Developments

Book Review - Victor Kattan's From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949 (2009)

By Sujith Xavier[*]

[VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT 1891-1949 (Pluto Press, 2009); ISBN-10: 0745325785; 261 pages; £ 29.99]

Abstract

Victor Kattan's "From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949" is an archival excavation of the Israeli-Palestinian (Arab-Israeli) conflict and its origins. This review will examine the contours of Kattan's book followed by a brief examination of objectivity in academic scholarship often enunciated through the concept of 'balance' as it relates to those scholars (like Kattan) working on the conflict. Finally, this review will explore some of the weakness of the arguments that Kattan advances.

A. Introduction

Victor Kattan's *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (From Coexistence to Conquest) is an archival excavation of the Israeli-Palestinian (Arab-Israeli) conflict and its origins. It is a pioneering attempt at historicizing the events leading up to the creation of the State of Israel and the ensuing conflict. From the preface to the epilogue, one is certain of Kattan's pro-Palestinian views and his attempts to unearth key historical events and facts leading up to the creation of the State of Israel and the Israeli-Arab conflict. This review will examine the contours of Kattan's book. Then there will be a brief examination of objectivity in academic scholarship often enunciated through the concept of 'balance' as it relates to those scholars (like Kattan) working on the conflict. Finally, this review will explore some of the weakness of the text and the arguments presented by Kattan.

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B. Summary

In the preface, Kattan commences his analysis by introducing to the reader his primary concern: "It seems to me that the pre-eminent question that one needs to ask oneself before coming to terms with the Arab-Israeli conflict is how the conflict started".[1] He then indicates that legal scholars have often 'overlooked' the relevant history when examining the Arab-Israeli conflict. Kattan rightly points out that some international law scholars have not spilled much ink on relevant historical legal documents relating to the League of Nations Mandate System (the Mandate).[2] Therein begins an excellent account of historical materials that Kattan has tracked, analyzed and synthesized. The relevant pieces examined by Kattan have yet to be analyzed in a similar manner by contemporary legal scholars, which points to the uniqueness of this book.[3] Moreover, one of the striking features of Kattan's monograph is the constant referencing to key historical figures (politicians, diplomats and government officials) and their respective statements, memorandums and speeches. The main objective of this scholarly exercise is to create a coherent argument for Palestinian self-determination by contextualizing events prior to the creation of the State of Israel.

Kattan first traces the genealogy of the Arab-Israeli conflict in Chapters 1 through 5. These chapters provide a detailed account of raw data that is rarely found in any other legal scholarship on Israeli-Arab conflict.[4] In the first chapter, Kattan historicizes the three-interrelated phenomena of Anti-Semitism, Colonialism and Zionism to better understand the big international legal issues that the book is concerned with. The second chapter is concerned with the history of the Mandate System as it relates to Palestine. Here, the author briefly examines the Hussein-McMahon Correspondence and the different issues that lead to the creation of the British Mandate over Palestine. In Chapter 3, Kattan traces the "roots of Palestinian opposition to the Jewish immigration from 1891 to the end of the

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

[2] See, *e.g.* FRANCIS A. BOYLE, PALESTINE, PALESTINIANS AND INTERNATIONAL LAW 26 (2003); JOHN B QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE 3-87 (2005): both Boyle and Quigley do not provide an in-depth analysis of the Mandate and the ensuing debates (Boyle provides a description on page 26 while Quigley devotes his first three sections to the history of Palestine). JAMES CRAWFORD, THE CREATION OF THE STATES IN INTERNATIONAL LAW 421-448 (2006); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES; A LEGAL REAPPRAISAL 230-247 (1995).

[3] For the most recent scholarship on the Arab-Israeli conflict and international law, see JOHN STRAWSON PARTITIONING PALESTINE: LEGAL FUNDAMENTALISM AND THE PALESTINIAN-ISRAELI CONFLICT (2010).

[4] BOYLE (note 2); QUIGLEY (note 2); CRAWFORD (note 2); CASSESE (note 2); for example, Cassese provides a historical account of the Arab-Israeli conflict and he nonetheless briefly refers to the Hussain-McMahon correspondence. An exposition of the historical significance of the correspondence is left out. Quigley and Boyle also do not offer such analysis of these historical materials. See, *e.g.* Francis A. Boyle, *The Creation of the State of Palestine* 1 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EUR. J. INT'L. L.) 301, 307 (1990); James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?* 1 EUR. J. INT'L. L. 307, 313 (1990).

second World War".[5] The Hussein-McMahon Correspondence is picked up again in greater detail in Chapter 4. The correspondence highlights the British agreement to grant independence to what are now Israel/Palestine, Iraq, Saudi Arabia and Syria with the exception of Lebanon. For any student of the Israeli-Arab conflict, Kattan provides unprecedented detail of the communication between politicians and senior officials of the Mandatory Powers and their allies.

In Chapter 5, Kattan then steers the reader to the issue of self-determination in international law. The right of self-determination is arguably *jus cogens*[6] and this right is constructed based on the historical effects of colonialism.[7] This right allows former colonial states and peoples to seek independence and self-rule. In this chapter, Kattan solidifies the arguments forwarded in the previous chapters and historicizes the Palestinian (Muslim, Christian and Jews) and Zionist claims for self-determination. He concludes by highlighting a forgotten reality of the British Mandate over Palestine: "[s]cared trust of civilization' lives on, the responsibility of which has been transferred to the UN General Assembly as the successor to the Council of the League of Nations".[8] Kattan raises this as an important issue for the Palestinians vis-à-vis the Mandate System administered by the British. The Mandate set out by the League of Nations in 1922 therefore lives on and is transferred to the United Nations.

In Chapter 6, Kattan traces the origins of the United Nations Partition Plan of Palestine.[9] The plan to partition Palestine into two states, one Jewish and the other Arab, was conceived and suggested by Lord Peel in 1937 and subsequently abandoned. The idea later reemerged in 1947, when the United Nations General Assembly voted to recommend the partition of Mandated Palestine. The Plan sought to create an Arab and Jewish state with Jerusalem and Bethlehem as a *corpus separatum* (separate units) administered by the United Nations. This chapter chronicles the behind-the-scenes politics of the United Nations (an excellent account of the UN General Assembly Resolution to partition Palestine is found on pages 151-156). Chapter 7 sets out the origins of the hostilities between the

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[5] KATTAN (note 1), 79.

[6] UN Charter, Arts. 75-83; *International Covenant on Civil and Political Rights*, 12 December 1966, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 993 UNTS 3; MANFRED NOVAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 5-26 (2005); SARAH JOSEPH, JENNY SCHULTZ & MESLISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 141-153 (2005); *Legality of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Rep, 2004, 139, 171.

[7] Daniel Thürer & Thomas Burri, *Self-Determination*, *in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 11 (Wolfrum ed., 2008, online edition), available at: http://www.mpepil.com/; CASSESE (note 2), 69.

[8] KATTAN (note 1), 144.

[9] KATTAN (note 1), 146-168.

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Arab indigenous population and the Jewish settlers precipitating a mass exodus of the Arab indigenous population.

In Chapter 9 and the Epilogue, Kattan brings the reader back to the thrust of his argument. Particularly in Chapter 9, "The Creation of Israel", Kattan argues "the birth of Israel in 1948 was quite simply one of the twentieth century's last examples of a successful conquest".[10] In the Epilogue, he concludes by arguing that the *sui generis* nature of the special experiment that led to the creation of the State of Israel is "outside all the rules and maxims" of international law.[11] Kattan acknowledges that the conquest, however, has become part of reality through the principle of effectivity: an illegal act may, over the course of time, acquire legal status. Effectiveness connotes a general principle in international law that connects a factual situation to international legality and stems "from the fact that there is no sanction mechanism in the world".[12] Thus ultimately, the principle allows an illegal act to become legal, and there are numerous exceptions to this rule.

To better understand the Arab-Israeli conflict, Kattan examines the origins of key issues (such as Palestinian resistance to the prolonged occupation and Zionism and territorial questions relating to title, sovereignty and self-determination) that continue to reappear throughout the 60-year conflict. In this regard, Kattan offers up in depth historical materials to support the Palestinian peoples claim to independence and statehood, which "finds ample justification in international law, [...] even according to the positive tradition of international law associated with British imperialism".[13]

C. Analysis

Kattan begins the narrative in "From Coexistence to Conquest" with candid honesty. He personalizes his scholarship, confesses to the reader his emotional ties to the conflict and his personal interpretation as he saw it during the second Palestinian uprising that started in September 2000 *(*popularly known as the Second *Intifada* or second uprising*)*. This narration has elicited claims that this form of situated scholarship is a biased attempt to historicize the conflict from a Palestinian perspective.[14]

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[10] KATTAN (note 1), 232.

[11] KATTAN (note 1), 251.

[12] Hiroshi Taki, *Effectiveness, in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1 (Wolfrum ed., 2008, online edition), available at: http://www.mpepil.com/.

[13] KATTAN (note 1), xix.

[14] Jean Allain, *On Coming to Terms with the Israeli-Palestinian Conflict: From Coexistence to Conquest International Law and the Origins of the Arab-Israeli Conflict, 1891–1949, Victor Kattan,* 12 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 155, 155 (2010): in this review, Allain describes Kattan's scholarship as "a young man's personal

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Neutrality is a complicated and highly contested concept. Robert Cover suggests that "[L]egal interpretation takes place in a field of pain and death".[15] Cover forays into the work of judges to uncover the political nature of judicial interpretation. Cover's thesis identifies aspects of judicial interpretation as a practical activity that is meant to deliver threats and actual deeds of violence in the most effective way. Similarly, academic scholarship is not free from politics either, [16] even though the academy would like to think otherwise.

The evolution of academic freedom moreover attests to a firm belief in knowledge production and knowledge delivery that is free from politics.[17] Politics is nonetheless part and parcel of knowledge and this belief has led some scholars to highlight the underlying tensions of academic freedom on the one hand and the politics of scholars on the other.[18] The legal academy is analogous. Legal scholars and jurists are taught to construct argumentation that furthers the 'single story' of the legal profession.[19] Investigation of the multiple bodies of knowledge in legal academia, and academia in general, reveal that scholarship is meshed in with politics, similar to the work of judges, as shown by Cover. Scholarship in public international law too has embedded political and structural biases.[20] The recourse to claims of objectivity, neutrality and bias therefore are used to exclude those that do not adhere to the general and standard norms of scholarship.[21] These

journey to come to terms with the Israeli-Palestinian conflict." Allain then dismissed Kattan's project as lacking in objectivity and the ability to discern between analysis and polemic because of his close ties to Palestine.

[15]Robert M. Cover, *Violence and the Word*, 95(8) YALE JOURNAL OF LAW 1601, 1601 (1986).

[16]Joan W. Scott, *Knowledge, Power and Academic Freedom*, 76(2) SOCIAL RESEARCH 395, 452 (2009).

[17]John Bearle, *Rationality and Realism, What is at Stake?*, 122 (2) DAEDALUS 55, 76 (1993).

[18]Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom, in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, 107 (Doumani ed., 2006).

[19]Chimamanda Ngozi Adichie, Video: "The Danger of a Single Story," TED Ideas Worth Spreading, available at: http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story.html; Karl Llewellyn, *Some Realism about Realism, Response to Dean Pound*, 44 HARVARD LAW REVIEW (HARV. L. REV) 1222 (1930-1931); Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*' 95. HARV. L. REV. I669 (1982); Roscoe Pound, *A Call For A Realist Jurisprudence,* 44 HARV. L. REV. 697 (1930-1931); Ibironke T. Odumosu, *Challenges for the (Present/) Future of Third World Approaches to International Law* 10 INTERNATIONAL COMMUNITY LAW REVIEW (I.C.L.R.) 467 (2008); Obiora C. Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both*? 10 I.C.L.R. 371 (2010).

[20]Balakrishnan Rajagopal, *Martti Koskenniemi's From Apology to Utopia: a reflection*, 12 GERMAN LAW JOURNAL (G.L.J) 1089, 1090 (2006); Mario Prost, *Born Again Lawyer*, 12 G.L.J 1037, 1038 (2006); Martti Koskenniemi, *A Response*, 12 G.L.J 1103, 1107 (2006); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF THE LEGAL ARGUMENT (2006).

[21] Sue Campbell, *Being Dismissed: The Politics of Emotional Expression*" 9 (3) Hypatia 46, 57 (1994); Llewellyn (note 19); Note (note 19); Pound (note 19).

general and standard norms, as Judith Butler argues "have origins other than the well meaning well-educated judgments of professionals" and they are "wrought not only from cognitive judgments but also from a confluence of historically evolved and changeable institutional and discursive practice".[22] The strict application of these standards is an act of acquiescence, along with their political underpinnings.

The crux of the academic freedom debate is all the more crystallized when scholarship is concerned with the Israeli-Arab conflict. Scholars engaged in critical examination of the conflict may be excluded for not presenting a balanced perspective.[23] They are often presented as undertaking scholarship that is partisan, biased and political; these scholars are recapitulated as lacking 'balance'.[24] Roy counters these sentiments when she argues that [C]omplete detachment and the struggle to achieve it [objectivity]… are ultimately impossible.[25] In Kattan's case, he is situating himself within his individual and personal context when he states "I spent several months living and working in the Occupied Palestinian Territories during the *intifada* […]".[26] He presents to the reader his personal connection to the conflict and his actual lived experience before proceeding with his analysis of the pertinent historical materials. It is therefore academically questionable to fault Kattan for his attempts at providing personal context. To do so would simply ignore his presentation of new materials and the arguments.

Moreover, Kattan's examination of the origins of the conflict provides new materials that have not been made available before (for example Foreign Office Legal Advice on the 1947-48 conflict, see, Chapter 7). His contribution to the existing literature is novel and unique. From a legal historical perspective, Quigley and Boyle's accounts do not sufficiently address the roots of the Israeli-Arab conflict.[27] Mazzawi and Mallison and Mallison explore the legal and political issues surrounding the conflict, while Crawford and Cassese briefly examine the Arab-Israeli conflict as it relates to their respective projects.[28] Kattan's analysis is therefore an important contribution in understanding the Middle East conflict and one that cannot be ignored based on claims of 'balance'.

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[22] Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, 129 (Doumani ed., 2006).

[23] Judith Butler, *Israel/Palestine and the Paradoxes of Academic Freedom,* 135 RADICAL PHILOSOPHY (January-February, 2006).

[24] ALLAIN (note 7), 156.

[25] Sara Roy, *Humanism, Scholarship and Politics: Writing on the Palestinian-Israeli Conflict,* XXXVI (2) JOURNAL OF PALESTINE STUDIES, 54 (Winter, 2007).

[26] KATTAN (note 1), xv.

[27] BOYLE (note 2); QUIGLEY (note 2).

[28] Thomas W. Mallison & Sally V. Mallison, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER (1986); Musa E. Mazzawi, PALESTINE AND THE LAW: GUIDELINES FOR THE RESOLUTION OF THE ARAB-ISRAEL CONFLICT (1997).

D. Criticism

That said, Kattan's project does have numerous shortcomings. Although his attempt to historicize the Israeli-Arab conflict is commendable and worthwhile given the dearth of legal scholarship, Kattan makes faint references to fields of knowledge that theorize colonial encounters with international law.

In Chapter 2, for example, Kattan emphatically states: "[U]unfortunately for indigenous peoples, the Great Powers were able to partition the region into separate territories with little regard for the interests of the inhabitants because international law had not outlawed Colonialism in the days of the First World War".[29] He then goes on to describe the creation of the Mandate System and civilizing mission of the Great Powers with a reference to David Miller's *The Drafting of the Covenant*.[30] Similar assertions are made through out the text.[31]

There are no references to or mention of the proliferation of scholarship that examines the role of international law and colonialism such as Third World Approaches to International Law (TWAIL). In 1990, this school of thought emerged with three specifics aims to understand, unpack and deconstruct the uses of international law as a way to create and perpetuate racialized hierarchies; construct and present an alternative normative legal edifice for international governance; influence, through scholarship, policy and politics to eradicate the conditions of underdevelopment in the third world.[32] This school of thought continues to grow as new and emerging scholars from the North and the South adopt this methodology and theory. Kattan's main argument centers on the use of international law to construct the current realities of the Arab-Israeli conflict. His thesis and subsequent arguments therefore would have greatly benefited from a Third World Approaches to International Law perspective.

The subtitle of the book, "International Law and the Origins of the Arab-Israeli Conflict, 1891-1949" is however tangentially relevant to the whole thesis. Kattan makes scant references to the Ottoman Period in the introductory chapter and admits that the "rest of the book is devoted to the question of what happened in the years when Palestine was placed under the League of Nations Mandate that was entrusted by the Great Powers to Great Britain to the time when war broke out between the Zionists and the Palestinian

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[29] KATTAN (note 1), 48.

[30] KATTAN (note 1), 278 (endnote 58).

[31] For example see p. 55 and 79; KATTAN (note 1).

[32] Makau Mutua, *What is TWAIL?*, 94 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS (AM. SOC'Y INT'L L. PROC.) 31, 31 (2000); See generally, Antony Anghie, *What is TWAIL: Comment*, 94 AM. SOC'Y INT'L L. PROC 39 (2000); Obiora C. Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 I.C.L.R. 371-378 (2010); Ruth Buchanan, *Writing Resistance into International Law*, 10 I.C.L.R. 445-454 (2008).

Arabs in the Years 1947-49".[33] For students of international law, particularly those interested in the origins of the Israeli-Arab conflict, an exposition of the legal regime(s) that existed during the Ottoman Empire would have been helpful, if not significant.

Finally, in last section of Chapter 7, Kattan problematically turns to the laws of war. He argues that the different belligerents (parties to the conflict) infringed the applicable laws of war and customs prior to the creation of the State of Israel. From the general method adopted by the text, this analysis seems to be out of place, if not brief. Kattan has approached his project in a systematized manner, substantiating every claim with historical data and legal analysis. This brief foray into the laws of war and the ensuing analysis is sparse. The reader is left with uncertainty as to the real rationale for the inclusion of this section and the legal status of Zionist militia members prior to the creation of the State of Israel.

E. Conclusion

Victor Kattan's *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* is a significant contribution to the Israeli-Arab conflict legal literature. His historical material is unprecedented and is a must read for any student interested in understanding the Arab-Israeli conflict and the role of international law in it.

[33] KATTAN (note 1), 2.

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