

## SYMPOSIUM ON THE MANY LIVES AND LEGACIES OF SYKES-PICOT

### TEXTUAL SETTLEMENTS: THE SYKES–PICOT AGREEMENT AND SECRET TREATY-MAKING

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The Sykes–Picot agreement embodies a certain style of diplomacy: an assumption of European predominance, given expression through cartographic line-drawing, terms of art (“protection,” “independence,” “interests”), and a structural secrecy which kept agreements from rival European powers, on the one hand, and from the peoples most affected, on the other. It is this element of secrecy that constitutes the focus of the present contribution.<sup>1</sup> I situate the Sykes–Picot agreement in a prewar pattern of secrecy as diplomatic technique, explore its role in spurring a new regime of publicity for treaties, and take it as a touchstone for exploring whether this new regime could achieve a fundamental transformation of prevailing modes of diplomacy.

#### *Secrecy as Diplomatic Technique: Sykes–Picot and Prewar Practice*

The Sykes–Picot agreement exemplifies a fusion of wartime *Realpolitik* with techniques of secret treaty-making that were well-established, if criticized, before WWI. In the nineteenth and early twentieth centuries, secret treaties were marginal (if they existed at all) in the United States, but a recognized instrument in Britain, and quite common in France and Continental Europe. Secret treaties, at least of a “political” kind that required no specific appropriation, or compliance by private actors, were accommodated within the public law of most European polities. International law also imposed no requirement of publication, and there was no consensus that a failure to secure any approval required under domestic public law affected the validity of a treaty at international law.

Secret treaties sometimes concerned alliances or interests in Europe, as with the Franco-Russian “dual alliance” of 1894, but they were also a particular fixture in the management of empire. Much imperial expansion was admittedly highly public; the Berlin General Act had even created a loosely systematized process for governments to give notice—to other signatories at least—of possession of territory or assumptions of a protectorate on the coasts of Africa.<sup>2</sup> However, in other instances, secrecy helped manage conflicting claims among European states. In 1898, for example, Britain had entered into a published convention, a secret convention, and a secret note with Germany concerning their mutual interests in the (precarious) Portuguese empire. The published text merely provided that each should participate equally in any loan sought by Portugal.

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<sup>1</sup> This essay draws on MEGAN DONALDSON, FROM SECRET DIPLOMACY TO DIPLOMATIC SECRECY: SECRECY AND PUBLICITY IN THE INTERNATIONAL LEGAL ORDER, c1919–1950 (JSD thesis, NYU School of Law, 2016).

<sup>2</sup> Signed Feb. 26, 1885, 165 Consol. T. S. 485, art 34, reproduced in E. HERTSLET, 1 THE MAP OF AFRICA BY TREATY 20, 43 (1894).

The secret texts went into greater detail about precisely how the loan (to be paid on security of customs revenue in the colonies) would translate into a partition of the territory between Britain and Germany. These commitments were in tension with both an ancient public alliance with Portugal, and a secret declaration of 1899 reaffirming the ancient treaties and including an undertaking to defend all Portuguese conquests and colonies.<sup>3</sup>

Secrecy also assisted in negotiating the qualified “independence” of many polities under greater or lesser degrees of European tutelage. In 1904, the Anglo-French “Entente cordiale” involved secret commitments on both Morocco and Egypt. A published “Declaration” of 8 April 1904, which supported the independence of Morocco, was accompanied by secret articles dealing with a case in which one of the governments would be “constrained, by the force of circumstances, to modify [its] policy”—agreeing, in essence, for France to have predominance in Morocco (subject to coming to some arrangement with Spain), and Britain to have the same in Egypt (Germany being excluded from the arrangement).<sup>4</sup> The planned Franco-Spanish arrangements ultimately involved an anodyne public declaration and much more detailed secret convention, the latter being communicated to the British Foreign Secretary on the basis that he keep it “entirely secret.”<sup>5</sup>

These dealings illustrate the way in which secrecy, coupled with a certain craft of drafting, served a diplomatic technique of shifting, ambiguous commitments. While there was sometimes one unitary treaty, more typically governments fashioned a sequence of linked texts; sometimes a whole treaty would be kept secret, but more often only certain clauses, or discrete ancillary texts, were held back. This layering of different texts created a repertoire of different commitments, the interpretation of which left scope for considerable creativity. If in many cases the *existence* of secret texts became known, by deliberate or accidental leaking, their secrecy meant that they could be disavowed if necessary, and their terms remained a matter of speculation.

The precise status of unpublished ancillary texts was sometimes a matter of doubt, but it is clear that there were at least some agreements that were intended both to be legally binding—“treaties,” in the general doctrinal sense—and to be withheld from national legislatures and publics. Nevertheless, officials tended not to think in binary terms about whether texts were binding treaties or not; rather they understood obligation holistically, involving legal, moral, and prudential dimensions, and gave agreements different weights in deliberations about the correct political course, depending on factors such as their material form, the circumstances of their conclusion, the nature of their terms, and the likely response to breach or repudiation.

Secret treaty-making was subject to sharp criticism in the early twentieth century (as it had been at various points throughout the eighteenth and nineteenth centuries). Crises with Germany over Morocco were tangible evidence that secret arrangements provoked distrust and sharpened conflict. When, in 1911, a further series of attempted secret dealings emerged into the public domain, and the 1904 arrangements followed, left and liberal parliamentarians in France and Britain suggested that secrecy of this kind was inimical both to peace and to the role which ought to be played by the legislature (or public opinion) in reviewing foreign policy commitments. Even officials not swayed by democratic or idealist appeals were internally acknowledging the prudential arguments against secrecy as a technique.

Despite prewar sentiment, wartime conditions favored, or even required, an embrace of secrecy, and the Sykes–Picot agreement was one of a number of secret “treaties” which procured other states’ entry into the war, and managed intra-alliance rivalry over future interests. As with many of the prewar secret treaties, the

<sup>3</sup> On these transactions, see Richard Langhorne, *The Anglo-German Negotiations Concerning the Future of the Portuguese Colonies, 1911–1914*, 16 *HIST. J.* 367 (1973).

<sup>4</sup> *Declaration between the United Kingdom and France respecting Egypt and Morocco, together with the secret articles signed at the same time* [1904], Cmd 5969 (1911).

<sup>5</sup> Reproduced in E. D. MOREL, *MOROCCO IN DIPLOMACY* 242–43 (1912).

Sykes–Picot agreement was not in fact a unitary text, but a series of texts embodying the initial line-drawing of January 1916 (and following an earlier Franco–British assent to a future Russian annexation of Constantinople).

In one of the key letters, from the British Prime Minister to the French Foreign Minister, the Governments agreed to “recognise and protect” an Arab state or confederation, but specified two zones for each of the European powers, one in which they “shall be allowed to establish such direct or indirect administration or control as they desire and . . . may think fit to arrange with the Arab State,” and one in which they had priority over the other in matters of enterprise, local loans, supply of advisers, and the like. An earlier letter put it more bluntly: some areas would “become entirely French” [or British]; in other areas “French [or British] interests [were] recognised as predominant.”<sup>6</sup>

The governments of Japan, Italy, and the United States were informed of the arrangements (Italy in particular having a special interest insofar as Britain and France had undertaken, in a separate secret treaty, to grant Italy “a share in any partition or rearrangement with Turkey”).<sup>7</sup> On the other hand, the Sharif of Mecca, to whom the British had offered undertakings about a future Arab state which were in some tension with the Sykes–Picot agreement, was not fully informed of the agreement until May 1917, roughly a year after the exchange of letters, and even at that point seems not to have seen the text of the letters.<sup>8</sup>

The Sykes–Picot agreement thus reflected many of the same qualities as prewar secret treaties concerning European colonial interests. The letters combine sweeping territorial dispositions with close attention to niceties of drafting (for example, the *ex post facto* realization that reference to a willingness to “protect an independent Arab state” came too close to suggesting a protectorate, and should be changed to “uphold”).<sup>9</sup> In doctrinal terms, an exchange of letters between a Prime Minister and Foreign Minister could create binding obligations.<sup>10</sup> Yet despite its formality, the Sykes–Picot agreement, and approaches to its interpretation, was a projection into the hypothetical future: it captured a momentary configuration of the kaleidoscope of projects being pursued at the time within different European ministries, posts and military hierarchies, which in turn depended on—often erroneous—understandings of Arab political organization. Views of the optimal course of action changed over time, and military action by Allies and Arab populations created *faits accomplis* that placed the determinative force, if not the legal status, of the agreement in question.<sup>11</sup>

### *Revelation and Reform*

The abolition of secret treaties had been a priority for leftist, democratic, and internationalist groups in the early phases of the war, but the Bolsheviks’ public revelation in November 1917 of wartime secret treaties, including the general lines of the Sykes–Picot agreement, and the casual acquisitiveness of these transactions, added impetus for reform.<sup>12</sup> The secrecy of the wartime treaties was not alone considered to render them

<sup>6</sup> Grey to Cambon, May 16, 1916; Grey to Cambon, May 15, 1916; in 4 DOCUMENTS ON BRITISH FOREIGN POLICY (1<sup>ST</sup> SERIES) 245, 244 [hereinafter 4 DBFP (1<sup>ST</sup> SERIES)] (as amended in accordance with note 9 below).

<sup>7</sup> Agreement between France, Russia, Great Britain and Italy [1915], Cmd 671 (1920), art 9.

<sup>8</sup> ELIE KEDOURIE, IN THE ANGLO-ARAB LABYRINTH: THE McMAHON–HUSAYN CORRESPONDENCE AND ITS INTERPRETATIONS 1914–1939 124–25, 160–66 (1976); BRUCE WESTRATE, THE ARAB BUREAU: BRITISH POLICY IN THE MIDDLE EAST, 1916–1920 154–55 (1992).

<sup>9</sup> Cambon to Grey, Aug. 25, 1916, in 4 DBFP (1<sup>ST</sup> SERIES), *supra* note 6, at 248–49.

<sup>10</sup> *See, e.g.*, L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 529 (1905).

<sup>11</sup> *See, e.g.*, WESTRATE, *supra* note 8, at 155–72; JAMES BARR, A LINE IN THE SAND: BRITAIN, FRANCE AND THE STRUGGLE THAT SHAPED THE MODERN MIDDLE EAST 45–63 (2011).

<sup>12</sup> Among the papers published was a Russian internal memorandum summarizing the arrangements reached by the Russian, French, and British Governments in the Middle East. The gist was reported in Britain in November 1917, and the full English translation a few weeks later: *Asiatic Turkey: Full Text of Allies’ Agreement with Ex-Tsar*, MANCHESTER GUARDIAN, Jan. 19, 1918, at 5.

retrospectively void. Rather, their legal force became a question in negotiations. In the case of the Sykes–Picot agreement, France, which had less of a military presence on the ground, was more reliant on the written terms. Yet there was also widespread recognition that the agreement could not be applied strictly. Taking stock of the cross-cutting statements and texts bearing on rights in the Middle East which had accrued during the war and thereafter, Balfour concluded in August 1919: they “are not consistent with each other; they represent no clear-cut policy; [and] the policy which they confusedly adumbrate is not really the policy of the Allied and Associated Powers.” They lived on, but in a qualified and spectral way: “so far as I can see, none of them *have wholly lost their validity or can be treated in all respects as of merely historic interest.*”<sup>13</sup>

If it did not automatically unsettle wartime arrangements, the stigma associated with secret treaties, given new force and reach by Wilson, did translate into a major prospective change. Article 18 of the Covenant of the League of Nations provided that “[e]very treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.” By this provision, the secret treaty was apparently abolished, at least as between League members. If states wished to frame commitments in the register of law, this entailed publicity. The fact that final texts would be subject to a loose form of supervision by League bodies,<sup>14</sup> and publicly known, promised to recalibrate relations between polities (ending secret treaties known to some governments but not to others), and between governments and people. The empowerment of domestic populations and legislatures was assumed to presage a more morally sound and democratically driven foreign policy, eliminating the sorts of contradictions of letter and spirit which had characterized prewar interimperial treaty-making, and Franco-British dealings with the Ottoman territories.

#### *The Postwar Architecture of Publicity and Its Limits*

Article 18 (together with some states’ revisions of domestic law) did contribute to the entrenchment of a norm of publicity for treaties. While registration rates were uneven, the League of Nations Treaty Series—and particularly its presentation of authentic texts and translations into English and French—incarnated a vision of one single, comprehensive public record of international commitments. Nevertheless, the transformative force of Article 18 was limited by restrictive interpretations in the early interwar years, and there were limits to how far the requirement for publicity of final treaty texts could alter the modes of diplomacy which had given rise to the Sykes–Picot agreement.

The connection created on the face of Article 18 between registration and publicity, on one hand, and legal force, on the other, was tacitly undone in the early interwar period. French and British governments were keen to retain the possibility of secret, yet legally binding, agreements, at least in narrow classes of case, but it proved impossible to develop strict rules to demarcate these cases. Informed by a legal opinion by the Italian jurist Anzilotti, then in the Secretariat, and seeking to avoid an open confrontation over noncompliance with Article 18, the Secretary-General acquiesced in an interpretation of Article 18 that made registration, and thence publication, a condition only of the League taking formal cognizance of treaties. On this view, governments were not absolutely prohibited from making secret treaties (unless constrained by their own public law or convention). They retained discretion to move at will between the pre-League order, in which secret treaties were permitted and the (public) League regime, with its enhanced enforcement apparatus. Moreover, although Article 18 was drafted with sweeping language to capture *all* manner of legal commitments regardless of nomenclature and form (“[e]very treaty or international engagement”), foreign ministries drew on the same techniques of

<sup>13</sup> Memorandum Balfour, Aug. 11, 1919, in 4 DBFP (1ST SERIES), *supra* note 6, 340, 342–343 (emphasis added).

<sup>14</sup> Covenant of the League of Nations arts 19, 20.

drafting evident in some of the prewar secret arrangements detailed above to craft agreements with at least some claim to legal force, but which were not unambiguously legally binding—and thus escaped the reach of Article 18.

Even when Article 18 operated as its proponents had initially envisaged, the publicity of final texts had only a limited and gradual effect on diplomatic techniques. The structure of negotiations shaped the range of possible final outcomes in ways which subsequent publicity and contestation often did little to unsettle. Indeed, the negotiation of the mandates for Iraq, Syria, and the Lebanon, and the violent implantations of mandatory authority against a nascent Arab state, illustrated that, even when opposition to “secret diplomacy” was at its height, local political representatives and populations had few formal avenues into the international legal order. Nor were the mandate negotiations an exceptional residuum of wartime entanglements. A similar dynamic of secret, exclusionary negotiation, and the limited remedial influence of publicity, arose with an Anglo–Italian exchange of notes in 1925, whereby each undertook to support the other in seeking specific concessions from the Abyssinian court. This interimperial negotiation about the ultimate arrangement of interests in a theoretically independent state echoed prior dealings stretching back to the nineteenth century. When it was belatedly understood by negotiators that the need for registration would result in the exchange being made public, and thus available to the Abyssinian court, there were some tentative efforts to rephrase it in a less offensive manner, but the changes were cosmetic.

Finally, experience complicated the view that mere publication of a final text empowered populations to grasp the nature of the policy pursued, much less resist it. Controversies over the proper interpretation of the Sykes–Picot agreement and contemporaneous texts, which divided officials at the time and remain a feature of the historiography today, suggest otherwise. Final treaties were ambiguous, and not readily extricated from the fabric of often unpublished communications and understandings—legally binding or otherwise—which had preceded them. The eventual publication of the Anglo–Italian exchange of notes over Abyssinia, for example, prompted radically different interpretations by the British public, the French foreign ministry, and the Abyssinian court, on one hand, to that offered by the British Foreign Office, on the other. The ability of Abyssinia to complain to the League, and elicit protests of innocent intent from Britain or Italy which imposed some constraint on action, was only a modest advance on the prewar position.

One striking feature of the Sykes–Picot agreement is the (fleeting) confidence that apportionment of territory on paper could settle its future political order. This faith in the power of the text was mirrored in the hope of reformers that *revealing* treaty texts would effect fundamental changes in the world. Although the historiography, and indeed this symposium, remains structured by punctual moments of text-creation and revelation, the reality was more complicated. What publicity offered was not so much an unmediated understanding of statecraft but, at best, wider public access to the same “labyrinth” of texts and interpretations in which officials moved.<sup>15</sup> The potential for this to offer any foundation for political contestation would depend in turn on contingencies of institutional fora, audience, and affinity.

<sup>15</sup> KEDOURIE, *supra* note 8.