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Review of *From Coexistence to Conquest:
International Law and the Origins of the
Arab-Israeli Conflict, 1891-1949* by Victor
Kattan

By
Elliot Shackelford*

I.
INTRODUCTION

As one of the central geo-political dilemmas of the last century, the Arab-Israeli conflict has been an ongoing challenge within international politics, testing the universality and applicability of international law. At its core, the conflict, which is grounded in a disagreement over the land of Palestine, has been characterized as an irresolvable struggle between two competing nationalisms.¹ While complicated by religious and political diversity, this dispute between peoples involves first and foremost competing claims to land, albeit a very significant land. For international law, establishing the identity of the first occupants is less relevant than who was sovereign at a critical moment. Yet determination of the validity of competing claims to Palestine is complicated, reflecting the complexities of Jewish and Arab history in the region.

Since sources of custom, treaty, and precedent guide the foundation of international law, an accurate historical perspective is essential in understanding and interpreting the legal elements of actions taken by a state or by a people. The fundamental disagreements underlying the conflict over Palestine may not have had their bases in disputes within international law, but the means with which legal norms have been used as a tool of resolution, political motivation, or claims to fairness has heavily influenced the conflict's current standing. For many, the ultimate solution to the Arab-Israeli struggle depends on the

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1. VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949* 1 (Pluto Press 2009).

capability of global legal mechanisms to discern and engender justice, even if such an “ideal” outcome has been elusive in Palestine’s previous record. Extrapolation from the past does not, of course, inherently dictate future certainties. However, the origins of the seemingly intractable conflict—the period between 1891 to the end of the Arab-Israeli War in 1949—could prove instructive, if not critical, in examining the applicability and effectiveness of international law in determining an eventual resolution.

Examining this critical period of transition for Palestine in his book *From Coexistence to Conquest*, Victor Kattan contrasts the realities in political thought and action that led to the region as it exists today with the evolving principles of international law that were applied as critical decisions were made.² While international law and global politics saw continuous transformation during this period, the decision-making Great Powers, Britain, France, and the United States, consistently invoked ideals and customary norms throughout the negotiations to create Israel from land that formerly was a province of the Ottoman Empire. Set against a temporal backdrop that included tremendous global socio-political change, Kattan’s book brings a critical and incisive legal focus to bear as he challenges familiar accounts and viewpoints of Palestine’s transformation.

For Kattan, an investigation into the legal status and foundation for the creation and development of Palestine is no mere academic exercise. While his credentials as a teaching fellow at the Centre for International Studies and Diplomacy in London demonstrate an exceptional academic background from which to approach this study, he also holds a personal connection to the region through his family heritage. Kattan’s experience in Palestine as a young man connected him to the land and to the period in which his father’s family lived in the region. These geographic, temporal, and ancestral associations serve to deeply enhance and enrich his academic interest in understanding the sources of the Arab-Israeli conflict within the international legal and historic context from which it evolved.

II. SUMMARY

Kattan’s detailed and well-researched work proposes two broad perspectives of the role of international law during the five-decade process that resulted in Palestine’s current geo-political arrangement.³ First, the Zionist objective in Palestine possessed a colonialist element, one that the Palestinian Arabs recognized and opposed throughout international legal maneuverings and

2. *Id.* at xvii.

3. Richard A. Falk presents a similar conception of the book in his forward, emphasizing the importance of the work as acknowledging the historical contexts and realities in which the conflicts of international law arose. *Id.* at ix.

political negotiations. The international political order gradually moved away from the colonialist mindset during the period as modern international law developed. However, the Zionists' effective use of international pressure, including legal policies and approaches, led to an imbalance in the application of international norms while determining the geopolitical outcome in the Middle East. Second, as the Great Powers put in place the governing structures that enabled the region's transformation, they systematically ignored the rights of the indigenous Arabs under international law. The resulting disparity of law and rights in the decision-making process produced an environment that led to the current configuration, putting the interests of the Israeli state against those of the Palestinian Arabs.

In laying the foundation with which he contrasts later developments in the region, Kattan contends that the application of international law should have been weighed against the geopolitical circumstances as they stood between Arabs and Jews in Palestine at the outset. The "Arab-Israeli conflict is not old," he writes, but rather emerged from the rise of a Jewish nationalism that had not existed in the region prior to Zionist activism.⁴ In fact, under the Ottoman Empire, the relations between Palestine's ethnic populations could be characterized as coexistence, a portrayal in stark contrast to the later conflict. Neither population bears the true liability for the escalation of nationalist contention, which Kattan argues resulted from a confluence of anti-Semitism, colonialism, and Zionism, despite that international humanitarian norms were then developing.⁵ Therefore, prejudice and the last remnants of colonialism gave Zionism a foundation, motivation, and process through which to pursue the goals of a Jewish home in Palestine. The result, according to Kattan, is that despite inconsistent or imprecise application of the law as large-scale Jewish immigration began, "international law was pivotal to the development of the Jewish national home," and "without it, Israel would not exist today."⁶ Although the process took place over five decades, the connection to international law gave the Zionist movement legitimacy on the world stage that bore results as the international norms started changing more rapidly following World War I.

The post-war uncertainties inherent in the region in 1919 are evident in Kattan's characterization of the period as a "scramble" for Palestine. As an area of strategic importance, the Middle East went through a radical transformation when the Great Powers divided it into separate territories at the Paris Peace Conference of 1919. Regarding Palestine, the difficulties in implementation of the Conference's solutions arose due to the conflict between promises made by the British to the Arabs during the war, the structure of the mandate outlining provisional British governance, and the Balfour Declaration pledging a Jewish

4. *Id.* at 1.

5. *Id.* at 8.

6. *Id.* at 22.

homeland.⁷ Kattan asserts that the Mandate system was very different than the *conquest* of Palestine that occurred through England's particular application of its governance in the region. Within conflicting pledges, the Arab population saw the Zionists as "settler-colonialists."⁸ Saddled with these inconsistencies, the British regime faced the steep challenge of governance in a situation where it became nearly impossible to ensure legal protection of Zionists and Arab interests alike. Sovereignty was one of many difficulties with the Mandate upon which the Great Powers could not reach agreement.⁹ The international community's legal objections to England's actions in interpretation of its agreements was an international response to the problematic Mandate system, a level of disapproval that was likewise pragmatically reflected in the active resistance of the Palestinian Arabs.

According to Kattan, Arab opposition to Jewish immigration in Palestine emerged as early as 1891, years before the first Zionist Congress. As British administration under the Mandate formally began in 1922, the question of how and in whom Palestinian sovereignty would eventually vest remained uncertain, particularly since England was merely the occupying power. No traditional modes of sovereign acquisition were available to the Zionists, and legitimate acquisition under international law would have required cession of land by the Palestinian people.¹⁰ However, continued Jewish immigration and the perception of a British policy favorable to Zionists led to Arab riots, a situation unusual in the prior eight decades. Despite studies like the Hope-Simpson report, which found that Arab standard of living would decline with continued Jewish immigration, the lack of political parity in British decisions caused Arabs to lose faith in the political process.¹¹ As a result, England's Peel Commission recommended the Partition of Palestine in response to the escalating violence. With Arab opposition to the concept of a Jewish national home continuing as the basis of unrest over an extended period, the comparative strength of international ties and the activity sanctioned as a result placed the two sides in relative relationships with the international community that were perhaps decisive in the outcome of the eventual war.

To illustrate the importance of both the Allied promises to the Arabs and communications that occurred between Western and Arab leaders, Kattan uses a novel approach in highlighting the correspondence between King Hussein, the

7. The Mandate resulted from the League of Nations system, and included the terms of the British governing presence in Palestine. Britain's Foreign Secretary, A.J. Balfour, is responsible for the Declaration that promised a national home for the Jews on the condition that it would not contravene the rights of existing Palestinians. Kattan questions the interpretation of both agreements in the years prior to the formation of the Israeli state, but the Balfour declaration had a particular influence on British foreign policy and international law in the region. *Id.* at 42.

8. *Id.* at 45.

9. *Id.* at 56.

10. *Id.* at 78.

11. *Id.* at 90, 93.

Sherif of Mecca, and British High Commissioner Sir Henry McMahon during WWI. The “Hussein-McMahon Correspondence” indicates to Kattan strong evidence that England promised Palestine to the Arabs through diplomatic communications that rose to the level of a secret treaty.¹² Because of differences in the handling of international treaty negotiations, the customary rule that only states could conclude treaties made possible legitimate exceptions that became common in British-Arab relations. Although disputes arose over whether the promises made to the Arabs had occurred, and to what extent they existed, the British government did not argue any lack of legal capacity by Hussein or that any agreement would not have been legally binding. When the correspondence was made public in 1939, many viewed it as a legal rather than a diplomatic document, among them the Chief Justice of Palestine’s Supreme Court.¹³ Such interpretations quickly became problematic for England’s foreign office, since they posed potential contradictions to the Balfour Declaration’s pledges to the Jews. The legal question ultimately raised, therefore, became how to combine the concurrent but opposing national aspirations of Palestinian Arabs and Zionists into a single Palestinian state.¹⁴

The concept of self-determination was among the international norms gaining support during the period, particularly in the post-World War I era. Measured against a self-determinative standard, the resolution of the conflict over Palestine as of 1948 came at the end of a process that included multiple decisions in stark variance with international law. Zionism was, in many ways, innately “at odds with twentieth-century notions of self-determination,” particularly since Jews “had no territory to claim as their own . . . and never formed the majority of Palestine’s population” prior to their conquest of the Arab population.¹⁵ In fact, Kattan contests that such “re-colonization” was at odds with the ongoing decolonization of the period, because British leadership recognized that implementing such policies would lead “unquestionably” to an unfavorable verdict for the Zionists.¹⁶ Apparently, even at that time, the British recognized that such a position was both politically and morally weak.

While Kattan concedes the difficulty of relating the concept of self-determination to a territory encompassing multiple ethnic groups, he submits simply that the Palestinian Arab majority should have been more determinative in the region’s formulation, at the very least during the critical period of post-World War II Partition. One of the most widely contested areas of international law, the right of self-determination is “customarily invoked by all sides to a

12. *Id.* at 98.

13. The Chief Justice, Sir Henry McDonnell, wrote that the documents were consistent and clear, reducing the validity of Britain’s claim that there was no intention to include Palestine in the territories promised to Hussein. *Id.* at 107-08.

14. *Id.* at 116.

15. *Id.* at 117.

16. *Id.* at 122

conflict,” a reality reflected in the incongruent characterizations of whether the population of Palestine was allowed to exercise it.”¹⁷ The British acknowledged that the policies emanating from the Balfour Declaration and the application of the mandate, among many other governing instruments, were counter to the principle, but justified it on the basis that Palestine was a unique and special case. However, as of 1919, there was “no obligation in customary international law to consult the inhabitants of a particular territory on their political development,” a deficiency in policy that continued to characterize the entire period leading to Partition.¹⁸ Therefore, the basis for the argument that self-determination should have inherently led to a different outcome is not as solid as it could be.

Kattan also points out logical inconsistencies that existed in the Great Powers’ invocation of international law. “If the Jewish people were not a ‘people’ for the purposes of international law in 1917,” he asks, “how could they assert a claim to self-determination in Palestine?”¹⁹ At the base of this question is the fact that, to some extent, the Great Powers indeed used self-determination as a policy rationale for Partition as well as the decisions that led up to and followed it. But if the principle as a legal norm applies to one population, it must apply to another. Under the doctrine of self-determination, the only way the Balfour Declaration could be aligned with the Mandate within the League of Nations was to accept that both Jews and Arabs had a claim to Palestine. However, this seeming impossibility has never been resolved, and it continues to present a source of controversy.²⁰ An indication of the prevailing thought is found in one British Foreign Office memorandum, which stated that because the Jewish population was entitled to greater influence than just numbers, the “problem of Palestine could not be *exclusively* solved on the principle of self-determination.”²¹ This conception, however, directly contradicts the Mandate’s notion that the British were holding the land in sacred trust until its population could more effectively exercise the principle of self-determination. According to Kattan, “it would be wrong to argue that, because self-determination was not a right in customary international law . . . the Palestinian people were not allowed to rely on it.”²²

Kattan finds it interesting that nearly all of Palestine’s neighbors were among those opposing Partition during the UN vote on November 29, 1947, although he perhaps places too much emphasis on geo-political reasons for that outcome. As the international community moved toward the decision to partition Palestine into separate Arab and Jewish states, the United Nation’s special

17. *Id.* at 118.

18. *Id.* at 121.

19. *Id.* at 125.

20. *Id.* at 126.

21. *Id.* at 129.

22. *Id.* at 143.

committee on Palestine paradoxically accepted an Arab predominance in population while concluding that self-determination did not apply to that population. Numerous instances of international jockeying on the subject of Partition, including a close (but failed) vote on submitting the question to the International Court of Justice for an advisory opinion, reflect the politicization of the situation rather than its grounding in international legal principles. At the Partition vote on November 20, 1947, Jews were awarded fifty-seven percent of Palestine albeit constituting thirty-three percent of the population.²³ The legal questions surrounding the vote, however, remain contested today: a) whether the United Nation's General Assembly "has the competence to partition mandated territory," and b) "whether the Plan was binding under international law."²⁴ Arguably, a UN Security Council vote is required in order for a vote to be binding, leading some to claim that the Partition vote was merely a resolution rather than a legally legitimate determination.

Although the two-state solution could be seen as adopting self-determination in reflecting the existence of two separate peoples, the implementation of Partition against the wishes of a two-thirds Arab majority might seem counter to international legal rights. Even if one accepts the 1947 UN Partition decision as binding, numerous conflicts of international law appear to remain. Land ownership does not equal sovereignty under international law. In establishing the boundary, the UN commission took little consideration of which population owned which land. Kattan provides prior examples of Armenia, Turkey, Ireland, Poland, and Czechoslovakia in asserting that the outcome contravened established international legal custom.²⁵ Success, or the perceived chances of success, should not be as much of an authority in applying international law as a simple acknowledgement of accepted norms. Unfortunately, the Partition's chances of future success influenced US support, among other nations. The Partition Plan may additionally have been at odds with the terms of the Mandate, especially since the Great Powers could have implemented such a solution in 1919 had they so desired. In terms of the Plan's success, rather than as merely a matter of law, Kattan asserts that accounting for Palestine's stability and peace would have been wise. He also proposes that, in its ideal conception of the ultimate outcome, the United Nations may in reality have contributed to the conflict by providing Palestinians with a cause to fight.²⁶

The application of international law to the Arab-Israeli conflict extends beyond the interactions preceding Partition in 1948. Specifically relating to the formation of the state of Israel, Kattan claims that legal scholars treat Israel's emergence as a legal entity as a question of fact without regard for the

23. *Id.* at 151-52.

24. *Id.* at 153.

25. *Id.* at 159.

26. *Id.* at 160.

lawfulness of the state's creation.²⁷ This oversight should be filled, he says, by examining the circumstances through the lens of international law. Rather controversially, Kattan uses words like "expulsion" to describe the Arab departure from Palestine and "revisionist history" in characterizing the prevailing Israeli characterizations of the process. He also cites abundant evidence designed to rebut the notions that the departure was voluntary, that the Arab states attacked Israel rather than acting to protect the indigenous Palestinians, and that the Arabs were intransigent in their political stance towards Israel.²⁸

According to Kattan, the true record of the state of Israel's emergence in 1948 includes events that could constitute multiple violations of international law, even if they occurred prior to the formal establishment of the state. An "insurrectional movement" that assumes administration of the national government can be considered "an act of that state under international law," a definition that Kattan applies to Zionist efforts toward formulation of the Israeli government.²⁹ While to some in the international legal community Israel's actions were inherently defensive, Kattan argues that the 1948 Arab-Israeli War and the atrocities committed by the Israelis throughout the open conflict, exhibit that the Arabs were not the aggressors. Instead, the states surrounding Israel were entitled to come to the defense of the Palestinians, and could even be said to have been acting in their own self-defense within the UN Charter.³⁰ Even if the Arab states accepted Partition as a legitimate concept, under international law they could still justifiably question the right of the Zionists to create a Jewish state. Some international lawyers have contended that the sovereignty vested in the state of Israel is valid due to the Jewish people's superior title to Palestine as the Mandate expired. Kattan responds to this assertion with the perspective that circumstances surrounding the war and the Mandate should have led to sovereignty vested in the people of Palestine themselves.³¹ However, through numerous acts of questionable legality under international norms, acts that Kattan enumerates in detail, the population demographics of Palestine radically shifted as the Arabs departed.

The former Arab residents must be acknowledged as a unique population, Kattan argues, because the concept of refugees under international law implies those who have fled their own country *with* the possibility of return.³² The deportation, or "expulsion," of Palestinian Arabs was not only contrary to customary international law, but also to the safeguards within the Balfour Declaration. Many tactics implemented against Arab civilians contravened

27. *Id.* at 169.

28. *Id.* at 171-72.

29. *Id.* at 173.

30. *Id.* at 179-80, 186.

31. *Id.* at 189.

32. *Id.* at 209

international humanitarian legal norms that had obtained some principled support in the nineteenth century, but which had become customary by the 1947-49 conflict.³³ While the 1949 Geneva Convention codified many norms not explicitly prohibited by any previous legal instrument, many of Israel's actions during the war arguably contravened provisions of the 1907 Hague Convention. If the expulsion of Palestinian Arabs was unlawful at the time, Kattan asks, what does international law offer this displaced people in terms of their rights to return and restitution?

Some international legal scholars have based Israel's legitimacy on the Zionist claim to Palestine within an ancient right of return, claiming that right as a people displaced by the Romans. Those who make this assertion do not accept similar claims by Palestinian Arabs, although the latter claims are only 60 years old and the United Nations reaffirms them each year.³⁴ Kattan characterizes the Arab departure as a "population exchange," even though most such instances possess some agreement that could exhibit validity under international law. Kattan cites International Law Commission (ILC) standards in arguing that the Israeli expulsion of Arabs is an ongoing violation of international norms rather than a historic event, and, as such, the obligation to allow repatriation is stronger due to current law.³⁵ According to some states and international legal organizations, the Israeli stance toward the displaced Palestinians is to a large extent an invasion of the sovereignty and territorial integrity of the states to which the Arabs escaped. Despite widespread international disapproval exemplified by UN resolutions and ILC findings, Israel has repeatedly refused to relinquish its hold on the land. Such a failure to compromise, Kattan suggests, resulted in missed opportunities to end the conflict.³⁶ Whether such a simplification could have resulted in a viable solution is questionable, but the issue remains one of the critical components of the conflict both on the ground and in the international legal regime.

In sum, Kattan forcefully argues that the process that led to Israel's emergence was not within international legal standards, but rather was "quite simply one of the twentieth century's last examples of a successful *conquest*."³⁷ This powerful and controversial conclusion summarizes the core of the book's argument, placing the historical realities in a very different context within international law. The creation and formalization of the Israeli state present additional questions of law quite different from those raised by the active

33. *Id.* at 203.

34. *Id.* at 211.

35. The International Law Commission's Articles on Responsibility of State for Internationally Wrongful Acts states in Article 14 that "the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation". *Id.* at 213.

36. *Id.* at 230.

37. *Id.* at 232.

conflict. One perspective contends that the formalization of the state of Israel had “as much to do with Great Power politics as with international law.”³⁸ Among those concerned were the US State Department's legal advisors, who believed that premature recognition of Israel could violate international legal standards. Despite similar reluctance by other governments to recognize Israel, the United Nations accepted Israel subject to pledges regarding Partition and refugee return. However, Kattan characterizes Israel's position that the refugee problem was “not of its own making” as “patent nonsense” because the Israeli state “cannot unilaterally interpret its obligations under international law.”³⁹ The difficulties in interpreting international norms in an era that included not only the codification of many elements of international law, but a changing international order and the advent of the United Nations, extended not only to challenges to Israel's existence, but to the formulation of its government and borders. Kattan concludes by citing multiple examples of the means by which a modern state evolves into legitimacy, none of which, he argues, fit Israel's path.

III. DISCUSSION

Among the strengths of Kattan's analysis is his representative inclusion of the vast array of communications that took place between leaders, diplomats, and key figures serving the Great Powers, the governing entities of the Arab world, and the advocates of Zionism. Through the words of those whose decisions were critical, the inconsistencies in application of relevant international legal principles that he argues to have existed become more clearly accessible. Kattan supplements pertinent letters and agreements with substantial text and quotes from international agreements, treaties, and declarations, some of which the parties negotiated publicly and were widely known and understood, and some which individual leaders concluded in bilateral secrecy. These sources are certainly not new nor are they just becoming available for academic analysis. One of the strengths of the book, therefore, lies in its application of international law in combination with these primary sources in advocating a perspective of the conflict that international law scholars and practitioners have not widely considered. By contrasting such evidence of the intentions of leaders and the written instruments of legal international norms with often-detailed historical accounts of the events occurring during the period, Kattan effectively supports his proposition that the Great Powers applied international law asymmetrically to Arabs and Jews throughout the process that determined Palestine's future and through which Israel emerged.

Exploring the confluence of history, religion, international law, and political realities while retaining the ability to ask difficult and, in some

38. *Id.* at 232.

39. *Id.* at 237.

instances, rarely-addressed questions, Kattan presents a legal perspective of the ongoing conflict that, according to him, many scholars of international law have avoided.⁴⁰ He challenges his reader with alternative perspectives on the decisions and instruments that influenced the Zionist predominance in Palestine at the expense, he argues, of the indigenous Palestinian Arabs. The abundance of evidence he marshals in support of the contention that the international legal regime, if properly applied, would have led to a different outcome, does not resolve the debate—although it seems at times that he believes his argument to be so convincing as to leave no room for counterargument. When Kattan does include an opposing perspective of an event or a historical circumstance, or where he cites a reading of international law that diverges from his own, he often characterizes it as simply mistaken rather than creating an opportunity for a balanced weighing of the analysis. Greater credence given to conflicting conceptualizations of Palestine's evolution could lend increased legitimacy to the originality of his argument. As a result, the book's acknowledgement of contrary views is lacking at times, leading one to wonder whether the prevailing view is sufficiently well-known so as to balance the dialogue and, if not, how the evidence Kattan presents has not gained a wider recognition.

Given Kattan's acknowledgement that modern international law was still developing throughout the period, it is difficult to accept the argument that there existed a regime of international law that, if properly applied, could have greatly changed the way the situation unfolded. The book contends that possession and sovereignty in Palestine should follow established international law based first on the situation as it stood prior to the Zionist efforts. But a potential counterargument exists that the constantly-changing situation in the region created an environment in which the likewise-evolving legal norms could not be definitively applied. In asserting that full and correct application of international law could or would have resulted in a different outcome, Kattan also acknowledges that the Great Powers had received their designation for a reason: their inherent strength allowed them to interpret legal norms through their own political goals. Of course, this would imply that international law was merely a veil obscuring a powerful state's individual objectives, a perspective that Kattan does not articulate. His argument seems rather that, despite radical changes in the global legal environment during the period, sufficient law existed through international custom and treaty to have been legitimately applied to both sides. He claims that, through such legal regimes, an alternative to the present circumstances and structure of both Palestine and the attendant conflict could have been determined. However, Kattan does not fully address the dichotomy between his assertions of alternate outcomes and the reality of an underdeveloped and still-evolving set of coherent international norms.

There are undoubtedly readers who will find Kattan's work biased to a fault. In response to those holding opposing views or seeking a more balanced

40. *Id.* at 169.

perspective of the conflict over Palestine, Kattan would likely argue that his work is itself an attempt to balance against a prevailing view of the region's transition. Among his critiques of international legal scholarship is that the international community unquestioningly accepts certain elements of the conflict's progression, such as the circumstances surrounding the organization of the state of Israel, rather than giving them the intensity of examination that a more thorough application of international law would apply. Kattan's book is designed to remedy this perceived oversight, bringing together a variety and depth of resources that pertain to the history of Palestine's transition. In addressing the arguably incomplete international legal scholarship pertaining to the long history of the Arab-Israeli conflict, *From Coexistence to Conquest* delves deeply into the historical context of the struggle for Palestine while posing thought-provoking and sometimes difficult questions about prevailing perspectives of the region's transition and the historical effectiveness of international law. As he attempts to enhance the reader's understanding of the Arab-Israeli conflict, a conflict with roots in a struggle now more than a century old, Kattan illuminates how the role and application of international law transitioned into its modern form just as Palestine too was transitioning.