

Book Reviews

Victor Kattan. **From Coexistence to Conquest, International Law and the Origins of the Arab-Israeli Conflict, 1891–1949.** London, New York: Pluto Press, 2009. Pp. xxxi + 415. £26.50. ISBN 9780745325781 (pbk).

It may be that only in Middle East negotiations would the interpretation of a century-old letter from a British official addressed to a tribal Sheikh be considered a topical legal issue. The reality is, however, that the parties in the Middle East conflict are still interpreting, for example, the 1915 correspondence between Sir Henry McMahon, the British High Commissioner in Egypt, and Sharif Hussein of Mecca. Kattan's book is an invaluable, albeit partisan, resource book for those of us who enjoy delving into such minutiae of the legal arguments of Israelis and Palestinians.

Seemingly arcane issues of early 20th century international law are solemnly debated whenever Israeli and Palestinian lawyers get together to try to solve their problems. This reviewer had the experience of being the legal advisor to the Israeli delegation at the post-Madrid Israeli–Palestinian talks held in Washington from 1991 to 1994. A large part of the negotiating sessions consisted of both sides setting out in detail their interpretations and comments on Middle Eastern legal history. Kattan's book, with its multitude of references to legal authorities, including many Israeli scholars, covers some of the issues we debated, including the history of Zionism, the 1922 Palestine Mandate, the 1947 Partition Plan, and Israel's declaration of independence. At one stage in the negotiations, a US State Department official called me aside and asked me, in the usual American forthright style, 'Why don't the two sides cut the crap and get down to real business?' I tried to explain to my American colleague that setting out one's

legal position in international law is an essential stage in any Middle Eastern negotiations. It serves as a form of catharsis. My American colleague refrained from complaining, as John Foster Dulles is reputed, most probably apocryphally, to have complained, 'Why can't the Jews and Arabs settle their differences in true Christian fashion?'

This penchant for historical legal analysis, which the Israelis share with the Palestinians, has various explanations. Both Arab and Jewish societies are based on strict written legal codes and great respect is given in both cultures to legal matters. The League of Nations and later the UN have been deeply involved in the Arab–Israeli conflict and the various resolutions of these bodies are invariably subjected to legal analysis. When the ICJ had to decide whether to give the UN General Assembly an advisory opinion on the legality of the Israel separation barrier the Court ruled:

The responsibility of the United Nations in this matter [the construction of the wall] also has its origin in the Mandate and the Partition Resolution concerning Palestine . . . This responsibility has been described by the General Assembly as 'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy'. . . Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions.¹

Nations lacking a territorial state and seeking such a state naturally try to rely on

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, at para. 49, available at: www.icj-cij.org/docket/files/131/1671.pdf.

international law to achieve what they feel are their rights. This was true of the Zionist movement in the early 20th century. The 1917 Balfour Declaration and the 1922 League of Nations Mandate, which called for a Jewish National Home, and the 1947 UN Partition plan, which recommended independent Arab and Jewish states, were seen as the crowning achievements of the political Zionist movement. Their actual legal significance will be discussed later in this review, but what is important to note at this stage is the importance the Zionist movement attached to such international instruments. I believe Kattan is correct in writing that 'international law was pivotal to the development of the Jewish national home' (at 22) and that '[u]ltimately, international law would give the Zionist movement legitimacy' (at 36). Since 1948 the situation has been reversed, and it is the Palestinians, lacking an independent state of their own, who now place their reliance and hopes on international legal documents. Parties negotiate 'in the shadow of the law'.² Palestinian negotiators tend to regard it as vitally important to establish a right based on international law and not to be in a position where they have to negotiate such a right. Once the right is established and recognized by Israel, they may be willing to negotiate modes of implementation but not to negotiate on the principle itself. This approach is reflected in the Palestinian insistence that Israel recognize the 'right of return' of Palestinian refugees, although stating that once the principle is accepted the actual number of refugees to be returned can be negotiated. In this respect international law may even be playing a negative role, for it leads both sides to dig in on questions of principle rather than try to reach a pragmatic compromise.³ This phenomenon is

aggravated by the fact that many Palestinian lawyers view frequently confirmed UN General Assembly resolutions as reflecting international law. According to this view, where the UN General Assembly approves a resolution by a large majority and reconfirms it year after year, the Assembly acts as a quasi-legislative body reflecting the view of the international community as to what is international law. The counterview, held by most Western international lawyers, is that UN General Assembly resolutions do not create international law and that the drafters of the UN Charter knowingly refrained from granting the Assembly such power. This view is reflected in Prosper Weil's statement, 'Neither is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect'.⁴ Thus, both sides to the conflict tend to base their narratives, their information campaigns, and their negotiating positions on international law, on the premise that '[I]legitimacy and lawful authority are key components of political power'.⁵ Kattan's well researched book is therefore not just of historical value, but we may well find it being quoted in future negotiations. Kattan had the advantage of access to recently opened British and Israeli state archives. It might have been fair for Kattan to note that no Arab state has opened its archives and that they do not seem to consider doing so.

In the tradition of its reputation as 'Perfidious Albion', the British government has been accused of promising Palestine both to the Jews and to the Arabs.⁶ In this context Kattan examines the McMahon letters referred to in the opening paragraph of this review. Sir Henry McMahon, the British

² Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law; The Case of Divorce', 88 *Yale LJ* (1979) 950, quoted in the Middle East context in Dajani, 'The Role of International Law in Palestinian-Israeli Peace Talks', 32 *Yale LJ* (2007) 61, at 64.

³ See Dajani, *supra* note 2.

⁴ Weil, 'Towards Relative Normativity in International Law', 77 *AJIL* (1983) 413, at 417.

⁵ R. Fisher, *Points of Choice: International Crises and the Role of Law* (1978), at 12.

⁶ An echo of these accusations can be found in the title of the book by A.D. Miller, *The Much Too Promised Land, America's Elusive Search for Arab-Israeli Peace* (2008).

High Commissioner in Egypt, wrote to Sheikh Hussein of Mecca, in an exchange of letters, promising that in exchange for Arab support in fighting the Ottomans, Britain would support Arab independence in the areas to be liberated from the Ottoman Empire. The letter excluded from this pledge the 'two districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo'.⁷ The Arabs under Hussein kept to their part of the bargain and fought with the British against the Ottomans. Kattan examines two elements concerning the exchange of letters: whether it was a binding treaty and whether Palestine was excluded. On the first issue Kattan argues convincingly that an exchange of letters, as such, can be binding. Furthermore the Sheikh was ruler of the Hejaz, which was an independent entity or at least was in *statu nascendi*, and international law, at the time, recognized the ability of such entities to be party to treaties. As to whether the intention was to exclude Palestine, Kattan argues, on the basis of the language used and on internal British memoranda, that there was no intention to exclude Palestine. Kattan does not, however, refer to a statement made at the 1918 Paris Peace Conference by Emir Feisal, the son of Hussein, that 'on account of its universal character, I shall leave Palestine on one side for the mutual consideration of all parties interested. With this exception, I ask for the independence of the Arabic areas enumerated in the memorandum'.⁸ With regard to the official 1939 British position paper that '[t]he whole of Palestine west of the Jordan was thus excluded from Sir Henry McMahon's

pledge'.⁹ Kattan writes, 'The legal document, which they prepared, was, however, very thin. It mainly focused on linguistics' (at 109). As to the fact that in a 1937 letter to *The Times* McMahon confirmed that he had intended to exclude Palestine from his promise to Hussein, Kattan comments that it 'was what McMahon did in 1915 that counts' and adds, perhaps rather unkindly, 'and not what he "recalled" years later when he was old, forgetful and retired from the civil service' (at 106). In the opinion of this reviewer, the jury is still out on this issue.

Kattan is forthright in condemning anti-semitism and does not shy away from describing its nefarious manifestations in Nazi Germany, where he writes that 'the Jews were stripped of all civil and political rights before being subjected to the extermination camps and the gas chambers' (at 9). His analysis of the anti-semitic background of many of the English gentile Zionists is illuminating and convincing. He quotes from numerous private diaries and conversations where pro-Zionist politicians made anti-semitic remarks. Kattan's thesis, which may well be correct, is that in some cases support for Zionism emanated from a desire to get rid of the Jews. It may explain the graffiti sprayed over walls during the 1930s in the East End of London calling on 'Jews [to] go back to Palestine'. The graffiti may also, however, illustrate the gut feeling of the sprayers that Palestine was the natural and ancestral home of the Jews. There is no doubt that European anti-semitism was far more virulent than anti-semitism in Arab countries; yet it is questionable whether it is fair scholarship for Kattan completely to ignore Arab anti-semitism, including the Damascus blood libel and the fact that in Muslim societies Jews, together with Christians, were considered second class citizens and had to pay special taxes.¹⁰

⁷ Correspondence Between Sir Henry McMahon, His Majesty's High Commissioner at Cairo, and the Sherif Hussein of Mecca in J.N. Moore (ed.), *The Arab Israeli Conflict* (1974), vol. III, at 6.

⁸ *Papers Relating to the Foreign Relations of the United States*, iii, at 891; D. Hunter Miller, *My Diary at the Peace Conference with Documents* (1928), ii, at 230, quoted from Feinberg, 'The Arab Israel Conflict in International Law' in J.N. Moore (ed.), *The Arab-Israeli Conflict* (1974), vol. I, at 416.

⁹ The British 1922 'White Paper', available at: http://avalon.law.yale.edu/subject_menus/mideast.asp.

¹⁰ See N. Stillman, *The Jews of Arab Lands* (1979); B. Ye'or, *The Dhimmi* (1985).

Kattan devotes considerable space to the issue of the right of self-determination. His starting premise is that ‘the Palestinians are an indigenous people descended from those who lived in the land between the Mediterranean Sea and the Jordan River in antiquity’, but that the ‘Zionists’ are predominately ‘Jewish immigrants who settled in Palestine mostly from Central and Eastern Europe’ (at 1). A contrary position could of course point out that it was the Jewish people who were in fact indigenous to Palestine. Kattan, however, acknowledges the futility of trying to determine who came first and treats the 1922–1948 British Mandate as the ‘critical date’ for the beginning of the conflict (at 2–3).

Kattan’s premise is that, as they were the indigenous population, the Arab Palestinians were entitled to self-determination and the terms of the British mandate denied them this right. The author does not dispute that it was not until the 1960s ‘that self-determination became a rule of customary international law applicable to all colonised people, as opposed to a vague political principle’ (at 119). He adds that in 1917 the Arabs in Palestine ‘could not independently invoke a right of self-determination’ as ‘at the time self-determination was, at best, a political principle’ (at 120). The author, however, expounds the theory that since Palestine was an ‘A’ class Mandate, the local population was entitled to self-determination in accordance with Article 22 of the Covenant of the League of Nations, which referred to ‘[c]ertain communities formerly belonging to the Turkish Empire [that] have reached a stage of development where their existence as independent nations can be provisionally recognized’ (at 138). Kattan strengthens his case by quoting from a memorandum by Balfour to the British Foreign Secretary, Curzon, in which Balfour refers to the ‘contradiction between the letter of the Covenant [of the League of Nations] and the policy of the Allies’, stating ‘[f]or in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country’ (at 123). The Palestine mandate was, however, *sui generis* in the sense that it was not officially designated an ‘A’

mandate. The principle of self-determination was to be applied by establishing a Jewish National Home; ‘recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for *reconstituting* their national home in that country’.¹¹ The Mandatory authorities were instructed to ‘facilitate Jewish immigration under suitable conditions’.¹² The terms of the British Mandate were reconfirmed at the San Francisco Founding Conference of the UN.¹³ Kattan may be correct that ‘[e]ffectively, Arab self-determination in Palestine was being temporarily *postponed* so as to give the Zionists an opportunity to create their home’ (at 130). This, however, was done by the League of Nations, and confirmed by the UN as a deliberate act, after excluding Eastern Palestine (Transjordan) from the terms of the Mandate referring to a Jewish National Home.¹⁴

Kattan is not a fan of the 1947 UN proposal to partition Western Palestine. He writes that ‘allowing a minority of the population to partition the country against the wishes of two-thirds of the population is a very odd way of giving effect to rights’ (at 156). He writes at length about the pressure the Zionist movement applied to states in order to persuade them to vote in favour of the resolution, although no mention is made of any counter-pressure that was, presumably, applied by Arab states. Kattan’s conclusion is that in addition to the inequity, in principle, of partition, there was inequity in awarding the Jewish population the most fertile parts of the country. Kattan might

¹¹ From the preamble to the British Mandate for Palestine, confirmed by the Council of the League of Nations, 24 July 1922, *League of Nations Official Journal*, Aug. 1922, at 1007 (emphasis added).

¹² Art. 6 of *ibid.*

¹³ See Feinberg, *supra* note 8, at 419.

¹⁴ The area of Transjordan was deleted from the area of Palestine in which a Jewish National Home was to be created: Memorandum by the British representative under Art. 25 of the Palestine Mandate, approved by the Council of the League of Nations on 16 Sept. 1922 (reproduced as UN Doc A/70, Oct. 1946, at 2–7).

have mentioned that the UN Commission recommending partition specifically pointed out that one Arab state had already been created in the historical area of Palestine,¹⁵ and presumably this was taken into account by the Commission in delimiting the area of an additional Arab state in Palestine.

As to Israel's independence, Kattan holds that 'there is nothing in the text of the British Mandate of Palestine that gave the Jewish people a right to break away and create a Jewish state' (at 141) and that '[t]he Zionists had a right to determine their own future in Palestine by creating a Jewish national home, but that this could only be established *within* a Palestinian state' (at 142). According to Kattan's reasoning, that 'the Arabs were willing to create a state with strong protection for minorities was consistent with the self-determination of both peoples, whereas the creation of a Jewish state in place of a Palestinian state was not' (at 242). Jewish self-determination was to take the form of being a 'protected' minority in an Arab state, not a proposition likely to engender much Zionist enthusiasm. In the opinion of this reviewer, the better interpretation is that in 1922 it was doubtful whether the principle of self-determination was a legal principle. Yet, by 1947 both the Jewish and the Palestinian peoples had the right to create independent states in Western Palestine. The Jewish population utilized this right; the Palestinians have not yet done so, and the border between the states will have to be negotiated between the parties.

This reviewer found the chapter on the 1948 Arab-Israeli conflict to be perhaps the most polemic chapter in the book. The author contends that the invading Arab armies were acting in self-defence and only to protect the local Palestinian population (at 180). This claim ignores the statements by Arab leaders themselves that their actions

were intended to prevent the partition of Palestine and the creation of an independent Jewish state.¹⁶ The book refers to a Haganah strength, prior to May 1948, of '30,000 front-line troops backed by up to 32,000 garrison forces' (at 178). The reality was that in May 1948, except for some 2,000 members of the Palmach, who were full-time soldiers, all the so-called 'front line troops' were civilians, members of an underground militia who were badly equipped, lacked sufficient arms, and whose largest tactical unit was the infantry company.¹⁷ In any armed conflict civilians are harmed and some soldiers commit war crimes. The author confirms that 'there were massacres committed by the Arab armies against Jewish civilians' (at 172), but then proceeds to enumerate a long list of Israel's crimes, many based on hearsay and unfounded rumours. The only Arab attack mentioned is that 'a ten-vehicle convoy en route to Hadassah Hospital was attacked by Arabs; 39 Jews, 6 Arabs and 2 British were killed in the seven-hour battle which followed' (at 193). This is a remarkably anodyne description if contrasted with another account which describes the same incident as an ambush of a convoy of clearly marked ambulances and hospital buses 'carrying mostly unarmed Jewish lecturers, students, nurses and doctors on their way to the mountaintop Hadassah Hospital', 'seventy-eight academics, doctors, students, nurses and Haganah men were dead, many roasted alive'.¹⁸ Apart from the reference to the Hadassah convoy there is no

¹⁵ See *supra* note 14. Official Records of the Second Session of the UN GA, Supp. 11, UN Special Committee on Palestine, Report to the GA, i (1947), UN Doc A/364, 3 Sept. 1947, Ch. II, at para. 70.

¹⁶ See cable of 15 May 1948 from the Secretary General of the League of Arab States to the Secretary General of the UN, UN SCOR Supp., May 1948, at 83; UN SCOR, 3rd Year, 292nd Meeting, at 3; UN Doc S/748, UN SCOR, 3rd Year, Supp. for Apr. 1948, at 90.

¹⁷ Lt. Col N. Lorch, *The Edge of the Sword, Israel's War of Independence 1947–1949*, Foreword General S.L.A. Marshall, USA Ret (1961; 2nd edn, 1968), at 30–31.

¹⁸ B. Morris, *1948 A History of the First Arab-Israeli War* (2008), at 128–129. Kattan frequently quotes from this book but not regarding this particular incident.

reference whatsoever to any Arab initiated attack on civilians or any war crimes committed by Arabs.

On the thorny question of Arab refugees, Kattan presents interesting material as to behind the scenes of the 1949 Lausanne Conference, which this reviewer had not seen before. On the claim of a right of return, Kattan marshals the frequently presented international law arguments to prove a right of return for Palestinian refugees, basing himself on international human rights instruments, on UN GA Resolution 194 (iii)¹⁹ and the principle of automatic succession to the nationality of a new successor state by residents of the former state (at 221). The author does not, however, present any of Israel's counter-arguments.²⁰ The reviewer would also have been interested to read a legal justification for the Palestinian claim that the right of return applies in principle to all descendants of refugees. It is on the basis of this claim that Israel now faces a demand to accept nearly five million Arab refugees, a demand which, if accepted, would imply turning Israel into an additional Arab Palestinian state. On the question of Jewish refugees from Arab countries Kattan holds that 'it would be difficult to argue that an exchange of population took place in 1948' (at 212). This perhaps contradicts Kattan's own statement that 'the Arab world retaliated for their [Jewish] expulsion of the Palestinians by forcibly ejecting their own Jewish population to Palestine' (at 252).

Kattan contends that because Israel, in 1948, 'emerged as a state from the throes of battle rather than from any legal entitlement bestowed upon it by the UN' (at 232), the US recognition of Israel in 1948 was premature and the Soviet recognition illegal (at 234). In Kattan's view, 'Israel's title to Palestine

is therefore based on conquest' (at 241). He further contends that Israel's membership of the UN was 'predicated' on reaching an agreement on the issue of the refugees. Kattan does not bring any authority to the rather surprising theory that the UN has an arrangement for conditional membership which has been applied only to Israel. As to Israel's borders Kattan writes that 'incorporating any territory beyond the 1948 [sic] Partition Plan's boundaries into the state of Israel was an act of unlawful annexation' (at 244). He further concludes that although 'Egypt and Jordan have acquiesced to Israel's existence' and so has the PLO (at 245– 246) it does not imply that they recognize Israel beyond the lines of the 1947 Partition Plan. Kattan refers to Watson's premise that Resolution 242 supersedes the 1947 Partition Plan,²¹ but denies the validity of the premise. According to Kattan, since 'the 1947 UN Partition Plan is the "only authoritative document produced by the United Nations,"' it can not be superseded by UN Security Council Resolution 242, a Security Council Resolution not based on Chapter VII' (at 245). Kattan could perhaps have added that the authority of Resolution 242 to supersede the Partition Plan derives not necessarily from a Chapter of the UN Charter, but rather from the fact that all the parties to the conflict, including the PLO, have accepted Resolution 242 as the basis for a solution.

Kattan does, however, end on an optimistic note, which this reviewer endorses, namely that if the PLO and the government of Jordan agreed to this 'there is no reason why, in principle, both Banks of the Jordan could not form one state' (at 256).

Kattan included an impressive bibliography, including Israeli authors who do not represent his views, many of them quoted in the text of the book. Nevertheless, I was disappointed to find jurists such as Nathan Feinberg, Ruth Lapidot, Jacob Robinson, and Shabtai Rosenne omitted from the list. The book also

¹⁹ Para. 11, UN GA Res. 194 (III) of 11 Dec. 1948.

²⁰ See, e.g., Lapidot, 'Legal Aspects of the Palestinian Refugee Question', *Jerusalem Viewpoints*, Jerusalem Center for Public Affairs No.485 (2002), available at: www.jcpa.org/jl/vp485.htm; Sabel, 'The Palestinian Refugees, International Law and the Peace Process', 21(2) *Refugee*, Canada's Periodical on Refugees (2003) 52.

²¹ G.R. Watson, *The Oslo Accords: International Law and the Israeli–Palestinian Peace Agreements* (2000), at 24.

includes a glossary, though I am not sure that in this Google age it is really necessary for a book on international law to include a glossary of terms such as 'United Nations', 'sovereignty', and 'self-defence'.

The book clearly reflects prodigious research and erudition. It includes a large amount of material from recently released archives and quotations from a multitude of sources. Notwithstanding the scholarship, it is a partisan book and occasionally polemic. Nevertheless, I recommend that it find its place in any library dealing with international legal aspects of the Arab-Israeli dispute.

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