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# REVIEW ARTICLE

## Israel's Legal Right to Exist and the Principle of the Self-determination of the Palestinian People?

Anthony Carty*

*Victor Kattan*, **From Coexistence to Conquest, International Law and the Origins of the Arab-Israeli Conflict, 1891–1949**, London, New York: Pluto Press, 2009, 416 + xxxi pp, hb £90.00, pb £29.95.

The question whether Israel has a legal right to exist might appear to be one of the most emotively charged in the vocabulary of international law and politics. It evokes immediately the 'exterminationist' rhetoric of numerous Arab and Islamic politicians and ideologues, not least the present President of Iran. Yet in the perhaps overly cool and detached world of analytical legal positivism, the proposition 'Israel has a right to exist' can only be taken to mean that there is an international legal order, which confers this right on Israel. If there is no international legal order, then Israel, no more and no less than any other country, cannot be said to have a legal right to exist. This may be no more than a Hobbesian assertion that states exist as wolves towards one another in a state of nature. For instance in 1966 in a debate in the Security Council the Israeli Representative said:

> Whatever we do, whatever our Government decides to do, is done in order to defend and protect our national independence and our national security – on the sole responsibility of our Government and not on behalf of anybody else or on behalf of any consideration but our own.[1]

In recent times, Premier Netanyahu has repeated this language, viz Israel must be the master of its fate, the Jewish state exists to protect the Jewish people etc. The existence of a legal order supposes some criteria, any criteria, of legitimacy, that somehow authorise decision-makers to engage in effective projects of order whatever their merits. If these conditions are not met, it is intellectually more honest to accept that we find ourselves in the absence of any international legal order. In this case, the dynamic or drive underlying state actions is for the state to sustain and preserve itself precisely with the same independent force and energy with which it originally established itself. This is a meta-legal drive which finds expression among international lawyers when they say that the existence of

*Sir Y K Pao Chair of Public Law, Faculty of Law, University of Hong Kong, on leave from the University of Aberdeen.

1 21st year, 1321st Meeting, UN doc.S/O.V.1321, 17, quoted by D. Bowett, 'Reprisals involving recourse to armed force' (1972) 66 AJIL 1, 6.

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a state is a question of fact. Israel itself used this argument against the request for an advisory opinion on the status of Palestine in 1948, saying, 'The existence of a State is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness'.[2] This fact is central to an analysis of international relations from a critical perspective, because it prepares one for the compulsive, repetitive nature of the lust of states for security, a mark of all states and a fundamental characteristic of inter-state relations.[3]A state may have an individual self-referring drive of legitimacy such as 'Manifest Destiny', but this will not offer, or even try to offer, a convincing basis for any international communal living. The question which will be asked of Kattan's book is whether it demonstrates, as he intends, a series of illegalities in the construction of Israel and in the destruction of the Palestinian people, or whether, instead, it demonstrates a legal vacuum which Israel itself reaffirms in Netanyahu's fighting rhetoric. In the latter event, is there a way to reconstruct from scratch a legal conceptual framework for Palestine and what would be the best forum in which to achieve this?

## THE CONSTRUCTION OF THE LEAGUE MANDATE OF PALESTINE AND ITS JEWISH HOME

Given the subtitle of the book one can expect its 261 pages of text and 105 pages of densely filled footnotes to show that these events are illegal, contravening international law. In Kattan's view, the flouting and manipulation of international law are the cause of the present continuing violence. Kattan bases his legal argument around a pillar, that the Mandate territory of Palestine was included in territories promised to the Arabs during the First World War, an implementation of self-determination according to the MacMahon Letter.[4] This promise was not fulfilled in relation to Palestine. Instead a Jewish Home was forcibly constructed in contravention of legal principles. From National Archive Records, Kattan quotes Arthur Balfour, the British Foreign Secretary, admitting that, 'The weak point of our position, of course, is that in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination. If the present inhabitants were consulted they would unquestionably give an anti-Jewish verdict' (121). Balfour qualifies his statement with the assurance that the Jewish home should be provided without dispossessing or oppressing the present population, but from the start it is never indicated how these dual objectives are to be

2 Abba Eban arguing before the Security Council, cited by James Crawford, in *The Creation of States in International Law* (Oxford:OUP,2nd ed,2006) 3.Crawford describes Eban as the Foreign Minister, at that time he was Israeli Representative at the UN.
3 See above all, J. Derrida, 'The Force of Law: The 'Mystical Foundation of Authority' 1990 (11) *Cardozo Law Review* 919; also D. Campbell, *Writing Security, United States Foreign Policy and the Politics of Identity* (Minneapolis, MN: University of Minnesota Press, 1998).
4 *The Hussein-McMahon Correspondence*, Chapter 4, see especially 46. Kattan quotes the MacMahon letter, of October 1915, to Sherif Hussain of Mecca, the main spokesman for the Pan Arab cause,

recognising the principle of Arab independence in purely Arab territory – which Palestine was at that time. As will be seen, in spite of this pledge, the post 1918 Mandate of Palestine included, at British direction, a pledge to provide a Jewish homeland. MacMahon was the British High Commissioner in Cairo acting under the instruction of the British Foreign Secretary, Sir Edward Grey.


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achieved. What is the logic behind requiring 700,000 Palestinian Arabs to accept the entry for the first time of 700,000 Jews in the same 'homeland'?
In 1939, a British Government White Paper stated there should be a 'State in which the two peoples in Palestine, Arabs and Jews, share authority in government in such a way that the essential interests of each are shared' (122).This is a goal that there could never have been any prospect of achieving. There had been riots in Jerusalem in 1920 and a British Court of Inquiry concluded in an 82-page report that the cause of the rioting was the disappointment at the non-fulfillment of promises made by British propaganda, and more specifically 'the inability to reconcile the Allies' declared policy of self-determination with the Balfour Declaration, giving rise to a sense of betrayal and intense anxiety for their [Arab] future; . . . fear of Jewish competition and domination, justified by experience and the apparent control exercised by the Zionists over the administration' (83–85). This report was drawn up by Generals of the British Army in Egypt advised by a Court of Appeal judge. Kattan stresses that, one of the first things that Herbert Samuel did when he took over Palestine as its first High Commissioner 'was to ensure that the findings of the inquiry never saw the light of day' (85).
So Balfour writes to Lord Curzon, his successor as Foreign Secretary, a memo which is worth quoting in full because it is an express avowal that there is no normative coherence whatever in what Britain, with the consent of the other Great Powers, is proposing and executing in Palestine:

> The contradiction between the letter of the Covenant and the policy of the Allies is even more flagrant in the case of the 'independent nation' of Palestine than in the 'independent nation' of Syria. For in Palestine we do not propose to go through the form of consulting the wishes of the present inhabitants of the country . . .The four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in an age-long tradition, in present needs, in future hopes of far profounder import than the desires and prejudices of the 700,00 Arabs who now inhabit that ancient land.[5]

In other words, there was never a normatively coherent project of governance in relation to Palestine. Curzon, as Kattan points out, commented along the same lines. Agreeing with the objection that Arabs in Palestine should not be described as 'non-Jewish communities', he said he had never been consulted about the Mandate and 'I think the entire conception is wrong' (123).A document is drawn up, he continues, which is an avowed constitution of a Jewish State, where there are 585,000 Arabs and 60,000 Jews. That said, all Curzon can conclude is that he wishes there was an alternative. Curzon repeated the argument that the Jews had no legal claim to Palestine and that the provision of a National Home in Palestine was 'not the same thing as the reconstitution of Palestine as a Jewish National Home – an extension of the phrase for which there was no justification' (124). However, Curzon did not, nor did subsequent British leaders, explain how the

two notions were to be kept distinct in Jewish, Zionist eyes (124–125).

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5 at (123). This is a very well known document. Its reference is FO 371/4183 (11 August 1919) Balfour to Curzon, but as Kattan notes, it is reproduced in E. L.Woodward and R. Butler (eds), *Documents on British Foreign Policy 1919–1939* (London: HMSO, 1952) 345.


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Having set out scrupulously and with little comment this bizarre British record of admissions that the principle of self-determination was being flouted in the case of the Palestinians, Kattan goes on to construct what he thinks are legal arguments. Chapters 5 and 6 are central to Kattan setting out a right to self-determination of the people of Palestine. This is extremely valuable as a history or chronology of institutional events, the acts of British administration, the conduct of the League of Nations, and the role of the UN General Assembly. It is difficult to read because there are about 20 pages of corresponding narrative in footnotes from 308 to 328 and the book can only be read with two page markers in place. This incongruity has a very basic conceptual explanation. These materials are not easily distinguishable as legally significant simply because there is no legal order to encompass them, but merely what I call institutional activity, none of it authoritative.
The key argument Kattan could well have chosen to see as most useful is presented by the Institute of International Law at its meeting in Cambridge in 1931. It passed a resolution on the legal significance of Mandates, which is hidden on page 312 of Kattan's footnotes, thereby revealing his lack of a clear concept of the international legal order which might protect the Palestinians:

5. [. . .] The powers conferred upon the mandatory are in the exclusive interest of the population subject to Mandate . . .
6. [. . .] The communities under Mandate are subjects of international law[.]
7. The functions of the mandatory end by renunciation or revocation of the Mandate . . . by the recognition of the independence of the community which has been under Mandate.
8. [. . .]The rights and duties of the communities under Mandate are not affected by the expiration of the mandate or the change of the Mandatory.

Kattan could have tried to argue that such a resolution constituted fundamental principles recognised by the juridical conscience of mankind, a kind of *ius cogens* against which should be measured the institutional practices he describes in such detail. Yet instead, in the search for binding positive law – as if there were an international legislature or even a customary law community with a will to enforce its choices – he tries to pick out legal crumbs here and there which could support the claim that at least the Palestinians in Palestine also have the right to self-determination which the Israelis/Jews succeeded in exercising in 1948. Perhaps a key stage in his argument is the citation of a British Foreign Office Legal Minute which says that the political position of the Palestine Arabs had to be legally respected (132).This would be no more than what Robbie Sabel argues in his long review of Kattan's book, where he says:

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.[6]

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6 R. Sabel, (2010) 21 EJIL 1103, 1107.


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Kattan vacillates between legal arguments in a positivist sense and arguments based upon equity and proportionality. So he asks whether the Mandate itself constituted a right to self-determination for the people of Palestine but has to face the fact that the phrase was left out precisely because of the intention to introduce Jews into the territory. Then he asks whether the Mandate permitted partition, whether the UN General Assembly or the Mandatory Power had legal authority to partition the Mandate. These questions could only have legal meaning if there was an international legal community, with a legal will and a determination to exercise it.

It is possible to read Kattan as favouring a fair two state solution, not excluded by Sabel, but also not guaranteed by him. Then Kattan's history is very telling in terms of the inequities in the weight accorded to the Jewish population at the time of the General Assembly Partition Resolution. The disproportion of the two populations in terms of the territory and quality of territory allocated to the two groups, Jews and Palestinian Arabs, was enormous. As a matter of history Kattan realistically shows that this European/North American initiative had to do with making more space for European Jewish survivors of the Holocaust finding their way out of the Euro-Atlantic area to Palestine. Certainly, there was no UN consensus on the Partition Plan and not only Arab nations boycotted it. The Plan was a recommendation not enforced by the Security Council, but, historically, this is to ignore the legitimacy which it gave to the Jewish cause in Palestine in the eyes of Europeans and North Americans. That remains a hard political fact today. Kattan does not connect this fact clearly with what he calls the Arab-Israeli Conflict in chapter 7.

Kattan goes on to use by analogy arguments from principles of international nationality law as well as Palestinian citizenship law to show that the Partition Plan was not fair. Even of the one third of the Palestine population which was Jewish, very many were recent arrivals and did not have Palestinian citizenship under Mandate law. Their connection with the territory was very much less than that of the Palestinian Arabs (141–142). These are important elements of an argument about equity, but they lose their real – not to mention positive legal – force once the political context is recognised. The Arab stance was that no Jewish immigration since 1920 should ever have taken place and the Jewish stance, also in 1948, was that its immigration was only beginning. The question was one of power. Could the Arabs stop the immigration? The purpose of the Mandate was to make this legally impossible in British hands. Could the Jews be stopped? Their purpose in ending the Mandate was to ensure that they could not be.

From the perspective of international law as a system of world governance,

the circumstances of Britain's withdraw from Palestine should receive a lot of attention. However, Kattan's obsession with proving that the Palestinian Arabs have rights, such as self-determination, leads him to take his eye off the conduct of Britain in the last days of the Mandate. The cumulative effect of events, such as the Mandatory power simply abandoning the territory of Palestine without providing for any transitional arrangements, a so-called United Nations General Assembly making recommendations for partition which it had no intention of trying to implement and a Security Council which also had no interest in implementing the General Assembly Resolution, together created a vacuum of power in Palestine.

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In his recent work, Quigley addresses the institutional practices which make this vacuum obvious.[7] The end of the tragic circus of British rule in Palestine were the so-called Morrison and Bevin Plans. The former proposed a strong central government for Palestine, with initially a British High Commissioner in charge, and two Provinces, with Jews and Arabs having considerable autonomy, and, particularly, control of immigration. The Arabs rejected this. The Bevin Plan proposed a five-year trusteeship, with a constituent assembly after four years and a High Commissioner who would take steps to set up an independent state. With breathtaking aplomb, the British Government announced that it had always been the British Government's intention 'to lay the foundations for an independent Palestinian State in which the Arabs and Jews would enjoy equal rights'.[8] When these fine sentiments elicited a generally negative response in the atmosphere of Palestine in February 1947, the British simply gave notice, in Quigley's words, 'to terminate the mandate unilaterally, even if no governing mechanisms could be put in place.'[9] Quigley records that British Cabinet discussions of the subsequent UN Partition Plan evoked horror in the minds of Foreign Secretary Bevin and British UN Representative Sir Andrew Cadogan. The latter thought that something so manifestly unjust to the Arabs would be difficult to reconcile with British consciences. However, Quigley notes that Cadogan expressed no reservations openly at the United Nations.[10]

The British Mandate ended as thoughtlessly and as confusedly as it had begun. What Kattan fails to highlight is that, having imposed the Jews on the Palestinian Arabs without their consent, while expressing vague hopes that the two communities would somehow 'treat one another fairly', they, the British, left the Palestinian Arabs to cope as best they could with the Jews, once they, the British, were satisfied that the two communities were irreconcilably opposed to one another. The additional contribution of the UN General Assembly was to make a recommendation for partition which it could hardly have expected the two communities in Palestine simply to implement by themselves on the ground, so to speak. This nonsense marks the true face of international law. In analytical legal terms, already outlined, it does not qualify as a true system of law. To try to extract crumbs of legality for the Palestinian Arabs out of such ludicrous international institutional irresponsibility is to misunderstand the nature of international legal

society. It simply does not exist.
In this context of skepticism about the existence of an international legal order, there may be some interest in reflecting on the extensive review attention Kattan's book has received. Not surprisingly, there is a certain skepticism as to whether legal argument can contribute constructively to the resolution of the Israel-Palestine conflict. In the *Journal of the History of International Law*, Jean Allain

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7 J. Quigley, *The Statehood of Palestine, International Law and The Middle East Conflict* (Cambridge: Cambridge UP, 2010) Parts I and II.
8 *ibid* quoted at 89. One could argue that Palestinian Arab leadership was perversely opposed (see Karsh, note 35 below) but that does not cover the issue why they should accept a program of Jewish immigration in the first place, a denial of their autonomy in Palestine – and so on, pointing to a failure of international governance and not just international law.
9 *ibid*.
10 *ibid* 91.



contests the usefulness of the international law argument, concluding his review with the remarks:

> In fact the book is a page turner, but its use of international law is instrumental as 'lawfare': a further salvo in the Israeli-Palestinian conflict . . . [which] will have little impact in the long run . . .To argue that the Palestinian side of the equation *always* had international law on its side, and this is the only measuring stick, makes this study a polemic to be shelved alongside Boyle and Dershowitz'.[11]

If Allain means Kattan's book will not weaken the resolve of Netanyahu to ensure that Israel remains master of its fate, he is right.
Exactly the same type of criticism is made in the *Times Literary Supplement*. In an essay entitled 'Public Intellectuals and the Arab-Israeli Conflict', Neil Caplan protests at the very idea of law providing an answer with his subtitle 'Is it the role of scholars to pronounce on the rights and wrongs of this complex and protracted dispute?'[12] Caplan criticises Kattan, while careful also to criticise a pro-Israeli scholar Efraim Karsh at the same time, for wishing to have his research contribute to today's unresolved debates between Israelis and Palestinians. This is presumably to deny the possibility of legal resolution of the conflict. So Caplan continues, elaborating on a word used by Allain, that Kattan's book is 'lawfare', 'the use of law and legal skills as a means of advancing a political agenda'. Effectively, Caplan is challenging the very idea of legal argument in public affairs.
It is probably the intention of both authors to say that any venture into the fray of the Israel-Palestine conflict will appear partisan to whatever side the author opposes, and that, therefore, the academic should stay out of it. This might make sense to a political scientist or historian such as Caplan who feels, as an outsider, that international law arguments are not realistically compelling, by whichever side they are used. However, Allain's argument is more grave. It is Kattan's failure to understand the development of the history of international law which makes Kattan biased and therefore unprofessional. To reach this conclusion, Allain has to

endorse the position that international law was an instrument of colonialism, a tool of the colonial powers, and, for this reason, cannot be used to argue in legal terms against these powers and their beneficiaries.

So Allain insists on Kattan's failure to realise the historically relative character of international law. It sanctioned, by the standards of the time, the conduct of those, such as Britain, that Kattan wishes to criticise. At the time, European Public Law made a distinction between 'civilised nations' and those beyond the Pale, which allowed for a colonial venture in Palestine. Allain concludes that the book is 'not a historical study per se', meaning that Kattan does not recognise that at the dawn of the 20th century, ie presumably more than 40 years before the time of the Arab-Israeli conflict and the creation of Israel, international law was merely a European Public Law, which distinguished 'civilised nations' and those beyond the Pale. By a lack of a sense of history, Allain means precisely that Kattan has forgotten the Inter-temporal rule – whereby questions of territorial title are

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11 J. Allain, 'On Coming toTerms with the Israeli-Palestinian Conflict' (2010) 12 JHIL 155, 159–160.
12 *The Times Literary Supplement* 5 January 2011.


 

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resolved by the law of the time when the territory was first acquired.At the same time, Allain appears to accept the immorality of British conduct. So, he says that the Schmittian understanding of sovereignty as 'he who decides the exception' rings true for the United Kingdom which sought to solve its Jewish Question at home while using Maxim guns abroad.13

However, Allain does not continue to say that in 1948 Zionists were civilised and Palestinians 'beyond the Pale'. Indeed Allain does not attempt to exercise his judgement as an international legal historian with respect to this second period. He mentions the chapter on the Arab-Israeli conflict only to note Kattan's conclusions that Zionists were aggressive, hypocritical and their conduct unlawful. That is,Allain does not engage with the evidence presented – taking the two chapters together – 55 pages of text and 30-plus pages of notes.14 When he dismisses Kattan for not having an international legal historian's sense of legal time, Allain refers only to the earlier period just considered in the review.15

## THE ARAB-ISRAELI CONFLICT AND THE CREATION OF THE STATE OF ISRAEL

These two phrases are the titles for chapters 7 and 9 of Kattan's book. The reviewer's starting point is that these events stand outside any regime of positive international law. The difficulty for Kattan the international lawyer, as distinct from Kattan the historian, is that he has to engage once again, as in the first part of his book, in eventually futile arguments about the legality or illegality of what has been happening to the Arab people of the Palestine Mandate. Kattan believes that international law can address the creation of Israel because it has plenty to say about the violation of the Mandate, the laws of war and the right of self-determination. Nonetheless, what appears to the reviewer really significant about

this book is that Kattan forces into the international law debate the following point. The manner in which the state of Israel came into existence entailed atrocities so grave as to undermine significantly, if not completely, in Kattan's view, the legality of the state of Israel. Yet the fact of these atrocities is something for which international lawyers cannot plead ignorance (169). Of course they do in the sense that, as Kattan puts it: 'It would seem that some scholars prefer silence, rather than critical engagement with a conflict that still resonates today' (169).[16] This charge is central to the book. But, immediately, the point has to be made that the positivist tools of international law analysis are not, in any case, adequate to the situation which Kattan describes. This is because the origin of the State of

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13 *ibid* 158–159.
14 As I have already argued this is a catastrophic error of presentation on Kattan's part which shows that,however slipshod Allain's criticism, there is real difficulty in applying international law standards to this conflict.The reason is the lack of clarity about the interrelation and inter-action of historical events and legal arguments- hence Kattan's vacillation between text and footnotes.
15 Allain, n 11 above, 159.
16 A scholar whom Kattan does not cite or consider systematically and who appears to deal conceptually very clearly with the issues of depopulation of Arab Palestinians and repopulation by further Jewish immigration, is John Quigley, in *The Case for Palestine, An International Law Perspective* (Durham: Duke University Press, 2005).



Israel is treated as a question of fact by international lawyers, and not regulated by law. Their arguments will be considered at a later stage of the review, after historical arguments about the events themselves are considered. It is the introduction of these historical arguments into a supposedly international law book which is the really radical and even devastating contribution of Kattan to the intellectual debate on the Israel/Palestine issue. Kattan himself recognises implicitly where the really significant arguments and research lie, by putting the historical argument in the text and virtually all of the legal doctrinal argument into fairly inaccessible and unreadable footnotes.
What is at issue can be seen readily from the historian Caplan's critique of Kattan. That is to say, it becomes a matter of evaluating the quality of historical scholarship and choosing among Israeli historians at odds with one another. So Caplan, of course, criticises Kattan's bias, but qualifies this criticism by saying that, as a matter of historical judgement, considerable weight should be given to the historians upon whom Kattan relies, however personally irritating the reader may find Kattan's own accompanying moralising.

> This is especially true of his [Kattan's] wholesale condemnation of Zionists and Israelis for ethnic cleansing, atrocities and brutal territorial conquest during the fighting in 1947–49. Yet despite the overstatement, the evidence he presents is enough to constitute a legitimate counterweight to the widespread oversimplification that the Jews in Palestine were passive underdogs waging a totally defensive war against a massive organized assault perpetrated by Palestinian and Arab forces . . . Kattan subscribes to and reinforces the ethnic cleansing explanation of the refugees' expulsion popularized by Ilan Pappé, adding his own moralistic chastising of the Zionists and the Israelis.[17]

The view that Kattan 'states a case' in a specifically historically effective way is also shared by Sujith Xavier in a detailed engagement which he makes with so-called academic arguments about lack of balance. Praising Kattan for providing the most complete historical picture yet by an international lawyer, he specifically takes issue with Allain's dismissal of Kattan as part of a power game in which uncomfortable arguments are marginalised.[18] In a review by an international lawyer, Paul deWaart, there is the following rather enigmatic concluding remark: 'The author himself [ie Kattan] considers it to be an intriguing gaping hole in the literature that it is silent on the serious and difficult questions for international lawyers, which arise from the manner in which Israel achieved its statehood in 1948–49'.[19] One might wonder why deWaart does not consider himself challenged by this charge of Kattan in an otherwise sympathetic four page review.

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17 *TheTimes Literary Supplement* n 12 above. Presumably Caplan's reference to 'moralizing' is to Kattan's talk about international law, 'polemics in academic and legal garb', showing, importantly, that international lawyers may have little credibility outside their own circles. Part of the problem of pinning down arguments of bias is how threadbare, and indeed silly, legal arguments may appear to non-international lawyers, applying 'common sense'.
18 Book review by S. Xavier, (2010) 11 *German Law Journal* 1038, 11042–1043, ie including Quigley's *The Case for Palestine* n 16 above.
19 Book review by P. deWaart, (2010) 23 *Leiden Journal if International Law* 967, 970.


 



The precise case to be stated against Israel, as Kattan the historian sees it, is whether the 'events of, roughly November 1947 to January 1949 amounted to a conquest of Palestine by the Israelis, according to a 'master plan' which included the deliberate expulsion of the Arab people, or whether 'although, numerous atrocities did occur, including expulsions, the Arab exodus was not premeditated by the Haganah but was an unintended consequence of the war' (184). According to Kattan, Ilan Pappé, already mentioned by Caplan, takes the first view while Benny Morris takes the second view (184). Kattan does not want to engage directly with the debate between these historians (184), but prefers to list, through roughly 20 pages or so of text, and again, 8 pages of notes, a series of Israeli operations (170,171, 181–202, 331–333, 338–345).He relies on a very wide variety of sources and uses a number of direct quotations from key Jewish figures such as Hannah Arendt, David Ben Gurion and Yitzhak Rabin, to support an argument of a deliberate plan of expulsion. Kattan concludes with a substantial quotation from the British Foreign Office Archive, drafted to counter the Jewish claim that the British and Arab rulers are responsible for the flight of the Arabs:

The facts are:
(a) That very many fled before the Arab invasion of 15th May owing to the brutality and the atrocities of IZL [the Irgun] and Haganah, eg at Deir Yassin. This policy of intimidation had since been pursued fairly consistently.
(c) Jewish settlers have systematically moved into houses and land of Arab

refugees[.]
(d) Jews have obstructed United Nations efforts to obtain return of Arab refugees to their homes.[20]

In his *Partitioning Palestine, Legal Fundamentalism in the Palestinian-Israeli Conflict*,[21] John Strawson recognises that the issue goes to the heart of the possibilities of resolving the conflict, 'as proponents of the view that refugees were expelled as part of a Zionist plan tend to view Israel itself as the obstacle to peace.'[22] Strawson deals with what Kattan calls the revisionist Israeli historical literature and remains skeptical about it. In considering a historian called Masalha, ignored by Kattan, Stawson objects to the idea that the 'mainstream (Israeli) labour leaders' could have had an ideological intent to make the exodus possible because 'ideologies are incapable of possessing intention as intentions can only be possessed by an individual human being'.[23] Then he argues against Morris, that any transfer plan could have been embodied in Zionist thinking from the beginning of Zionism in the 19th century until 1948. Instead, Ben-Gurion and others tried to think

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20 At (200), refering to a document dated 19 January 1949 FO 371/5367 Minute from Mr Reddaway to Mr Mayhew, requesting a statement of answers to inaccurate Jewish propaganda.
21 J. Strawson, *Partitioning Palestine, Legal Fundamentalism in the Palestinian-Israeli Conflict* (London: Pluto Press, 2010). Oddly enough,Strawson was not driven by Roger van Zwanenberg, the editor of Pluto Press, to make an authorial confession. Strawson does not purport to offer more than a brief review of historical literature in the key sections relevant for the present review.
22 *ibid* 138.
23 *ibid* 139.



through power sharing with the Arabs.[24] Strawson points also to Morris's view that the refugee problem was 'born of war, not by design, Jewish or Arab. It was largely a byproduct of Arab and Jewish fears'.[25] For some reason, Strawson does not address Morris's latest work, *1948, A History of the First Arab-Israeli War*, although it is in his bibliography.[26]
Finally Strawson comes to Pappé, whom he characterises as taking 'a deconstructionist hatchet' to some key 1948 texts.[27] Strawson accepts that the infamous Plan D provided for the expulsion of civilians, but asks was it part of a coordinated and systematic plan? In Strawson's view Plan D 'was based on a reasonable assessment that threats to the Jewish state would not come from a classical invasion . . . but that the strategy of the regular armies would be to link up with irregular and other armed groups already acting behind the lines.' In other words, Pappé is wrong to speak of ethnic cleansing. This Plan D was military in conception. There would be a war with no front line and concern would be that a village could be used as a military base. Strawson concludes that there is no doubt that the Israeli Defense Force was involved in the expulsion of thousands of Palestinians from their homes. 'The course of the battle seemed to dictate the intensity of these operations'.[28]
Strawson's central point is that the 1948 conflict showed the difficulty of making a distinction between civilians and military. Israel was fighting a defensive

war against countries which wished to destroy the Jewish state, ie Arab States which had been threatening to use force since 1946. Strawson continues:

> In Palestine . . . towns and villages became enemy bases. As a result military commanders began to view the civilians themselves as a factor in the fighting. Thus in the terms of Plan D Palestinian civilians living in enemy controlled areas became a justified target. According to this view by removing those civilians a military threat could be eliminated. The return of civilian Palestinians was also seen in this light . . .[29]

It is necessary to offer some historical judgement and recommendations about the two cases stated by Kattan and Strawson. The work of Benny Morris will be considered first. Then there will be an examination of the work of Illian Pappé. The work of Morris and other revisionist Israeli historians is made possible since the mid-1980s because of the Israeli publication of their own official archives. The evidence comes mainly from Israeli military and especially intelligence records of the actual events.

So Morris's riveting narrative of the Civil War from November 1947 to May 1948 and the international war from mid May 1947 until January 1949 shows overwhelmingly that a leaderless Arab community panicked in the face of the

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24 *ibid* 141.
25 *ibid* 143, quoting Morris.
26 B. Morris, *1948, A History of the First Arab-Israeli War* (New Haven, Ct: Yale UP, 2008).This work will be discussed below.
27 Strawson n 21 above, 144.
28 *ibid* 147.
29 *ibid* 148.


 



threat and presence of Israeli military action.[30] The conclusion from Morris's analysis is that clearly official Israeli political and military action was used to expel most of the 750,000 Palestinians who left their homes during the period of especially October 1947–October 1948.This was both within the area assigned to the Jews under the partition Resolution and in the areas that later fell within the Israel of the 1949 Armistice Lines. As for atrocities, Morris says that 'Yishuv troops probably murdered some eight hundred civilians and prisoners of war – most of them in several clusters of massacres in captured villages'.[31] This all happened within an institutional context of the abandonment of the Mandate territory by the mandatory Power and the absence of any immediate or subsequent intervention by the United Nations, or the international community.

Morris points to the complete absence of any serious political or military coordination by the Arab Palestine community.[32] He says, 'The Palestinian Arabs, with well established traditions of disunity, corruption and organisational incompetence, failed to mobilise their resources.'[33] So few young Palestinians actually participated in any of the battles and theYishuv was fighting not a 'people' but an assortment of regions, towns and villages. That is to say, no Palestinian village community or town ever came to the help of another. 'One day, when the

Palestinians face up to their past and produce serious historiography, they will probe these parameters of weakness and irresponsibility . . .What this says about the Palestinian Arabs, at the time, as a "people" will also need to be confronted'.[34] There are parallels here with the argument of Efraim Karsh, that the refugees' departure was due to the prior abandonment of Palestinian leadership responsibility.[35] They were unprepared for the events of 1947–48.

Kattan has already drawn attention to the disagreements Morris has with Pappé. A major weakness of Kattan's book is that he does not focus on their disagreements as his central issue from an international law, or a general legal perspective. Kattan thinks he can get around this by enumerating a whole series of incidents, but this will not of itself prove they are part of a preconceived plan, rather than merely the chaotic outcome of civil war among entities neither of which are yet fully fledged states. What is at issue becomes much clearer if one looks to Pappé's central thesis, rather than using him, as Kattan does, to help enumerate a series of incidents. Pappé is obviously a contested historian. It is a position he himself examines at length in a recent autobiography published by Pluto Press.[36] His major recent work *The Ethnic Cleansing of Palestine* provides an alternative framework to the Arab Israeli Conflict of 1947–49 to the one provided by Strawson and Morris.[37] It is worth mentioning also that Baruch

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30 Morris, n 26 above.
31 *ibid* 406.
32 *ibid* 'Some Conclusions' 392–420.
33 *ibid* 399.
34 *ibid* 400.
35 E. Karsh, *Palestine Betrayed* (New Haven, Ct: Yale UP, 2010). In opposition there is the video testimony to which Kattan draws attention (170).
36 I. Pappé, *Out Of The Frame, The Struggle for Academic Freedom in Israel* (London: Pluto Press, 2010).
37 I. Pappé, *The Ethnic Cleansing of Palestine* (Oxford: One World Press, 2006). Again, this appears not to be a mainstream academic publisher.


 



Kimmerling warns how Morris, in contrast, adheres so strictly to a positivist historiography that he 'prefers to leave his moral and ideological attitude toward the events he described ambiguous . . . '[38] However, from a sociological perspective, Kimmerling – the author is a Professor of Sociology at the Hebrew University of Jerusalem – also presents the events of 1948 as a land seizure by force.[39] So Kimmerling's view reinforces Pappé.

Pappé uses Israeli National Archives and especially private Israeli archives, diaries of key Israeli figures, particularly Ben Gurion, for the following argument.

> The Jewish leaders, particularly Ben Gurion, knew perfectly well that the Arabs, whether the Palestinians within the Mandate or the neighboring Arab states, constituted no real threat to the Jews. Arab hot air rhetoric was not at all matched with weapons and military skills. The only exception was Transjordan and the Jews were careful to come to an agreement with it to divide up Eastern Palestine – what is now the West Bank. Ben Gurion painted a public picture of an impending second holocaust, while privately, with his confederates – Pappé calls

them ‘The Consultancy’ – he exercised himself with reducing the Arab population of what was to be Jewish Palestine to less than 20 per cent. The records of the Consultancy meetings show that Plan D can only have had a population transfer intention in mind as there was no real military threat. Most importantly, in this connection, the Palestinian population did not wish to fight. They hoped to continue life as normal, wishing thereby to escape conflict, whatever changes of sovereignty took place. Jewish attacks upon them, orchestrated and directed by The Consultancy, were not reprisals but provocations to strike fear into – and drive to flight – a population which wished to continue with ‘business as usual’. A final element in the picture was that the speed of the British withdrawal and the irresponsible character of the UN Partition Resolution – offering immediate radical change without any mechanisms for implementation – completely upset the Arab preference for a much longer drawn out negotiation of a solution along the lines of a Palestinian State, the Mandate being granted independence, with guarantees for the Jewish minority, in October 1947, one third of the population.[40]

Pappé’s conclusion was that security played no significant role in Jewish removal of the populations of Palestinian towns and villages. Morris’s conclusion about the absence of a Palestinian ‘people’ in 1948, and Karsh’s argument about lack of Palestinian leadership, are given parallel and compatible interpretation with Pappé’s argument that the Palestinians remaining in Palestine at the time were apolitical. That is, they hoped to survive as intact local communities under alien lordship, now of the Israelis, as so often before, whether under the Ottomans

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38 http://hnn.us/articles/3166.html (last visited 10 October 2012). Kimmerling actually highlights a strongly Zionist picture of Morris, someone favoring not only past but also future population transfers to the advantage of Israel. Kimmerling is the author of *Zionism and Territory, The Socio-Territorial Dimensions of Zionist Politics* (Berkeley: Institute of International Studies, University of California Press, 1983). From a sociological perspective – the author is a Professor of Sociology at the Hebrew University of Jerusalem – Kimmerling presents the events of 1948 as a land seizure by force, especially in chapter 5, ‘From Money to Sword’.

39 *ibid* especially in chapter 5.

40 Pappé, *The Ethnic Cleansing of Palestine* n 37 above, 37–126, and notes, 266–275.



 

or the British. Finally, Pappé points to the consternation of the Palestinians at the rapidity of unregulated change which followed the passing of the General Assembly Resolution on partition in November 1947. The events which followed in the Mandate Territory after November 1947 represented a complete international institutional vacuum – the very absence of international legal order – hence the continued, general, international ignorance of these events until the present moment.

## WAS PALESTINE CONQUERED?

Perhaps the most mainstream, recent, legal positivist interpretation of the events of 1947–48 comes from Roger O’Keefe. He presents three points. Firstly, the

inter-temporal rule requires that one judge matters by the standards of the time, not by today's standards. Secondly, when Britain gave up the mandate, it was not substituted by a geographically coextensive independent state, an event for which there was no precedent in international law. Thirdly, and most importantly, in the absence of centralised international institutions, what is the authoritative legal characterisation of a fact is 'a function as much of discerning how other states have adjudged these matters legally as [it is] of abstract juridical reasoning'.[41] O'Keefe says that, whatever rules there may have been on the use of force in 1948, they could not be applied within the former Mandate territory, now an entity without legal status. So there was no principle of law which prevented the Jews, or for that matter the Palestinians from seizing as much of the former Mandate territory as they could – which they did.[42] O'Keefe does not refer to any of the historical material which makes up Kattan's book, although, as Kattan is at pains to insist, this material has been available for about twenty five years. O'Keefe insists that the rules on the use of force, under article 2/4 of the UN Charter only apply among states and not within the boundaries of a defunct Mandate. It is simply that article 2/4 would not protect any territory within the former Mandate territory from being incorporated into the state of Israel. O'Keefe might have tried to respond to the 1931 resolution of the Institut de Droit International on the legal significance of Mandates,[43] which said:

6. [. . .] The communities under Mandate are subjects of international law
7. The functions of the mandatory end by renunciation or revocation of the Mandate . . . by the recognition of the independence of the community which has been under Mandate.
8. [. . .]The rights and duties of the communities under Mandate are not affected by the expiration of the Mandate or the change of the Mandatory.

However, Kattan places this document in a footnote and does not try to construct any extended argument from it.

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41 R. O'Keefe, 'Israel/Palestine Sixty years On' inT. Giegerich and A. Proelb (eds), *Trouble Spots in the Focus of International Law* (Berlin: Dunker-Humblot, 2010) 13, 14–15.
42 *ibid* 18–24.
43 Already mentioned by Kattan in a footnote of his book at 312.



O'Keefe goes on to make a distinction between the 'Jewish population of the territory' and the state of Israel. At first, one could say the Jewish population of the territory of the defunct Mandate was not prohibited by international law from seizing as much land as they could. At a second stage, where this Jewish population becomes the State of Israel sometime between 14 May 1948 and February 1949, one can now say, somehow in addition, that there was no rule of international law that protected any territory of the former Mandate from being incorporated into the State of Israel.[44]
Nor is any right the Palestinians may now have to self-determination applicable at that time because international law did not then recognise a right of self-determination. This is a reference by O'Keefe to the so-called inter-temporal

rule. Highly relevant in O'Keefe's view is 'the absence at the time of protests by third states, with the notable exception of the Arab bloc, at the incorporation into the state of Israel of the territories within the borders of the former Mandate'.[45] There was also no protest within the UN about Israel going beyond the Partition resolution recommendations.[46] However, he also remarks: 'At the same time, states generally refrained from explicitly recognising Israel's asserted title to these lands.'[47] He continues to say: 'While formal recognition of Israel's right to the territory claimed by it in 1949 remains rare, there nonetheless appears today to be general acquiescence in Israel's assertion'.[48] The position of most states is that the extent and delimitation of the frontiers is a matter for resolution in final status negotiations between Israel and representatives of the Palestinians. For this proposition O'Keefe relies upon exhortations from the Security Council in 1949, which, having declined to enforce the GA Partition Resolution, expressed hope for the early achievement of 'agreement on the final settlement of all questions outstanding between the governments and authorities concerned'.[49] There must be force in the contention that the rapid recognition of Israel by most states indicated an indifference to the circumstances of its birth. This is the 'Juridical Power of the Factual' and O'Keefe is not alone as an international lawyer in the general argument which he has made. As Eban argued in 1948, '[t]he existence of a State is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness'.[50]

Another important commentator is O'Keefe's Cambridge colleague, James Crawford. Kattan engages particularly with him as possibly the leading authority on international law on the creation of states. Crawford argues that once Britain had relinquished the Mandate – which it could do through the approval of the UNGA Partition Resolution (181 II) – Palestine did not become a *res nullius* in 1948. If it had, then the creation of Israel would have been one of original occupation. So, unlike O'Keefe, Crawford gives due weight to the presence of

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44 O'Keefe, n 41 above, 18–24.
45 *ibid* 20.
46 This is not true, as will be seen from the analysis of the UN record by Scobbie and Hibbin, see n 56 below.
47 O'Keefe, n 41 above, 20
48 *ibid* 20.
49 *ibid* 21 citing SCR 79 (1949).
50 n 2 above.


 

some sort of ghostly shell of a state on the territory of the Mandate, after the British departure, as the above cited Resolution of the Institute of International law would lead one to expect. He says that, in any case, the category of *res nullius* is of limited application and cannot apply where there is what Crawford calls an organised population.[51]

In other words, he is not absolutely categorical, as is O'Keefe, that self-determination has no place in the events of the founding of Israel. Crawford does also say, self-determination – of presumably the Palestinians or the remaining people of the defunct Mandate – could not be an obstacle to the Israeli State's creation, because self-determination was not established as a principle of international

law at the time.[52] However, Crawford adds:

> And in any event, given the social and political situation in Palestine by that time, it was arguable that partition and the creation of two States was consistent with the principle of self-determination as applied to Palestine as a whole. Certainly the General Assembly proceeded on that basis in adopting the Partition Resolution.[53]

Obviously these remarks appear to indicate that Crawford is aware of an international consensus, already reflected in the Partition resolution, that self-determination was naturally the principle applicable to the defunct Mandate's population. It would naturally apply to both the Jews and the Palestinians and hence it could be quite natural – O'Keefe not withstanding – to talk of aggression by one people against the other, conquest and deprivation of the other people's right of self-determination.
However, Crawford appears to characterise the situation on the ground, during the events of 1947–48, as one of a struggle of the Jews to separate themselves from the Palestinians:

> Secession would thus appear to be the appropriate mode, and the question then becomes at what time Israel qualified as a seceding State . . . [I]n applying these criteria [which Crawford has discussed earlier in this chapter] . . .Palestine should be regarded as a single self-determination unit.[54]

The Partition resolution could be taken to be concerned with this but, as Crawford has already argued, it lacked legal authority as a mere non-binding General Assembly Resolution and was not effective. So the Jewish struggle for separation was not the implementation of a legal self-determination principle, but merely a classical breakaway movement of a part of a state. So the lesser test of qualified effectiveness did not apply to Israel as a self-determining unit within the defunct Mandate, but rather the stricter test of stable and effective government of

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51 Crawford, n 2 above 432.
52 *ibid* 434.
53 *ibid* 434 Crawford cites in a footnote three academic publications as somehow relevant to these remarks.
54 *ibid* 433.


 



territory, which Israel met by concluding an Armistice Agreement with Egypt in February 1949.[55] So, Crawford says:

> It must be concluded that Israel was effectively and lawfully established as a state by secession from Palestine in the period 1948 to 1949. Its original territory was its armistice territory, not the partition territory.[56]

Kattan's comment on Crawford is that he is one of those international lawyers who choose 'a diplomatic way of describing what transpired in Palestine in 1948 without having to actually engage with the legal consequences of such a conclusion'.

[57] Secession is not appropriate to describe what happened because the Zionists were not a minority trying to break away from the majority to create a Jewish state in a part of Palestine.
Rather, the Zionists wanted as much of Palestine as they could get, with as few Palestinian Arabs in it as possible, including territories well beyond the UN Partition Plan's boundaries to create their Jewish state. The *Yishuv* accomplished this through war, occupation and annexation after which the Provisional Government of Israel extended its administration and laws there. Israel's title to Palestine is therefore based on conquest and annexation and not on 'unilateral secession' 'auto-emancipation' defensive conquest' or any other novel term or legal fiction created by international lawyers to describe it.[58]
However, this supposes Kattan accepts Pappé's interpretation of events rather than Morris's. Kattan, as has been seen, does not make any such categorical choice of historians in his own text, preferring to accumulate specific incidents of Jewish expulsion of Palestinians. Yet the idea of conquest requires the focused intention of some general actor. The present reviewer does make a choice for Pappé's interpretation, taken together with Kimmerling's. There was a deliberate, conscious plan of the Jewish leadership to seize land and vacate it of its existing population. Whether this plan was conceived long in advance of events in 1947–48, or improvised as a response to opportunities presenting themselves,

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55 *ibid*.
56 Iain Scobbie and Sarah Hibbin contest this assertion about the armistice line, although probably Crawford only wanted to say 'at least the Armistice lines and not the Partition resolution lines.' However, Scobbie and Hibbin point to the UN Official Records which show clearly that for its part Israel refused to accept the armistice lines as anything other than provisional, while when the General Assembly voted for the admission of Israel to the UN it drew attention to the implementation by Israel of Resolutions 181 and 194. See further, I. Scobbie and S. Hibbin, *The Israel-Palestine Conflict in International law: Territorial Issues* 2009 US/Middle East Project at http://www.soas.ac.uk/lawpeacemideast/publications/file60534.pdf 61 commenting on Crawford, 58–64 on the Armistice Agreements, and 57 on the General Assembly admissions process (last visited 10 October 2012).
57 at 240–241.While Scobbie and Hibbin do not attempt a history of the conflict on the ground their minute examination of UN records leads them to note the justification the Israelis gave for the inclusion of western Galilee. Since the Arab population had now left, they would not put at risk a Jewish majority in the state. Further, events had shown it was vital for Israel's defense. The authors comment that this was the first time Israel appears to use the argument that defense considerations determined frontiers 'but it also appears to contain an effacement of the rights of the indigenous Palestinian Arab population' esp *ibid* 56, but also 55–56.
58 *ibid* 241.


 

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would not matter legally. The reviewer inclines to the latter sequence of events. The most impressive survey of events the reviewer has read is that of Morris. Kimmerling says that Morris adheres so strictly to a positivist historiography that he remains conceptually ambiguous about the larger picture. However, the reviewer found a full reading of Morris's *1948, A History of the First Arab-Israeli War* a quite devastating picture – taken from Israeli/Jewish intelligence and military archives – of a gradually increasing Jewish/Israeli sweeping of the Palestinians off their lands. They did not voluntarily leave. Morris describes them as being pushed. At the same time, Strawson's point remains that the Jews/Israelis would have regarded these Palestinians as potential 5th columnists in the event of

an international Arab attack. Finally, there is arguably evidence, especially from Morris, that Jewish/Israeli actions were not fully coordinated. Varying decisions to expel or surround and detain Palestinians were taken by individual field commanders.

Kattan does not address in any sustained or systematic way the representative view of O'Keefe and Crawford, that the principle of self-determination was not law in 1947–48, so that there could be no aggression against or conquest of the Palestinians at that time. He may assume that the people of the Mandate, in their entirety and as a single whole, had such a right, but, as he notes himself, mention of the right was deliberately excluded from the Mandate. The principle of self-determination is widely regarded as becoming law some time after 1960.[59] It must surely be the case that the Great Powers did not regard themselves as bound by any such principle in 1919 or even 1947.As Kattan's book amply shows, the Great Powers decided by 1919 to set up a Jewish community in the Palestine Mandate. The same Great Powers decided to accept in 1947–48 and continue to accept now, the State of Israel in that defunct Mandate.

The main feature of Kattan's book is that he puts before international lawyers the new research by Israeli historians about the events on the ground in the Mandate and after its lapse, from roughly November 1947 to January 1949.The reaction of one international lawyer, Paul deWaart is to ask whether the profession as a whole will ever address the facts on the ground in the founding months of 1947–49.This is unlikely. Europe and North America are equally implicated with Israel in its foundational history and the security issues surrounding its continued survival. Kattan does not address directly the nature and power of historical fact, of collective memory, in this case, of the entire Western world. Instead, he is saying that what happened to the Palestinians in 1947–49 was illegal according to international law, presumably because conquest was then illegal. In that case why did the international community acquiesce in the founding of Israel and recognise it? There was, and appears to continue to be – also among international lawyers such as Crawford and O'Keefe – no felt need to readdress the events in Palestine in 1947–48.Will Kattan's book change that? From reviews one can see that it is making some impact, but he does not provide legal guidance, as distinct from moral outrage and frustration with the international legal profession.

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59 See also, and generally, R. McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in regard to the Right of Self-Determination' (1996) 66 *British Yearbook of International Law* 283.



It is necessary to address systemically the positivist character of international law if one wishes to achieve the conclusions that Kattan wants. It would be necessary for Kattan to argue that self-determination of peoples is an absolute principle of *ius cogens*, which no dominating state practice of Great Powers can contravene. This *ius cogens* should break the so-called Inter-temporal Rule for the acquisition of territory used by Colonial Powers to resolve disputes among themselves about dividing up the territories of non-Western peoples. In other words, international lawyers would have to undertake the conceptual work of

rejecting the whole complicity of international law in colonialism and thereby insist that empires and colonies were, from the start, illegal. For instance, this has been the position of China with respect to the unequal treaties founding the former British Colony of Hong Kong. The Joint Declaration of the UK and the PRC of 1984 contains no Chinese recognition of the legality of the Treaty of Nanking of 1842.[60] Kattan would have to take the same position with respect to the Palestinians since 1920.

The concept of *ius cogens,* taken from article 53 of the Vienna Convention on the Law of Treaties is purely formal. It provides that there cannot be any derogation from a norm accepted and recognised by the international community as peremptory. It might be objected that the principle of self-determination cannot be said to have come into existence as late as 1960, since it was the whole basis for the dismantling of Empires, from at least 1919. McCorquodale shows how self-determination was part of UK policy at least since 1918.[61] However, the international community has certainly acquiesced in its non-observance on numerous occasions and any principle will depend upon interpretation before it can be implemented.

The reviewer suggests, by way of conclusion, that the many questions left in the air by Kattan's book could be made the subject of yet another request by the UN General Assembly for an Advisory Opinion of the International Court of Justice. The campaigning tone of Kattan's text would suggest such an avenue.[62] It is conceivable that Palestine could find the support for such an initiative in the General Assembly. The Court might be asked the following questions: whether the principle of self-determination was recognised as binding at the conclusion of World War One, so that it should have been incorporated in the Palestine Mandate; whether, consequently the Palestine Mandate violated the principle of self-determination and the League of Nations failed to uphold it; whether the Jewish/Israeli political and military operations in the Mandate and later Israel during the civil conflict within the Mandate and during the international war up until Armistice Agreements were signed, constituted a violation of the principle of self-determination as applied to the Palestinian people; whether, consequently, the State of Israel came into existence

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60 http://www.cmab.gov.hk/en/issues/jd2.htm (last visited 10 October 2012). Paragraph 1 states that the Chinese resume sovereignty over Hong Kong, while paragraph 2 says that the UK restores Hong Kong to China.

61 McCorquodale, n 59 above, 284.

62 There is also the ongoing Russell Tribunal on Palestine, which is, obviously, a purely non-governmental body, not in any case a purely legal enterprise. http://www.russelltribunalonpalestine.com/en/ (last visited 10 October 2012).



 

in violation of the principle of the self-determination of the Palestinian people; whether, in the alternative, the international community has recognised the existence of the State of Israel as an accomplished fact, broadly within the boundaries of the Armistice Agreements, so that any attempt to apply the principle of self-determination at present to the Palestinian question must not now operate retrospectively so as to upset the Inter-temporal Rule, itself an expression of what has already been agreed in the past by the international

community. Obviously these are questions which a mere book, or a mere book review cannot resolve. They require an international legal judgment of authority.

Anthony Carty

 

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