, religious buildings or sites to be so transferred will be made by the British Government. Such transference shall, however, not affect the right and duty of the British Government to maintain order and decorum in the places so transferred, and the buildings and sites will be subject to the provisions of such laws relating to public monuments as may be enacted by the Government of Palestine ...

Up till then the formulation of the text had been in the hands of the Governments which were to be signatories of the Treaty of Peace. Now, however, non-governmental forces began to participate. The first of these was the Zionist Organization. In July, Balfour had authorized Mr. Forbes Adam of the Foreign Office, who at that time served with the Peace Delegation in Paris, to discuss with Dr. Weizmann, Mr. Frankfurter (as he than was) and Mr. Ganz the draft for the Palestine Mandate "on the supposition that Great Britain were to obtain the mandate for Palestine.<sup>23</sup> As a result several meetings took place. The Zionist leaders naturally were mainly interested in the clauses which concerned the Jewish National Home and made few remarks on the articles dealing with the Holy Places. But one of these meetings, inadvertently, led to a further development in this field. On July 18, Mr. Forbes Adam, recording in the Minutes that "the articles dealing with the Holy Places were accepted by the Zionists after some discussion" added the following personal observation:<sup>24</sup>

Incidentally it should be pointed out in connection with Article 14 that no provision is actually made for the Mandatory to decide by the appointment of an appropriate commission the ownership of Holy Places, buildings or sites which will be disputed by various religions, and some such additional provisions ought perhaps also to be made to our Article.

Accordingly in the next draft the following paragraph 2 was added to Article 14:

The Mandatory will also be responsible for deciding after investigation by a commission appointed by it and containing representatives of the denominations concerned, questions arising in connection with any Holy Places, religious buildings or sites which, in the opinion of the Mandatory should be dealt with under this Article, but whose ownership or control may be disputed by two or more denominations;<sup>25</sup>

and in a memorandum dated September 26, 1919 by Mr. Forbes Adam, Article 14 as a whole was recast as follows:<sup>26</sup>

23 *Documents on British Foreign Policy (1919-39)* Series I Vol. IV, p.428.

24 P.R.O., FO 608/117 p. 105 reverse.

25 P.R.O., FO 608/116 p. 484.

26 See *supra* n. 23.

14. The Mandatory will be responsible for providing that certain Holy Places, religious buildings or sites regarded with special veneration by the adherents of one particular religion, are transferred to the permanent possession and control of suitable bodies selected or appointed by it and representing the adherents of the religion concerned. The selection of the Holy Places, religious buildings, or sites to be so transferred will be made by the Mandatory.

The Mandatory will also be responsible for deciding, after investigation by a Commission appointed by it and containing representatives of the denominations concerned, questions arising in connection with any Holy Places, religious buildings or sites, which in the opinion of the Mandatory, should be dealt with under this Article, but whose ownership or control may be disputed by two or more denominations.

In all cases of transference, however, the right and duty of the Mandatory to maintain order and decorum in the places transferred, shall not be affected, and the buildings and sites will be subject to the provisions of such laws relating to public monuments as may be enacted by the Government of Palestine.

The rights of possession and control conferred upon (sic) Article are guaranteed by the League of Nations, and shall never be subject to any diminution or modification whatsoever, unless by the consent of a majority of the Council of the League of Nations.

#### *Catholic Initiative and Article 14 of the Mandate*

The other non-governmental body which took a profound and most active interest in the shaping of the terms of the Palestine Mandate, was the Catholic Church. In the negotiations the Zionist Organization had concentrated on those clauses which concerned the Jewish National Home. The Vatican concentrated its main efforts on the issue of the Holy Places and especially the respective rights of the Christian communities in the Sanctuaries. For more than 150 years Catholics had felt themselves to be the victims of usurpations by the Greeks. Now a unique historic situation seemed to present itself. Jerusalem was freed from Moslem rule. Russia, the defender of the Orthodox, was powerless and - perhaps even more important - disinterested in places of Christian worship.<sup>27</sup> A new Latin pre-eminence in the Holy Land, and a restoration of the glories of the first crusade seemed imminent.

27 It is of interest that, in contrast to the attitude of the Soviet Government, Prince Lvoff, M. Sazanoff and M. Maklakoff, as Members of "The Russian Political Conference in Paris in the interest of the administration of Admiral Kolchak" on July 5, 1919, submitted to the President of the Peace Conference a memorandum which stresses the profound interest of Russia in the Holy Places, draws attention to the centuries-old rivalries between the Orthodox and Catholic clergy regarding the Sanctuaries, asks for an unbiased administration and claims the restoration of all Russian Ecclesiastical property. The memorandum adds that if the religious interests are assured, Russia will reaffirm her favourable attitude towards the establishment of a Jewish National Home. *Documents on British Foreign Policy* (1919-1939) Series I, Vol. IV, p. 670 *et. seq.*

Paschal Baldi, one of the leading Catholic writers in this field, in a brochure of November 1918, printed in Rome by the Istituto Pio IX, exclaimed :<sup>28</sup>

To hope under Turkish rule for a re-assertion of the Latin element, a triumph of Catholicity in the Holy Land, would have exceeded human foresight, and would have appeared as something more than an illusion, an insanity.

Today the improbable has become a fact; today by a wonderful combination of events, which we look upon as providential, Italy, France and England, three nations which had such a large part in the Holy Wars, have Jerusalem in their power; today the Catholics of the whole world may justly expect the hour of justice finally to strike; today they may finally hope that for the Sanctuaries of Palestine may return the splendour of the era of Constantine, the splendour of the first century of the Crusades.

Using the term “usurpers” for Moslems and Orthodox alike, he added:

At last the day is about to break which the Fathers of the Holy Land have awaited for more than a century and a half, the day on which they will regain possession of the usurped sanctuaries and the exercise of their violated rights;

and equating Latin Christendom with Christendom as a whole, he concluded:

It is now seven centuries since Christian Jerusalem, Latin Jerusalem, fell into the power of the followers of Islam, who by right of conquest possessed themselves of the sacred monuments existing there, and disposed of them at will. Today, the nations of Christianity, the Latin nations, have taken revenge on the usurpers; today the warrior-descendants of the Crusaders of the twelfth century have re-occupied the Holy City. They therefore retake what belongs to them; they re-enter the Sanctuary of the Resurrection erected by their own forefathers and restore it to Catholic worship.

In the same spirit the Custos of the Holy Land submitted to the Peace Conference in Paris the ‘Memorandum on the Latins’<sup>29</sup> in which - after surveying the history of the Holy Places from a Catholic point of view - he summed up the situation in the following words:

The great question of the Holy Places has not yet been solved; it has merely been referred - for political reasons - to more favourable times.

Now having waited for more than a century and a half, Palestine has been liberated from Turkish rule... The Catholic world hopes for and demands an exact clarification of the rights

28 Paschal Baldi, *The Question of the Holy Places*, Roma Typographic Pontifica ‘Istituto Pio IX’, 1919 (Jerusalem, Franciscan Press, New edition, 1955) 94, 96, 97.

29 *Les Lieux Saints de la Palestine, Mémoire des Latins à la Conférence de la Paix*, 1919 (Jerusalem, Franciscan Press, 1922) reprinted in B. Collin, *Le Problème Juridique des Lieux-Saints* (Paris, 1956) Part II pp. 173-181.

and possessions of the different Christian communities which officiate in the Sanctuaries of Judea. Today the Custodian of the Holy Land, as often before on the eve of great peace treaties between Turkey and the Western Powers, addresses his requests to the representatives of the nations which are assembling in Versailles ...

The Custos of the Holy Land demands nothing but the justice which is due to him. What he demands is that one examines once and for all the controversies which have taken place throughout the centuries between the different Christian communities which are entitled to officiate in the Holy Places; that one verifies the value of the historic documents produced by each of them, and that each should be put into definite possession of that part to which each is entitled;

and anticipating the result of the proposed enquiry, he concluded:

The Custos of the Holy Land demands therefore that one accedes to the demands which General Aupick, the representative of France, at the eve of the Crimean war presented to the Ottoman Government.

These efforts of the Vatican to reverse the *status quo* of 1757 and to restore a Latin pre-eminence in the Sanctuaries, were to determine, more than the political interests of any state, the course of all debates about the Holy Places, within and without the League of Nations, for several years.

The case of the Catholic Church concerning the Holy Places was taken up in the Supreme Council of the Allies by the Italian Prime Minister, Signor Nitti, during the conferences of London and San Remo, in February and April 1920, when the Peace Treaty with Turkey was discussed. After decades of conflict between the Vatican and the Italian State a Catholic party, Il Partito Popolare Italiano, had been formed in January 1919 under the leadership of a Sicilian priest, Don Luigi Sturzo. It had constituted itself, in the words of M. Pernot,<sup>30</sup> "within the framework of the parishes and dioceses, and counted among its leaders and the rank and file numerous priests and monks". At the elections in November 1919 it had secured 100 seats in Parliament, and the Popolare joined the coalition government under the Liberal Leader, Signor Nitti, as Prime Minister. It can well be assumed that in the question of the Sanctuaries Signor Nitti was guided by his coalition partners; and he himself, at the meeting of the Supreme Council on February 17, 1920, announced that "Italy attached great importance to that question because the Catholic party in the Italian Parliament had since the last election greatly increased, and it now took a great interest in all religious matters".<sup>31</sup>

When the question of the Holy Places came up for discussion, the French representatives - as at the Congress of Berlin - drew attention to the traditional rights of France in the Sanctuaries, and demanded that these rights be respected even if the Mandate for Palestine was to be given to Great

30 M. Pernot, *Le Saint Siège, L'Eglise Catholique et la Politique Mondiale* (Paris, 1924) 96.

31 *Documents on British Foreign Policy* (1919-1939) Series 1 Vol. VII, p. 109.

Britain.<sup>32</sup> To this Signor Nitti replied<sup>33</sup> that Italy had never recognized a French protectorate over the Holy Places; and that in addition no protection of Christian interests was any longer required, since the rule of Islam had come to an end, and the government of the country was to pass into the hands of a Christian Power. He asked the Council, however, to consider "the usurpations which the Latins had undergone in past centuries". During the deliberations at San Remo he again raised "the whole question of the position of Roman Catholics", and at this stage suggested that all privileges and prerogatives concerning religious communities should be abolished, and that the Mandatory should appoint, as soon as possible, a Special Commission to study all questions and claims concerning the religious communities.<sup>34</sup> His prepared draft read as follows:

Tout privilège, et toute prérogative vis-à-vis des communautés religieuses prendra fin. La Puissance mandataire s'engage à nommer dans le plus bref délai une commission spéciale pour étudier toute question et toute réclamation concernant les différentes communautés religieuses et en établir le règlement. Il sera tenu compte dans la composition de cette commission des intérêts religieux en jeu. Le président de la commission sera nommé par le Conseil de la Société des Nations.

This clause, he claimed, would deal with both questions which the Council had to face: the political issue of French privileges and the religious issue of Catholic rights.

M. Millerand, on behalf of France, said<sup>35</sup> that he had no strong objections to the proposed special commission (although he suggested some slight changes in its composition). But he urged his Italian and British friends not to ask France to surrender formally her long-existing rights and privileges. The ensuing debate concentrated almost entirely on the French prerogatives. The issue was finally settled by France surrendering her rights on the understanding that the renunciation was not included in the text of the Article itself, but expressed in a procès-verbal.<sup>36</sup> The second point of Signor Nitti's suggestion - concerning the special commission - was accepted, as proposed. But the legal implications of this clause, particularly the relationship of the Special Commission to the Courts of the country and to possible local legislation, were - according to the official minutes - not mentioned. Thus the following formula was agreed upon, and inserted as paragraph 2 into Article 95 of the Peace Treaty of Sèvres which Turkey signed, although never ratified, on August 10, 1920:

The Mandatory undertakes to appoint as soon as possible a Special Commission to study and regulate all questions and claims relating to the different religious communities. In the composition of this Commission the religious interests concerned will be taken into account. The Chairman of the Commission will be appointed by the Council of the League of Nations.

<sup>32</sup> *Ibid.*, pp. 103, 109, 110.

<sup>33</sup> *Ibid.*, pp. 109, 110.

<sup>34</sup> *Ibid.*, p. 162.

<sup>35</sup> *Ibid.*, pp. 164, 165.

<sup>36</sup> *Ibid.*, pp. 170, 171.

Thus among the manifold duties of the Mandatory in regard to the Holy Places, such as the guarantee of free access and worship, and the preservation and protection of the Sanctuaries, only the appointment of the Special Commission for the settlement of disputes was singled out to be incorporated into the Treaty of Peace; and the importance which the authors attached to this issue was furthermore enhanced by the provision that the clause was to be put into operation with particular urgency.

The clause was now transplanted into the Mandate, replacing the paragraph which in July 1919 Mr. Forbes Adam had devised for the settlement of disputes, and the Mandate was adjusted accordingly. The following is the text of the Draft of Article 14 as it was presented by Great Britain to the League of Nations, showing in brackets the origin of each section:

In accordance with Article 95 of the Treaty of Peace with Turkey, the Mandatory undertakes to appoint as soon as possible a special Commission to study and regulate all questions and claims relating to the different religious communities. In the composition of this Commission the religious interests concerned will be taken into account. The Chairman of the Commission will be appointed by the Council of the League of Nations. (NITTI)

It will be the duty of this Commission to ensure that certain Holy Places, religious buildings or sites, regarded with special veneration by the adherents of one particular religion, are entrusted to the permanent control of suitable bodies representing the adherents of the religion concerned. (CONSTANTINOPLE and SYKES-PICOT Agreements, modified by the FOREIGN OFFICE)

The selection of the Holy Places, religious buildings or sites so to be entrusted shall be made by the Commission, subject to the approval of the Mandatory. (FOREIGN OFFICE adjusted to NITTI) In all cases dealt with under this Article, however, the right and duty of the Mandatory to maintain order and decorum in the place concerned shall not be affected, and the buildings and sites will be subject to the provisions of such laws relating to public monuments as may be enacted in Palestine with the approval of the Mandatory. (FOREIGN OFFICE)

The rights of control conferred under this Article will be guaranteed by the League of Nations. (FOREIGN OFFICE)

Signor Nitti had submitted his proposal with direct reference to the “usurpations which the Latins had undergone”. The task of restoring a new Catholic pre-eminence was undertaken, as soon as the debate on the Mandate was opened in the Council of the League. The case was conducted by the Vatican itself. On May 15, 1922, Cardinal Gasparri, Secretary of State, addressed a letter to the Council in which he summed up his arguments.<sup>37</sup> The Holy See, he wrote, would never accept the right of the Commission to investigate the ownership of Catholic Sanctuaries. Even more important,

<sup>37</sup> *Osservatore Romano*, June 30, 1922; English translation in *The Tablet*, July 8, 1922, reprinted in B. Collin, *op. cit.*, *supra* n. 29 at pp. 209-211.

he declared that the Commission, if composed of members of different Christian denominations, could never reach any concrete results since undoubtedly a fierce struggle (*une lutte acharnée*) would arise among them. He therefore suggested that the Commission should be formed by the local Consuls of the Council members (which at that time had a Catholic majority). Finally he demanded that voting power in the Commission should be reserved exclusively to Catholics. “The Holy See does not oppose the representatives of the various religious denominations taking part in the Commission as long as their vote is only consultative.”

In response the British Government assured all concerned that nothing would be done which could be construed as negligence or indifference to Christian sentiment.<sup>38</sup> In order to meet all objections, the Government now suggested that the composition of the Commission should be subject to approval by the Council and that every report of the Commission should be laid before the Council for confirmation; and submitted the following alternative draft of Article 14:

In order to determine the existing rights in the Holy Places and religious buildings or sites in Palestine which the Mandatory is pledged under the preceding article to maintain, a commission consisting of not less than seven members shall be appointed by the Mandatory, subject to the approval of the Council of the League of Nations. The duty of the commission shall be to frame a report defining these rights, including rights of ownership, user and access. The report shall be laid before the Council of the League of Nations for confirmation, and when confirmed shall be binding on the Mandatory. In the preparation of their report the Commission will consider all conflicting claims to any of the Holy Places and religious buildings or sites, and will endeavour in consultation with representatives of the confessions concerned to arrive at an agreed definition of existing rights. If no agreement can be arrived at within a period to be fixed in each case by the Commission, the Commission after hearing all parties shall decide judicially on the claims of which it has had notice and shall embody such decisions in their report.

The report of the Commission may also contain recommendations for ensuring that certain Holy Places, religious buildings or sites which the Commission finds to be regarded with special veneration by the adherents of one particular religion are entrusted to the permanent control of suitable bodies representing the adherents of the religion concerned.

Such control will be guaranteed by the League of Nations.

The Commission will settle its own procedure and shall appoint its own staff. Each member of the Commission will in turn act as chairman of the Commission. The expenses of the Commission shall be defrayed by the League of Nations.

In all cases dealt with under this article, the right and duty of the Mandatory to maintain order and decorum in the place concerned shall not be affected, and the buildings and sites will be

38 Cmd 1708.

subject to the provisions of such laws relating to public monuments as may be enacted in Palestine with the approval of the Mandatory. Any religious confession which considers that the Mandatory is not giving effect to the provisions of the report may appeal to the Council of the League who may require the Mandatory to reassemble the Commission for the purpose of considering and reporting on such appeal. Such report shall be laid before the Council of the League of Nations for confirmation, and when confirmed shall be binding on the Mandatory.

This draft was discussed by the Council of the League in two sessions, both held on July 22, 1922.<sup>39</sup> But no agreement upon it was reached. Since on the other hand all other clauses of the Mandate had been settled satisfactorily, Lord Balfour suggested that the Mandate be approved now, reserving Article 14 which would be finally drafted at a later stage. M. Viviani, on behalf of France, supported the suggestion and added that “pending the drafting of the final text of Article 14, the *status quo* in regard to the Holy Places would persist”. The Marquis Imperiali (Italy) and M. Hymans (Belgium) expressed doubts about the proposed procedure; the former thinking that “Article 14 was one of the most important provisions of the Mandate without which it could hardly be considered as final”; the other asking “what would be the effect on public opinion if the Palestine Mandate was adopted with reservations as to this Article”. To these objections Lord Balfour gave a reply which is still of importance today. The system of the Mandates, he said, had been conceived in the interest of the populations living within the countries concerned; Article 14, however, was mainly of interest to people outside Palestine. On the strength of this statement the Council decided to proceed. As for Article 14 a compromise solution was found by which the duty of the Mandatory to appoint the Commission was reaffirmed, but at the same time laid down that the Commission should not become operative until the method of nomination, the composition and the functions of the Commission had been approved by the Council. Accordingly the following new draft of Article 14 was formulated during the sessions:<sup>40</sup>

A special commission shall be appointed by the Mandatory to study and define the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this commission shall be submitted to the Council of the League for its approval and the commission shall not be appointed or enter upon its functions until approved by the Council.

In this form Article 14 was finally agreed upon, and the Mandate was approved.

The still outstanding details concerning the Special Commission were to be discussed by the Council at a later meeting. In preparation, on August 15, Cardinal Gasparri submitted a new memorandum<sup>41</sup> which contained several changes in the position of the Holy See:

1. The proposed Commission was to be permanent, a suggestion which Great Britain had refused

39 League of Nations Official Journal, August 1922, Minutes of the 19th Session of the Council, pp. 785 *et seq.*

40 *Ibid.*, p. 822.

41 B. Collin, *op. cit.*, *supra* n. 29 at pp. 230-232.

since it would create a kind of Executive Power within the Mandate:

2. The Holy See no longer insisted that only Catholics should have voting power in the Commission, but demanded that they must form a majority:
3. The prohibition to discuss Catholic rights in the Commission was now formulated, as follows: “The Commission cannot consider itself authorised to discuss any rights on the Holy Places which have already been acquired by the Catholics”.

This last demand transcended any previous statement. The introduction of the word “already” made it clear that the Cardinal considered the question of Catholic rights not as static, but as a dynamic process of further expansion. This demand - added to the condition that the majority of the Commission must be Catholics - ended all hopes for an agreed settlement. Nevertheless, the British Government made one more and last attempt, to save the Commission. It now proposed<sup>42</sup> that the Commission was to be divided into three Sub-Commissions, one Christian, one Moslem, and one Jewish. Each Sub-Commission should have its own President; and there should be a Chairman to preside over the whole Commission. For this Lord Balfour suggested “a prominent American of high standing and judicial temperament”, and felt that such an appointment would be particularly suitable, as it would enable representation to be given to the Protestant communities which would not otherwise be represented on the Commission.

The Christian Sub-Commission was to have a French President; three Catholic representatives (an Italian, a Spaniard, and a Belgian); three Orthodox (a Greek, a Russian, and an Armenian) ; and one or possibly two representatives of the Abyssinians and the Copts. Unanimous reports of any of the Sub-Commissions should be final. In cases where no unanimity could be achieved, the final decision was to rest with the Chairman of the whole Commission.

The proposal was rejected by the Catholic world with indignation. The *Osservatore Romano*, on September 6, described the suggestion as “preposterous”; and Cardinal Gasparri, on September 21, wrote personally to Prime Minister Lloyd George, urging him - over the head of the Foreign Secretary Lord Balfour - “to prevent a serious injustice”.<sup>43</sup>

Since no agreement could be reached, the British Government asked the Catholic Powers to make their own suggestions. But the replies from Italy and France were contradictory. Thereupon Great Britain decided to give up any further attempts to secure agreement between those concerned; and at the meeting of the Council on October 4, 1922, Lord Balfour withdrew the proposals Britain had made in the course of the negotiations. He said:

As the Mandatory Power it is the business of my country not merely to do its best to find a solution which shall reconcile differences of opinion within the Catholic community, but it is its business also to see that justice is done as between Catholic and Orthodox... indeed between all the various sects of Christians who have for centuries disputed certain points in connection

42 *Ibid.*, pp. 233-235.

43 P.R.O. FO 371/7786, p. 237 *et seq.*

with the Holy Places... The Mandatory is most anxious to arrive at a solution... We ask for the co-operation of our colleagues to help us to arrive at a solution which shall be regarded as equitable by all the world, whether it be Catholic, whether it be Orthodox, whether it be Protestant, or whether it be indifferent to all these religions and only desirous that justice shall be done, that peace, order and decorum be preserved within the limits of Palestine.<sup>44</sup>

In practice this decision meant to abstain - for the time being - from all investigations into "existing rights" and to maintain the *status quo* as it had been preserved under Turkish rule since 1757. This was expressed with great clarity in the first report to the Council of the League, submitted by Great Britain in the following year in accordance with Article 24 of the Mandate:

The Administration of Palestine has assumed responsibility for the Holy Places and religious buildings and sites as successor to the Turkish Government. In all specific cases that have arisen, it has strictly maintained the *status quo* and has postponed the final determination of any disputed questions until the establishment of the Holy Places Commission.<sup>45</sup>

### *The Borgongini-Duca Episode*

A few days before Great Britain withdrew her suggestions regarding the Special Commission, a move was made in Rome which was utterly unexpected and which by its repercussions determines the jurisdiction over the Holy Places up to the present day. On September 26, Monsignor Borgongini-Duca, acting as Secretary to Cardinal Gasparri, approached the British Chargé d'Affaires at the Vatican, Mr. Cecil Dormer, and in the course of a conversation about Cardinal Gasparri's letter to Mr. Lloyd George, suggested privately that the whole idea of the Special Commission to which throughout the years so much thought and effort had been devoted, should be given up, and disputes about the ownership of the Sanctuaries be dealt with by the local British Courts. A religious commission, he felt, was actually a commission of interested parties, and the Catholic world would certainly have more confidence in a British court of justice than in such a commission. It would be far preferable to let any claims be dealt with by the British tribunals. The Chargé d'Affaires, in reporting to London on the conversation added:<sup>46</sup>

I did not enter into a discussion; and the idea runs counter to Article 95 of the Treaty of Sèvres, but although Monsignor Borgongini-Duca was speaking privately it seems to me worth while recording his observations.

The reaction in London was utter surprise, if not bewilderment; and some remarks in the Minutes of the Foreign Office files were almost sarcastic:

The Vatican seems to be climbing down. The Colonial Office would be perfectly content that

44 Reprinted in B. Collin op. cit. supra n. 29 at pp. 239-243.

45 Report by His Britannic Majesty's Government on the Palestine Administration for 1923 to the Council of the League of Nations, p. 19.

46 P.R.O. FO 371/7786, pp. 246-7.

there should be no Commission. But it was the Vatican themselves who, a short time ago, were asking that the Consuls of the Powers interested in Jerusalem should form the desired Commission - hardly the juridical body they now desire to secure.<sup>47</sup>

The Foreign Office forwarded the despatch to the Colonial Office and Lord Curzon added that he did not consider "that too much attention should be paid at this stage to the private opinion of the Acting Secretary of State at the Vatican".<sup>48</sup>

On October 30 Monsignor Borgongini-Duca took up the matter again, and the Chargé d'Affaires sent this report:<sup>49</sup>

In my despatch of September 26, I had the honour to report a suggestion made to me privately by Monsignor Borgongini-Duca in regard to the Holy Places. He had proposed that there should be no Commission and that the *status quo* of the Turkish regime in Palestine be maintained. In other words if any claims were raised regarding the Holy Places they should be dealt with by the ordinary British tribunals. I saw Monsignor Borgongini-Duca this morning and he asked me if I knew how His Majesty's Government regarded his proposal. I said that I had, it was true, reported his remarks but had added that they were a private expression of his views. In the circumstances I had not expected any reply. He then suggested that I should urge them again. The more he thought about the matter, the more convinced he was that they offered the best solution of the difficulty. I made no answer and turned the conversation into other channels.

Monsignor Borgongini-Duca has lately been definitely appointed Secretary to the Secretary of State, thus filling the post formerly held by Monsignor Cerretti. As a rule he is very cautious and non-committal, and I think it is evident that he would not have insisted on his suggestion unless he had obtained approval.

I do not know whether his idea will commend itself as feasible or desirable to His Majesty's Government. If it does, it would possibly help matters to let their approval be known confidentially or otherwise to the Vatican, who might then be disposed to take the initiative and secure its acceptance by the other Governments chiefly concerned. In the meantime I propose to avoid any discussion of it . . .

After this report the matter had to be taken seriously. The idea of getting rid of the Special Commission was certainly attractive. It had never formed a part of the drafts which the Foreign Office had prepared. It had been added from outside, and did not quite fit into the structure of the Mandate. Moreover it lacked legal precision since it failed to determine the competence of the Commission in relation to the ordinary Courts and the legislature. Its abolition would therefore be

47 *Ibid.*, p. 245.

48 P.R.O. FO 371/7787, p. 40.

49 *Ibid.*, p. 69 *et seq.* The assumption of Monsignor Borgongini-Duca that under the Turkish regime the local courts had been able to deal with claims regarding the Holy Places is mistaken, since Turkey had pledged herself in the Treaty of Berlin to maintain the *status quo*. This excluded any investigation as to whether the *status quo* was legally justified.

welcome; and both Lord Curzon in the Foreign Office and the Duke of Devonshire in the Colonial Office described in their Minutes the Borgongini-Duca suggestion as “a desirable solution”. But there were considerable difficulties. The implementation required the consent of the other Powers. How would they react? “Italy”, said one of the Minutes, “would hardly be in favour, and France would certainly be against it”. In any case the scheme could not be put into operation without a change of the Mandate, and the Foreign Office was most anxious to avoid a reopening of this issue. In these circumstances Lord Curzon proposed

to inform Mr. Dormer that he may let it be known that His Majesty’s Government would raise no objection to the solution put forward by Monsignor Borgongini-Duca if all the other Governments represented on the Council of the League of Nations were persuaded by the Vatican in the first instance to agree to such a solution. If this solution were adopted, however, it would, of course, involve the modification of Article 14 of the Mandate.<sup>50</sup>

Before sending these instructions to the Chargé d’Affaires, he naturally asked the Colonial Secretary to concur, and the Duke of Devonshire, for his part, before replying, forwarded the papers to Sir Herbert Samuel, the High Commissioner, for his observations. The answer to Mr. Dormer, therefore, had to be kept in abeyance.

Meanwhile the Colonial Office raised the question whether “the latest proposals from the Vatican should be communicated unofficially to the Secretary General of the League of Nations”.<sup>51</sup> But Lord Curzon did not agree to make any communication to the League “implying a possibility of an eventual amendment however small in the text of the Mandate”.<sup>52</sup> At last, on December 23, the High Commissioner cabled his reply which brought shock and disappointment:

I see serious difficulty in Local Courts adjudicating and I am sending despatch making alternative suggestion.<sup>53</sup>

Difficulties from France and Italy had been expected, and the problems of a change of the Mandate had been envisaged. But nobody in London had foreseen that the proposal of granting the jurisdiction over the Holy Places to the Palestinian Courts would meet with opposition in Palestine itself.

“It would be a great pity”, read the first comment on the cable in the files of the Colonial Office, “to put a damper on the suggestion from the Vatican ... If the Vatican is prepared to allow disputes to be settled by British Tribunals we should be the last people to object ... It might be found necessary to establish a special British Tribunal to deal with claims of this kind”<sup>54</sup>

“It is unfortunate”, read another comment, “that the High Commissioner delayed his reply, but he may have considerations to advance which we have overlooked”.<sup>55</sup> This, in fact, proved to be the case. The observations of the High Commissioner were contained in his despatch of December 28, 1922:<sup>56</sup>

50 P.R.O. FO 371/7787 p. 74.

54 Ibid., p. 414.

51 Ibid., p. 107.

55 Ibid., p. 414 r.

52 Ibid., p. 112.

56 Ibid., pp. 482-3. 53P.R.O. CO 733/28 p. 415.

Government House  
Jerusalem

My Lord Duke,

I have the honour to refer to Your Grace's despatch dated 20th November 1922, and the correspondence which accompanied it containing proposals by Monsignor Borgongini-Duca in regard to the Holy Places. I have given these proposals very careful consideration and I would submit that the question of the Holy Places cannot be satisfactorily dealt with by the Palestine Courts. Great difficulty would arise in adequately dealing with such important issues as those comprised, for instance in the questions of the Coenaculum and of the Wailing Wall, on a strictly legal basis. Moreover if such matters were dealt with locally on that basis, the Courts would have to decide them according to the rules of the Ottoman Law. The experience gained recently in a comparatively simple case between the Custode di Terra Santa and the Spanish Consul in regard to certain immovable property purchased in Palestine for religious purposes has proved how difficult it is for the local tribunals to deal with the rivalries between religious bodies. Competent as is the Palestinian Bench for meeting the requirements of judicial work in Palestine, I am of opinion that it is hardly sufficiently equipped for performing the suggested additional functions. I am too of opinion that questions relating to the Holy Places in Palestine, being of a nature deeply interesting to religious communities throughout the world, should be dealt with by a higher authority than a local Court.

2. It is gratifying that the Vatican is disposed to agree that a British Tribunal should settle any dispute in regard to the Holy Places and could satisfactorily do so. I would suggest that the constitution of a special tribunal for this purpose composed of distinguished British judges or persons of judicial experience be considered. If it were possible, the tribunal might be a sub-committee of the Privy Council and presided over by one of the members of the judicial Commission of the Council. It would of course be necessary, before elaborating this proposal in detail, to be assured that the Vatican would be disposed to regard it favourably.

I have the honour to be,

My Lord Duke,

Your Grace's most obedient, humble servant,

**Herbert Samuel**  
High Commissioner.

The question how to act on this despatch was discussed within the Colonial Office for more than a month. The High Commissioner's advice that the Palestine Courts should not be entrusted with the jurisdiction over the Holy Places, was accepted unreservedly. In fact, there is not a word in the Minutes to question this proposition. Instead all attention was concentrated on the positive part of his reply: the establishment of a special Tribunal of one or several British Judges. Was the appointment of such a Tribunal compatible with Article 14 of the Mandate which reserved all questions relating to the Sanctuaries to the Special Commission? Could the Tribunal perhaps be justified as a temporary measure, if it was set up merely as an *ad hoc* body to settle issues of extreme

urgency, or could it possibly be based - instead of Article 14 - on Article 13 of the Mandate? These were only some of the questions which had to be clarified.<sup>57</sup>

On February 20, 1923 Sir John Shuckburgh, on behalf of the Colonial Secretary, wrote to the Foreign Office:<sup>58</sup>

I am directed by the Duke of Devonshire to transmit to you to be laid before the Marquess Curzon of Kedleston the accompanying copy of a despatch from the High Commissioner for Palestine in which he deals with the proposals put forward by Monsignor Borgongini-Duca. The High Commissioner's opinion that the Palestine Courts are not fitted to examine and decide disputes on purely religious matters of this kind cannot be disregarded, and His Grace considers that the best solution is to give effect in some form or another to the suggestion put forward in the final paragraph of Sir H. Samuel's despatch. What is proposed is that in the event of any case arising which would be dealt with by the Holy Places Commission, if that Commission were in existence, a special commission of enquiry consisting of one or more British judges should be appointed *ad hoc*. This commission would not be a standing tribunal but a special body set up to deal with a special case. The advantage of this arrangement is that it could, it appears, be carried into effect under the powers conferred on His Majesty's Government by Article 13 of the Mandate without any additional legislation and that it would provide a solution of the immediate difficulty without prejudicing the question of the final settlement of the Holy Places Commission. I am to add that a somewhat similar arrangement was recently adopted with success in a dispute relating to the affairs of the Orthodox Patriarchate. I am to enquire whether Lord Curzon approves the proposal contained in the foregoing paragraph.

On March 12, the Foreign Office concurred, provided that action were limited to disputes which had "actually arisen" and the proposal would not involve setting up of any "permanent machinery";<sup>59</sup> and on March 15 the following instructions were sent to the High Commissioner by the Duke of Devonshire:<sup>60</sup>

I have the honour to acknowledge the receipt of your despatch dated the 28th December, 1922 regarding the steps to be taken for regulating disputes in regard to the Holy Places pending the constitution of the Commission provided for in Article 14 of the Palestine Mandate, and to inform you that after careful consideration of the objections, to such questions being determined by the local Palestine Courts, I propose that in the event of any case arising which may call for urgent settlement, and which would be dealt with by the Holy Places Commission, if that Commission were in existence, a special commission of enquiry composed of one or more British judges not residing in Palestine should be appointed *ad hoc*, on the lines of the commission established to investigate the affairs of the Orthodox Patriarchate.

57 Ibid., pp. 477-81.

58 Ibid., p. 486.

59 P.R.O. CO 733/55 p. 290.

60 Ibid., pp. 293-4.

This commission would not be required to administer any law but to reach a decision on the facts of an individual case on the evidence presented to them, and could, I am advised, be appointed by virtue of the provisions of Article 13 of the Mandate. Such a commission would, however, only be appointed in order to deal with cases in which a dispute had actually arisen for which the Mandatory was obliged under Article 13 of the Mandate to provide a solution, and no permanent machinery would be set up to replace the Holy Places Commission while the present state of uncertainty continues in regard to the eventual effect to be given to Article 14.

The Foreign Office have expressed their concurrence in this proposal, with which I shall be glad to learn that you are in agreement.

The High Commissioner expressed his agreement by letter of April 5, 1923.<sup>61</sup> This brought the episode initiated by Monsignor Borgongini-Duca to its conclusion. It had led to the opposite result of what he had intended. He had hoped to see the local Courts of Palestine entrusted with the jurisdiction over the Holy Places and the disputes between Christian communities. In fact, the Palestine Courts were now debarred from hearing any cases of this kind whatever solution might be agreed upon in the future. Instead contingency plans had been prepared for cases of emergency. But neither the withdrawal of jurisdiction nor the preparations for an emergency, were revealed to the outside world for the time being. The matter, however, was soon to be opened again. This time the initiative came not from Rome - but from Moscow.

#### *Russian Ecclesiastical Property and the Palestine (Holy Places) Order*

On May 18, 1923, six weeks after the High Commissioner for Palestine had agreed to the procedure laid down by the Colonial Office in their despatch of March 15, the Head of the Trade delegation of the Soviet Union, Mr. Krassin sent a note<sup>62</sup> to the Foreign Secretary in which he claimed for the Soviet Union all properties in Palestine which in the past had belonged to the Russian Palestine Society, to the Russian Ecclesiastical Mission and to the Russian Ministry for Foreign Affairs. Concerning the first two categories the claim was based on the Decree of January 23, 1918 by which Church and State had been separated and the Church property had been nationalized. Concerning the last category it was claimed that the Soviets were the legal successors to the Imperial Russian Government. The Foreign Office at first was inclined to refer the Soviet Government to the local Courts for the establishment of their claims; and on August 11 sent to the Colonial Office for their concurrence a draft of the proposed reply the relevant part of which reads as follows:<sup>63</sup>

His Majesty's Government consider that the validity in Palestine of the claim of the Soviet Government to certain property in that country, in virtue of the legislation under which various categories of property in Russia have been transferred to the Russian state, can only be determined by the Palestinian Courts.

61 P.R.O FO 371/8997 p. 109.

62 P.R.O CO 733/56 pp. 35-6.

63 *ibid.*, pp. 66-7.

The Colonial Office, however, did not concur. They felt that more was involved here than a mere expropriation of land; and that the issue had religious implications.<sup>64</sup>

Within their own territory the Soviet Government had not only nationalized the property of the Church, but to a large extent alienated it from religious purposes by secularization. How would such actions be judged by English Law? Would English Courts accept the validity of the Decree of January 23, 1918 in relation to, say, a Russian Church situated in London, or would they hold that a secularization of Church property was incompatible with the doctrine of "implied trust"? As for Palestine the situation was even more complex. Moslem Law did not allow, and in the words of Sir Anton Bertram even "viewed with horror" the alienation of any property devoted to religious purposes; and - perhaps even more important - there were issues of International Law. Great Britain had solemnly committed herself, in Article 13 of the Mandate to undertake all responsibility in connection with the Holy Places and religious buildings or sites, including that of preserving existing rights and of securing free access and the free exercise of worship; and although Russian Church property would probably not be classified as a Holy Place, it would certainly fall under the definition of religious buildings or sites, and therefore be subject to Article 14 of the Mandate whenever this clause came into operation. These responsibilities had to be faced by the Government before the matter was turned over to the Courts. Lastly, it had just been agreed between the Colonial and the Foreign Offices that cases of this kind should not be adjudicated in the Courts of Palestine. It appeared advisable therefore to speed up legislative measures - possibly by an Order-in-Council - to exclude their jurisdiction. The Colonial Office expressed these thoughts in a letter to the Foreign Office, dated September 13, 1923:<sup>65</sup>

His Grace has given further careful considerations to this question and is now inclined to the view that the issues involved may turn out to be of such far-reaching importance that it would in any case be undesirable that they should be dealt with by the Palestine Courts. In view of Article 13 of the Mandate for Palestine he feels that a very special responsibility rests upon His Britannic Majesty, as Mandatory, for ensuring that nothing shall be done in Palestine which might be regarded by any religious community as indicating an imperfect appreciation of the intense religious interest in that country which is felt throughout the world...

I am to invite Lord Curzon's view on the desirability of steps being taken,... to ensure by legislation under Order-in-Council that pending the formation of the Holy Places Commission referred to in Article 14 thereof ... no executive or judicial decision shall be taken in Palestine except in accordance with some approved procedure in such matters as might ... come within the competence of, or necessitate a prior reference to, the said Commission if and when it is appointed. The recognition by the Palestine Government of the secularization of Christian Church property in Palestine by the Soviet Government would, in His Grace's opinion, be a step which could not, if the Holy Places Commission had entered upon its functions, be decided upon without a prior reference to that body, and would therefore come within the above definition of matters which should not in the meanwhile be decided except in accordance with some approved procedure. I am to refer in this connection to

64 *Ibid.*, p. 62 et seq.

65 *Ibid.*, pp. 78-9.

correspondence ending with Foreign Office letter of the 12th March 1923 and to suggest that the approved procedure referred to should be the appointment *ad hoc* of a special Commission of Enquiry composed of one or more British judges not residing in Palestine, on the lines of the Commission established to investigate the affairs of the Orthodox Patriarchate.

Simultaneously with this letter the Colonial Secretary informed the High Commissioner and invited his observation.<sup>66</sup> Sir Herbert Samuel sent his reply on October 26<sup>67</sup> He enclosed a list of the properties involved showing “the great extent and value” of the foundations. He expressed the opinion that “the churches and religious hostels would appear to fall under the definition of religious buildings in Article 13 of the Mandate; and the land near the Holy Sepulchre and in such places as the Mount of Olives and at Ein Karem under the definition of religious sites in the same Article. Some of the churches and hostels of the Ecclesiastical Mission had been constituted *Wakf* before the Moslem Religious Court, and therefore could not be alienated to a secular purpose. But the greater part of the properties did not enjoy the same protection. In this connection he referred to a draft Charitable Trusts Ordinance which had been submitted some time earlier to the Colonial Secretary, since it had been realised “before the question of the Russian property came under notice that it was desirable to supplement the provisions of the law of *wakf* by some legislation dealing with other charitable trusts in accordance with the general principles of the English Law of Trusts”. Concerning the question of jurisdiction over cases of this kind he restated the views which he had expressed in December 1922 on the occasion of the proposals of Monsignor Borgongini-Duca:

I am in agreement with the suggestion that the question of the treatment of Christian Church property in Palestine, and in particular, the disposal of any claim which may be put forward by the Soviet Government for the appropriation of that property should be entrusted to a special judicial commission of enquiry composed of one or more British judges from outside the Palestine Judiciary. It would seriously encumber the normal work of the Palestine Courts if they had to deal with a claim of that kind; and, moreover I am of the opinion that these questions, which may involve intricate problems of history and international law, should be decided by jurists of international repute and standing.

I would therefore welcome the proposal to enact by Order-in-Council that any question touching holy sites and religious buildings in Palestine should be referred to a special judicial procedure, pending the creation of the Holy Places Commission in accordance with the terms of the Mandate.

In conclusion he asked that the expenditure of the Commission should not be charged on Palestine Government funds.

It would not be fair to impose such an exceptional charge on the revenues of the country, as the service to be rendered is one which concerns rather the whole Religious Community than the members or properties of the Community in Palestine.<sup>68</sup>

66 Ibid., pp. 76-7.

67 P.R.O CO 733/50 p. 403 *et seq.*

68 Ibid., p. 410.

In January 1924 a Labour Government was formed and Lord Curzon and the Duke of Devonshire were succeeded as Foreign and Colonial Secretaries by Ramsay Macdonald and James H. Thomas respectively. During the following months the debate between the Colonial Office and the Foreign Office continued - not always without misunderstandings - whilst the Russians had to wait for a reply to their letter of May 18, 1923. At last, on May 23, 1924 an agreement was reached at a conference of the leading officials of both Ministries. At this meeting it was decided that (a) an Order-in-Council be promulgated as soon as possible, withdrawing from the Palestinian Courts all causes and matters falling under Articles 13 and 14 of the Mandate; (b) legislation be prepared concerning Charitable Trusts in order to protect trust property which did not fall under these Articles against alienation; (c) a procedure be worked out for cases which were to be withdrawn from the jurisdiction of the Courts by the proposed Order-in-Council.

The details of the decisions were laid down in a letter from the Colonial Office to the Foreign Office, dated June 5, 1924 to which a draft of the proposed Order-in-Council in its final form was attached.<sup>69</sup> The relevant passages of the letter were:

It was generally agreed at this Conference that His Majesty's Government could, in no circumstances contemplate a final decision being taken in any cause or matter in connection with the Holy Places or religious buildings or sites in Palestine, or the rights or claims relating to the different religious communities in that country, except by some procedure which had been definitely approved by the Council of the League of Nations. It was also agreed that... there was a risk that the Palestine Courts might be forced to take such a decision if the claims of the Russian Government come up for judgment in present circumstances. It was therefore proposed that immediate steps should be taken to remove from the jurisdiction of the Palestine Courts any cause or matter, as described above, and that, if any question were to arise as to whether the matter in dispute fell within this definition or not, such question should be referred to the High Commissioner, who should decide it after making due enquiry in accordance with such instructions as he might receive from the Secretary of State for the Colonies. It was felt that the best method of removing the matters referred to from the jurisdiction of the Palestine Courts would be the immediate promulgation of an Order-in-Council with this object in view, and a draft Order has accordingly been prepared.

The letter then discusses the proposed legislation on charitable trusts which does not concern directly the issue of jurisdiction, and continues:

On the assumption that Mr. Macdonald concurs in the procedure suggested above, which was unanimously recommended by the Conference held in this Department on the 23rd May, the question arises what steps should be taken in the event of any cause or matter being decided by the High Commissioner to have been removed from the jurisdiction of the Palestine Courts by the proposed Order-in-Council. Mr. Thomas suggests for Mr. Macdonald's consideration that, as soon as a concrete case arises, which may perhaps be anticipated in the near future as the result of claims by the Russian Soviet Government, the matter should be referred to the Council of the League of Nations, and proposals laid before that body for approval.

<sup>69</sup> P.R.O CO 733/80 p. 42 *et seq.*

These proposals might follow the line that, pending the formation of the Commission referred to in Article 14 of the Palestine Mandate, matters which have been decided by the High Commissioner, in pursuance of the authority given to him by the Mandatory, to fall within the competence of the said Commission, shall be brought before a special Commission composed of the Chief Justice of Palestine and not less than two British Judges of the Palestine Courts. This Commission would not sit as a Palestine Court, but as a special *ad hoc* Commission charged with the duty of enabling the Mandatory to carry out the provisions of Article 13 of the Mandate, subject to subsequent endorsement by the Commission referred to in Article 14 ...

In conclusion the letter suggests to inform the Soviet Delegation of the promulgation of the proposed Order-in-Council and warns

that it would be dangerous to refer the Delegation to the Palestine Courts until the proposed Order-in-Council has been promulgated and local legislation for the safeguarding of charitable trusts has received the necessary revision.

The Foreign Office in their reply of June 24 concurred in the terms of the proposed Order-in-Council, and also agreed with the main suggestions contained in the letter.<sup>70</sup> The Palestine (Holy Places) Order-in-Council was accordingly promulgated on July 25, 1924, as proposed:

Whereas by the Palestine Order-in-Council 1922 it is (among other things) provided that the Civil Courts in Palestine shall exercise jurisdiction in all matters and over all persons in Palestine.

And whereas it is expedient that certain matters shall not be cognizable by the said Courts.

And whereas by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within Palestine.

Now, therefore, His Majesty by virtue and in exercise of the powers in this behalf by the Foreign Jurisdiction Act 1890, or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:

1. This Order may be cited as "The Palestine (Holy Places) Order-in-Council 1924".
2. Notwithstanding anything to the contrary in the Palestine Order-in-Council 1922 or in any Ordinance or law in Palestine, no cause or matter in connection with the Holy Places or religious buildings or sites in Palestine or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any Court in Palestine.
3. If any question arises whether any cause or matter comes within the terms of the preceding article hereof, such question shall, pending the constitution of a Commission charged with

70 Ibid., p. 554.

jurisdiction over the matters set out in the said article, be referred to the High Commissioner, who shall decide the question after making due enquiry into the matter in accordance with such instructions as he may receive from one of His Majesty's Principal Secretaries of State.

The decision of the High Commissioner shall be final and binding on all parties.

4. His Majesty, His heirs and successors in Council, may at any time revoke, alter or amend this Order.

And the Right Honourable James Henry Thomas one of His Majesty's Principal Secretaries of State is to give the necessary directions herein accordingly.

A week before the promulgation of the Order, the Soviet Government, which by then had been recognized *de jure* by Great Britain, had taken up the matter once more, and in a note of July 17 reaffirmed their claim to the properties in Palestine.<sup>71</sup> The answer of the Foreign Office was at first "purposely delayed until the draft Order-in-Council had been approved"<sup>72</sup> but finally given on October 24, 1924.<sup>73</sup> The relevant clause which had been under consideration for seventeen months, was formulated in the following words:

In the event of the Soviet Government desiring to establish its title to any property in Palestine, the ownership of which is a matter of dispute, the proper course for it to take is to prove its title thereto in the Palestine Courts. It appears, however, that some at any rate of the property ... may belong to the category mentioned in Articles 13 and 14 of the Mandate for Palestine conferred on His Majesty's Government by the League of Nations. In view of the obligations assumed by His Majesty's Government under these articles, an Order-in-Council was recently promulgated removing from the jurisdiction of the ordinary courts in Palestine all causes or matters relating to the Holy Places, religious buildings or sites, or to the rights or claims relating to the different religious communities in that country. A copy of the Order-in-Council is enclosed herewith.

Although the text of the Order appears to be clear, some confusion arose concerning the power it gave to the High Commissioner, and a number of authors, including the present writer, mistakenly expressed the view that Article 3 authorized the High Commissioner to decide himself those causes or matters which had been removed from the jurisdiction of the Palestine Courts.<sup>74</sup> Even the United

71 *Ibid.*, p. 735.

72 A Minute in CO 733/80 p. 729 relating to the letter of the Chargé d'Affaires of the Soviet Government says: "I purposely delayed answering this until the draft Order-in-Council has been approved. That will be signed on 25/7/24."

73 P.R.O. CO 733/81 pp. 339.

74 J. Stoyanovski, *The Mandate for Palestine* (London, 1928) 302; B. Collin, *Les Lieux Saints* (Paris, 1948) 152; B. Collin, *op. cit. supra* n. 5 at p. 98; W. Zander, *Israel and the Holy Places of Christendom* (London-New York, 1971) 70; and most recently Eugene Bovis, *The Jerusalem Question, 1917-1968* (Hoover Institution Press, Stanford, California, 1971) 17. The error is of importance because if the High Commissioner had been authorized by the Order to decide the disputes, this authority would have been transferred to the Israel Government.

Nations Special Committee on Palestine (UNSCOP) in their report of 1947 fell into the same error when stating in Chapter 3 section 6:

The Palestine (Holy Places) Order-in-Council of 1924 withdrew from the law courts of Palestine any “cause or matter in connection with the Holy Places or religious buildings or sites in Palestine or the rights or claims relating to the different religious communities of Palestine”. Jurisdiction was vested in the High Commissioner, whose decisions were “final and binding on all parties”.

No such opinions can be held any longer. Moreover the files of the Foreign Office contain a statement on this question which gives an irrefutable official interpretation of the Order, and at the same time shows which part of the arrangements was to be made known, and which was to be kept secret for the time being.

On October 8, 1924 the British Minister to the Holy See, Sir Odo Russell, cabled to the Foreign Office,<sup>75</sup> that the *Journal des Débats* had stated that under the Order-in-Council questions affecting the Holy Places and other religious matters would be dealt with in future by the High Commissioner, and asked for exact information. The Foreign Office, on October 27, gave the following reply:<sup>76</sup>

It appears that a misunderstanding has arisen from the wording of Article 3 of the Order. His Majesty's High Commissioner in Palestine is not empowered to settle disputes connected with the Holy Places and religious questions, as the *Journal des Débats* seems to suggest, but merely to decide whether or not a case should be removed from the jurisdiction of the ordinary courts as being “a cause or matter in connection with the Holy Places or religious buildings or sites in Palestine, or the rights or claims relating to the different religious communities in Palestine” within the meaning of Article 2 of the Order. You should make this point clear to any persons who may address enquiries to you on the subject.

For your own information I wish to explain that it is proposed to adopt the procedure indicated in the Colonial Office letter of June 5th, namely that if the High Commissioner decides that any case should be removed from the jurisdiction of the ordinary courts in Palestine, the matter will be referred to the Council of the League of Nations and proposals laid before that body for approval. If, however, any person enquires of you what action will be taken after the High Commissioner has decided that a case should be removed from the jurisdiction of the ordinary Courts, you should confine yourself to stating that His Majesty's Government do not contemplate taking any action in connection with disputes relating to the Holy Places which could conflict with the terms of the Mandate for Palestine.

In the following year Great Britain - in the Report for 1924 informed the Council of the League of Nations of the promulgation of the Order, describing it “as a measure for the assumption by the

75 P.R.O. CO 733/81 p. 398.

76 *Ibid.*, p. 399.

Mandatory of its responsibilities in connection with the Holy Places and religious buildings or sites".<sup>77</sup>

During the next years a number of smaller disputes between Christian communities occurred. Thus the Report of the Mandatory to the Council of the League for 1933 stated:

Minor disputes between the worshipping communities in the Church of the Nativity at Bethlehem show no signs of abatement. Police have to be in daily attendance to prevent disturbances. The District Officer is continually summoned by one or other party to intervene, and as no law or regulation exists governing the activities of the clergy within the edifice, his task is difficult.

Similarly the Report for 1938 contained the following item:

A decision has been given by Government in connection with the dispute between the Latin and the Orthodox Communities regarding the use of certain parts of the Grotto of the Nativity on the coincident occasion of the festivals of the Latin Epiphany and the Orthodox Christmas. Both communities have submitted a formal protest in writing against Government's decision.

It is also noteworthy that the Ethiopian community approached the Mandatory in connection with their long standing conflict with the Copts which later was to come before the Supreme Court of Israel. But they accepted the Government's assurance that the matter would be submitted to the Holy Places Commission, as soon as this was established; and no further steps were taken at that time.<sup>78</sup>

Altogether it appears from the Reports of the Mandatory Government that up to the end of the Mandate no case concerning Christian Holy Places or disputes between Christian communities was actually brought before the Palestine Courts.

#### *Suspense of Jurisdiction - Expression of Respect*

One of the earliest legislative measures after the establishment of the State of Israel was the promulgation of the Law and Administration Ordinance, 1948, section 11 of which provides:

The Law which existed in Palestine on the 5th Iyar (14th May 1948) shall remain in force insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.<sup>79</sup>

By Amendment No. 11 to this Ordinance enacted in 1967, the law, jurisdiction, and administration of the State of Israel were extended to the area which in June of that year had come under the control of the State. This area included most of the Holy Places under discussion.

<sup>77</sup> *Reports by His Britannic Majesty's Government on the Palestine Administration for the year 1924*, Section IX.

<sup>78</sup> *Proche Orient Chrétien* (1971) 184-5.

<sup>79</sup> (1948) 1 L.S.I. 9.

The question as to whether the Israeli Courts have jurisdiction over causes or matters in connection with the Christian Holy Places depends, therefore, in the first instance upon whether the Palestine (Holy Places) Order, 1924 is still in force. As is well known, this question was brought before the Supreme Court in *Hugim Leumiyim Incorp. v. Minister of Police*.<sup>80</sup> Silberg J. and Witkon J. felt that the Order was not compatible with the spirit of a free and independent State, based on the rule of law. But the majority (Berinson, J., Kister, J. and Agranat, P.) held that it was not repugnant to any law of Israel and accordingly had remained in force. This decision was affirmed in *Orthodox Coptic Archbishop of Jerusalem and the Near East v. Minister of Police*,<sup>81</sup> where it is stated that the Israeli Courts have no jurisdiction over disputes about substantive rights or claims in connection with Christian Holy Places; but that this prohibition does not apply where the maintenance of good order and public peace is involved and, in particular, if one of the parties by trespassing or otherwise, has taken the law into its own hands.

How do the new facts concerning the origin and purpose of the Order described above but which were not known at the time of the two judgments. affect the situation? In the opinion of this writer they are likely to strengthen the view held by the Supreme Court and to help allay the doubts which have been expressed about it.

As has been shown, the Palestine (Holy Places) Order has its origin in the “Borgongini-Duca despatch” of Sir Herbert Samuel in which he advised that “the question of the Holy Places could not be dealt with satisfactorily by the Palestine Courts”. Among the reasons he adduced to support his view, which included doubt whether matters of this kind should be decided “on a strictly legal basis”, the possibility of having to apply Moslem Law, the difficulty for local tribunals of dealing with rivalries between religious bodies, one reason stands out above all - the notion that the jurisdiction over the Holy Places is not part of the “juridical work in Palestine” but “an additional function”, affecting interests outside the country.

In his despatch of October 26, 1923 relating to the Russian Ecclesiastical property. he reaffirmed the same arguments (“it would seriously encumber the normal work of the Palestine Courts if they had to deal with a claim of that kind”) and asked that the expenditure in this matter should not be charged on Palestine Government funds:

It would not be fair to impose such an exceptional charge on the revenues of the country, as the service to be rendered is one which concerns rather the whole religious Community than the members or properties of the Community in Palestine.

Thus in both despatches he distinguished between the “normal juridical work in Palestine” and the “additional” or even “exceptional” issues of the jurisdiction over the Holy Places. This distinction was in full accordance with the historic statement made by Lord Balfour on the day the Mandate for Palestine was created, according to which the Mandate was to serve the “welfare of the

<sup>80</sup> (1970) (II) 24 P.D. 141. See also C. Klein, “The Temple Mount Case” (1971) 6 Is.L.R. 257.

<sup>81</sup> (1971) (1) 25 P.D. 225.

population living in the country”, whilst Article 14 (i.e., the jurisdiction over the Holy Places) was of interest “mainly to people outside Palestine”.<sup>82</sup>

The essence of the argument is that the worldwide interest in the Christian Holy Places is relevant to the question of the jurisdiction over the Sanctuaries. To what extent this interest should be legally recognized may be doubtful. Many suggestions on this subject have been made, ranging from territorial internationalization of the Sanctuaries to the establishment of special tribunals. The Palestine (Holy Places) Order only restrains the judges in the country from adjudicating on certain matters.

Such self-imposed limitations of jurisdiction for the sake of a matter which transcends the borders of a country, - are a common feature of International Law in the field of extraterritoriality and immunity. It is submitted that these principles of International Law might be usefully applied, directly or by way of analogy, to the question of the jurisdiction over the Christian Holy Places - in addition to the consideration of constitutional issues which hitherto have dominated the discussion.

Seen in this way, the suspension of jurisdiction - an expression of respect for the universal interest in the Christian Holy Places - cannot be considered as a violation of the rights of the local population. On the contrary, the Order has been of great practical value to Israel by protecting the courts at a critical time from being involved in issues which might easily have become an embarrassment.

Nor can the suspension of Jurisdiction be considered as a wrong done to the Christian communities in Israel and all over the world. jurisdiction over the Sanctuaries has been legally in suspense at least since the Treaty of Berlin which made the maintenance of the *status quo* a part of International Law. The Palestine (Holy Places) Order on the other hand was never intended to be permanent. It was to last until the Special Commission of Article 14 of the Mandate had been established. This means in substance: until the Christian communities had reached agreement among themselves. Such agreement was not secured at the time. But since then the world has been witnessing an unprecedented progress in the ecumenical movement. Pope Paul VI and the late Patriarch Athenagoras I met personally in Jerusalem. The ancient mutual excommunications of Byzantium and Rome have been solemnly withdrawn. This is not the time to set up a new machinery for secular jurisdiction, for ultimately the disputes about the Christian Holy Places can only be settled by a reconciliation of the Churches.

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<sup>82</sup> See *supra* text after n. 39.