

Book Review

FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949, by Victor Kattan ¹

MICHAEL LYNK ²

BETWEEN 1915 AND 1917, as part of its eastern strategy during the First World War, Great Britain made three different promises regarding the future of Palestine and the Middle East. At the time, Palestine and the neighbouring lands were still part of the beleaguered Ottoman Empire, and Great Britain was engaged in a titanic war against Turkey and its allies, Germany and the Austro-Hungarian Empire. These separate British promises—to the Arabs, the French, and the European Zionist movement—were ambiguous, laced with imperial self-interest, and, most tragically for the peoples of the region, irreconcilable with each other. Almost a century later, the Middle East is still reaping the whirlwind.

To the Arabs living in the Levantine provinces of the Ottoman Empire, Great Britain promised independence if they would initiate a revolt against their Turkish masters. In a series of letters exchanged in 1915 and 1916 between Sir Henry McMahon, the British High Commissioner in Cairo, and Hussein Ibn Ali, Sherif of Mecca, Great Britain pledged that it would support “the independence of the Arabs in all of the regions within the limits demanded by the Sherif of Mecca,” which would include much of present-day Syria, Lebanon, Iraq, Jordan, and Israel/Palestine.³ This pledge of support was the most congruent

1. (London: Pluto Press, 2009) 544 pages.

2. Associate Professor and Associate Dean, Faculty of Law, University of Western Ontario.

3. U.K., H.C., *Correspondence between Sir Henry McMahon, His Majesty's High Commissioner at Cairo, and the Sherif Hussein of Mecca*, Cmd 5957 in *Sessional Papers*, vol. 27 (1938-39) 3, reprinted in “The Hussein-McMahon Letters, July 1915-March 1916” in John Norton Moore, ed., *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974) vol. 3, 5 at 11 (the Hussein-McMahon Agreement excluded only the areas along the northern

with the demographic and cultural reality of Palestine at the time, as these lands and their peoples had been overwhelmingly Arab in language, culture, and identity for over a thousand years. Moreover, Arab opposition to Ottoman rule had been rising steadily over the previous decade, led by a nascent intellectual class of teachers, army officers, and writers in Damascus, Beirut, and Jerusalem who were now allied with the warrior tribes from northern Arabia. Palestine, which was within the scope of the Hussein-McMahon Agreement, was at the time about 92 per cent Palestinian Arab.

In May 1916, shortly after the last of the McMahon-Hussein letters were exchanged, Great Britain and France covertly agreed to carve up the Arab provinces of the Ottoman Empire between themselves once the Great War was over. Under the Sykes-Picot Agreement⁴ (named after the two diplomats who negotiated the terms), Britain would acquire Transjordan, Gaza, northern Arabia, and much of Mesopotamia, while France would gain Cilicia, the Syrian and Lebanese coast, Mosul, Aleppo, and Damascus. Palestine would come under a vaguely defined “international administration” in consultation with Russia. Absent from the Sykes-Picot Agreement was any mention of self-determination or the political aspirations of the Arabs living in these lands.

Great Britain also made a third promise respecting Palestine. On 2 November 1917 the British Cabinet endorsed a letter written by Lord Balfour, the British Foreign Secretary, to Lord Rothschild, a leading Zionist figure in England. In what was to become famously known as the Balfour Declaration, Britain promised its best efforts to establish a national home for the Jewish people in Palestine, provided that “nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”⁵ The Declaration was a significant achievement for the small Zionist movement and its leader, Dr. Chaim Weizmann, which enabled Zionism to receive the political support

Syrian coast between Damascus and the Mediterranean, as those “cannot be said to be purely Arab,” as well as the provinces of Baghdad and Basra in Mesopotamia).

4. *The Sykes-Picot Agreement, May 16, 1916*, Documents on British Foreign Policy 1919-1939, First Series, vol. 5 (1952) 244, reprinted in Moore, *ibid.* 24.
5. Letter from Lord Arthur James Balfour, the British Foreign Secretary, to Lord Rothschild (2 November 1917) in “The Balfour Declaration, November 2, 1917” in Moore, ed., *ibid.* 31 at 32.

of the most potent European power just as the British army and the Arab insurgents were amassing to capture Palestine from the Ottomans.

Two of the promises were subsequently kept. After the Great War, the newly-formed League of Nations endorsed the British and French *fait accompli* and awarded them mandates over the Arab lands of the vanquished Ottoman Empire. Great Britain was given the Mandate for Palestine, with the Balfour Declaration specifically included in the terms of the Mandate. European Jewish immigration and the building of pre-state Zionist institutions flourished under British rule; during the Mandate, the demography of Palestine changed significantly as the Jewish population grew from 8 per cent in 1917 to 31 per cent by 1946. These two promises were largely compatible with one other, as the fledgling Zionist movement required a strong and sympathetic European patron to govern Palestine and facilitate its nascent colonies in the face of an antagonistic indigenous population.

The burden of the unkept promise, however, was borne by the Arabs, whose hopes for independence after the First World War were thwarted by the European mandates. The greatest burden fell on the Palestinians, who opposed the Zionist project from the start as a mortal threat to their homeland, but whose successive rebellions in the 1920s and 1930s were routed by the British Mandate army. Ultimately, with the creation of Israel in 1948 the Palestinians lost their struggle for Palestine. The 730,000 Palestinians who were expelled from their homes or fled the fighting became, with their descendants, the world's largest, longest-lasting, and most destabilizing refugee problem.

The contradictory promises embedded in these three documents—the McMahon-Hussein letters, the Sykes-Picot Agreement, and the Balfour Declaration—set in motion the political forces that would decisively reshape Palestine and the Middle East over the next century. In *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949*,⁶ Victor Kattan, a British international law scholar teaching at the University of London's School of Oriental and African Studies, provides a well argued, richly documented, and lucidly written history of those early yet monumental years of the conflict through the lens of the law. In particular, Kattan focuses on the emergence of Wilsonian self-determination as the question of Palestine sharpened after the First World War. Using these three documents as his analytical platform, Kattan

6. *Supra* note 1.

marches historical narrative and legal interpretation forward in a creative lockstep to explain how, by the end of the thirty-year British rule in 1948, the indigenous population in Palestine was on the verge of being decisively stripped of its homeland and its majority status by a European settler-colonial movement. This almost-complete demographic transformation of a colonial territory in the modern era was extraordinary, even in the annals of a tumultuous twentieth century. For Kattan, the struggle for Palestine during the Mandate years presents both a historical and a legal predicament: how was Great Britain to “implement a policy that promised two peoples self-determination in the same country without seriously considering how this could be accommodated,”⁷ especially in the face of the unified opposition of the majority population?

The historical figure who most prominently stalks the pages of *From Coexistence to Conquest* is Arthur James Balfour. An unsuccessful prime minister who subsequently returned to high office as the Foreign Secretary in the British War Cabinet, and an anti-Semite who came to embrace Zionism without discarding all of his prejudices, Balfour was the animating political force within the British establishment for the cementing of a diplomatic alliance with Zionism at a time when the Zionist movement represented only a small minority of British Jews.⁸ Balfour’s significance as a central figure in this story was due, in large part, to his clear-eyed articulation of British imperial interests in Palestine and the looming consequences that Zionism presented for the indigenous population. In a 1919 memo to his successor, written shortly after his resignation as Foreign Secretary, Balfour acknowledged that his 1917 promise of a Jewish homeland in Palestine entailed the denial of self-determination for the Palestinians:

[F]or in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country, though the [1919 King-Crane] American Commission has been going through the form of asking what they are. The four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long tradition, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.⁹

7. *Ibid.* at 7.

8. See Jonathan Schneer, *The Balfour Declaration: The Origins of the Arab-Israeli Conflict* (New York: Random House, 2010).

9. *Supra* note 1 at 123, citing Memorandum from Arthur Balfour to George Curzon, British Foreign Secretary (11 August 1919) Foreign Office No. 371/4183.

Later, in a 1923 speech to the English Zionist Federation, Balfour laid out his justification for this exceptionalism. Motivated by his own Christian Zionism and by the grander British desire to encourage the growth of a sympathetic settler population that could secure a strategic territory for Britain as well as reduce the strain on the imperial treasury by paying its own way, Balfour stated that the “great experiment” of a Jewish homeland in Palestine, with its civilizing potential, trumped the Wilsonian principle:

[T]he critics of this movement shelter themselves ... behind the principle of self-determination, and say that, if you apply that principle logically and honestly, it is to the majority of the existing population of Palestine that the future destinies of Palestine should be committed. My lords, ladies and gentlemen, there is a technical ingenuity in that plea, and on technical grounds I neither can nor desire to provide the answer; but, looking back upon the history of the world, I say that the case of Jewry in all countries is absolutely exceptional, falls outside the ordinary rules and maxims, cannot be contained in a formula or explained in a sentence. The deep, underlying principle of self-determination really points to a Zionist policy, however little in its strict technical interpretation it may seem to favour it.¹⁰

Lord Balfour’s Declaration became an intractable challenge for his successors as British Foreign Secretary; each would try, and fail, to square the circle over the next thirty years. Commissions of inquiry were sent off to Palestine after every episode of rebellion by the Palestinians, and most reported back that the promise of a Jewish homeland in Palestine was incompatible with the Arab demand for self-determination.¹¹ The partition of Palestine into Jewish and Arab states was first recommended by the 1937 Peel Commission, which was accepted by some in the Zionist movement while being adamantly opposed by Palestinians. Britain’s dilemma, and the tragedy embedded in the eventual decision to pursue partition, was aptly captured in early 1947 by Ernest Bevin, the Foreign Secretary, just as the country was handing over the problem to the United Nations (UN):

10. *Ibid.* at 250, citing Israel Cohen, ed., *Speeches on Zionism by the Right Hon. The Earl of Balfour* (London: Arrowsmith, 1928) at 25-26.

11. See e.g. U.K., H.C., “Report of the Palestine Royal Commission (The Peel Commission) June 22, 1937,” Cmd 5479 in *Sessional Papers* (1937), reprinted in “Excerpts from the Report of the Palestine Royal Commission (The Peel Commission), June 22, 1937” in Moore, *supra* note 3, 150. The 1937 Report of the Peel Commission stated, “The underlying causes of the disturbances, or (as we regard it) the rebellion, of 1936 are, first, the desire of the Arabs for national independence: secondly, their antagonism to the establishment of the Jewish National Home in Palestine, quickened by their fear of Jewish domination” (at 151).

The best partition scheme, and the most favourable one that I have seen up to now, has the effect that it would leave ... 450,000 Jews and 380,000 Arabs in that Jewish State. I put that to the Arabs quite frankly, and what was their answer? The Arabs say: "If it is wrong for the Jews to be a minority of 33½ or 40 percent in the whole country, what justification is there for putting 380,000 Arabs under the Jews. What is your answer to that?" I have no answer.¹²

From Coexistence to Conquest provides a fresh assessment of this critical period in the history of the modern Middle East. Other recent histories of the Mandate have proficiently recounted the working alliance between Britain and the Zionist movement after the Great War, the growth of the *Yishuv* (the Jewish community in Palestine), the mounting Palestinian resistance, and the pattern of imperial perfidy.¹³ The uniqueness and the strength of Kattan's approach is his sophisticated deployment of international law as an analytical tool to explain and critique what happened in Palestine from the twilight years of the Ottoman Empire up to the creation of Israel. This focus on the law is entirely appropriate, for there is no other territorial conflict in the contemporary world where so much attention has been paid to the importance of formal legitimacy and legal authority. The 1897 Basel Program adopted by the first Zionist Congress proclaimed, "The aim of Zionism is to create for the Jewish people a home in Palestine *secured by public law*."¹⁴ Great Britain took care to secure the consent of the League of Nations for its Mandate over Palestine and expressly included the Balfour Declaration as part of its Mandate terms. The Palestinians framed their pleas for independence from the 1920s forward as the right to self-determination. The partition of Palestine was endorsed in 1947 by the UN General Assembly. Virtually all of the subsequent central issues of the conflict—the right of the Palestinian refugees to return to their homes, the various wars between Israel and her Arab neighbours, the status of the Israeli

12. As cited in Howard M. Sachse, *A History of Israel from the Rise of Zionism to Our Time*, 3d ed. (New York: Alfred Knopf, 2007) at 276.

13. See Roza El-Eini, *Mandated Landscape: British Imperial Rule in Palestine, 1929-1948* (New York: Routledge, 2006); Tom Segev, *One Palestine, Complete: Jews and Arabs Under the British Mandate* (New York: Henry Holt and Company, 2000); and Naomi Shepherd, *Ploughing Sand: British Rule in Palestine, 1917-1948* (New Brunswick: Rutgers University Press, 2000). For a more uncritical narrative of Britain's role, see Norman Rose, *A Senseless, Squalid War: Voices from Palestine, 1945-1948* (London: Random House, 2009).

14. *Supra* note 1 at 22 [emphasis added].

settlements, the role of human rights, and the future of Jerusalem—have been the subjects of scores of UN resolutions and volumes of legal commentary. Yet, for all of this, the will of the world community to actively apply the content of international law—especially its stated focus on justice and rights—to resolve the Arab-Israeli conflict has been strangely inert. As Kattan notes in his introduction, “[T]he problem is not international law *per se* but its lack of enforcement; that in the Middle East international law is closer to power than to justice.”¹⁵

At the centre of Kattan’s argument in *From Coexistence to Conquest* is his identification of the two parallel universes of law warring with each other in Mandate Palestine: one based on the positivist tradition of international law associated with British imperial rule, including the actual laws of, and the legal justifications for, the Mandate power, and the other anchored in the normative rights found in the emerging doctrines of self-determination and human rights. Through the inter-war period, popular demand for Arab independence was articulated in the normative rights-based narrative. If the trajectory of modern international law since the First World War has been characterized by the long decline of the positivist tradition and the ascension of the modern legal framework of rights-based norms, then an apposite legal-historical analysis of a particular colonial relationship would invariably encompass a critical assessment of the governing forms of the imperial legal system that underpinned the dominant-subordinate colonial relationship. With its exhaustive documentation and its command of the international legal foundations of the Mandate, *From Coexistence to Conquest* is an admirable contribution to the growing library of contemporary critical studies on the role of the law and jurisprudence in maintaining imperial power.

Three legal themes in particular are highlighted in *From Coexistence to Conquest*: the three initial promises to the Arabs, the French, and the European Zionist movement; the partition decision; and the principle of self-determination. Kattan first turns his focus to the legal content of the pledges made by Great Britain during the Great War, which steered Palestine towards its unhappy fate. He argues that, even within the traditional prism of positivism itself, the Hussein-McMahon letters can be considered to be a binding treaty between Great Britain and the Arabs of the Hejaz, given the capacity of the parties

15. *Ibid.* at 4.

to make a binding agreement.¹⁶ The Balfour Declaration, which acquired legal status once it was incorporated into the League of Nations' Mandate, contained a very precise and restricted scope: it promised a Jewish homeland in Palestine, not Palestine as the Jewish homeland, let alone a Jewish state. While the Sykes-Picot Agreement was originally a backdoor deal between two imperial powers, Kattan argues that it grew into the Palestine Mandate which imposed substantive obligations upon the British. The Mandate, a "sacred trust of civilisation" in its own words, required Britain to ensure the "well-being and development" of the peoples living in Palestine.¹⁷ The role of the Mandate power was to provide administration and advice in leading the people of Palestine to independence consistent with the "wishes of these communities."¹⁸ Considering the three promises together, Kattan asserts that Britain as the Mandatory power was vested with "fiduciary duties in relation to the beneficiaries of this trust who were the indigenous peoples of Palestine."¹⁹ These promises should have led to the maturation and eventual creation of a Palestinian Arab state in all of Palestine, reflecting the wishes and the identity of its majority population while protecting its minority communities. The fact that Britain, throughout its administration of Palestine, acted primarily on more disingenuous motives—its imperial interests in the region and its support for the colonizing imperatives of the Zionist movement—may come as no surprise to historians of the Empire, but in the context of Kattan's legal critique these ulterior motives constitute a profound breach of the promise to the Arabs and a betrayal of the Mandate.

The narrative in *From Coexistence to Conquest* leads inexorably to the culmination of the unkept promise: the 1947 decision to partition Palestine. By the end of the Second World War, the two communities—the Arab Palestinians and the Jewish *Yishuv*—were articulating utterly irreconcilable futures for Palestine. The Palestinians wanted a single bi-national state with democratic institutions and constitutional guarantees for individual, collective, and minority rights. The *Yishuv*, recognizing that it was not going to achieve a demographic majority in Palestine through European Jewish immigration under the British

16. *Ibid.* c. 4 at 98ff.

17. *Ibid.* at 54-55, citing "Article 22, Covenant of the League of Nations" (1920) 1 League of Nations Official Journal at 9.

18. *Ibid.*

19. *Ibid.* at 56.

Mandate, pursued its second-best option: the partition of the country with a maximum amount of land to allow for the largest possible Jewish majority. With vastly superior diplomatic influence and panache, and with the indispensable support of the Truman Administration in the United States, the Zionist movement's partition proposal gained the crucial endorsement of the UN General Assembly in November 1947.²⁰

Kattan mounts a number of critiques of the partition plan: the partition breached the promises to the Palestinians that the future of Palestine would not be decided without their consent; it was economically unfeasible; it was unenforceable; the partition itself was a gerrymandered process, with the minority community awarded the majority of the country's land mass, most of the fertile lands, and all of the good sea ports; and, once executed, the partition plan would be politically unsustainable because the Jewish state would have a large Palestinian minority who, in all likelihood, would have resisted the imposition of a racially-based government and legal system. In law, Kattan argues, the partition of Palestine violated the principle of majority rule by carving out a separate state at the instigation of the minority *Yishuv* community (which was an overwhelmingly immigrant population), on part of the territory that was integral to the majority indigenous population.²¹ Citing the rule then emerging in international law, as expressed in the 1941 *Atlantic Charter*, that "no territorial changes that do not accord with the freely expressed wishes of the peoples concerned,"²² Kattan asserts that no justification in law for the 1947 partition can be found in any of the international instruments then prevailing in the immediate post-war period.²³

The question of self-determination and its application to Mandate Palestine is the thread that runs as the common theme throughout the book. "In many respects," Kattan asserts, "Zionism was at odds with twentieth-century notions of self-determination."²⁴ As the concept grew and matured in the years after 1920, self-determination became "inherently anti-colonial and was intricately

20. *Future government of Palestine*, GA Res. 181(II), UN GAOR (1947), online: <<http://unispal.un.org/unispal.nsf/a06f2943c226015c85256c40005d359c/7f0af2bd897689b785256c330061d253?OpenDocument>>.

21. *Supra* note 1, c. 6 at 146ff.

22. *Ibid.* at 159, citing "The Atlantic Charter of 14 August 1941," reprinted in (1941) 35 Am. J. Int'l L. Sup. 191.

23. *Ibid.*, c. 6 at 146ff.

24. *Ibid.* at 117.

linked to decolonisation. But what happened in Palestine was precisely the reverse of decolonisation.²⁵ The dilemma for the Zionist movement in the early twentieth century was that it lacked one of the essential pre-conditions for self-determination: it possessed no territory, and it could only acquire the necessary homeland to build a state through the auspices of a colonial power and the unavoidable suppression of the native population, the very antithesis of what was happening elsewhere. As for the competing interests of the two communities in Palestine in the Mandate years, Kattan maintains that “international law would give first consideration to the interests of the original and indigenous inhabitants over those who had recently immigrated there from overseas.”²⁶ Even by the terms of the British Mandate, Kattan argues, the Zionist movement may have acquired a

right to determine their own future in Palestine by creating a Jewish national home, but this could only be established *within* a Palestinian state. The Mandate conferred no right on the “Jewish people” to convert Palestine into a Jewish state to the detriment of the majority Palestinian Arab population.²⁷

The League of Nations’ mandate system would eventually wither away after the Second World War, as the winds of change brought independence to virtually all of the former Mandate territories. Even South West Africa (now Namibia) eventually won its independence in 1990 after a prolonged war of liberation, and both the UN General Assembly and the International Court of Justice revoked the Mandate of apartheid South Africa over the territory. Palestine was left behind as an orphan of history—the only mandated territory under the League of Nations’ system that did not become an independent state of its indigenous peoples.

If Kattan’s splendid book has a weakness, it lies in his apparent indecision over which critical tool of legal-historical analysis to employ. At times, Kattan assesses the British Mandate by means of a positivist legal critique of its actions, contrasting the language of Britain’s formal pledges to the Arabs with its own patterns of deceit. With these positivist lenses, Kattan reads the Balfour Declaration and the League of Nations’ Mandate through the eyes of an engaged litigator searching for language and arguments that would limit the legal reach of these

25. *Ibid.*

26. *Ibid.* at 126-27.

27. *Ibid.* at 142.

documents. On other occasions, Kattan deploys a modernist critique of the Mandate, applying contemporary historical approaches to the era of late colonialism. This modernist critique is enriched by Kattan's creative use of international law principles respecting self-determination. The positivist legal critique is the tool of an advocate, which is powerful but blunt; the modernist critique is the tool of a historian, which is methodological but not always precise. Both critical tools are valid, but care has to be taken on how to employ them in unison. As an example of the limitation of Kattan's use of these critical tools, the 1947 decision to partition Palestine is judged in the book to be unfair, unworkable, and a violation of solemn undertakings, which it surely was. However, the book's primary reliance on the positivist critique of partition downplays the more penetrating historical assessment of the phenomenon as an ill-conceived, even cynical, imperial stratagem that often left fatally fractured societies and regions in its wake—a sort of posthumous revenge of the British Empire. As prime exhibits of the results of such imperial stratagems, think of Ireland, Cyprus, the South Asian sub-continent, as well as Israel-Palestine. Had Kattan provided a methodological focus on the comparative lessons of partition across the British Empire, this would have placed the endgame in Palestine within a broader picture and provided a more dynamic understanding of how late imperial policy managed to thwart the rights-based promise of modern international law in that tormented land.

This quibble aside, *From Coexistence to Conquest* is a compelling piece of scholarship, shaped by a well-organized presentation of the mass of historical information on the Mandate period and supported by over a hundred pages of impressively sourced footnotes. Its central thesis—that a critical legal-historical assessment can tell us much about the fateful triangular relationship between the British, the Palestinians, and Zionism—is a sturdy challenge to the traditional *Exodus*-inspired narrative of the origins of the Israeli-Palestinian struggle, and to the more shaded, if similarly problematic, “competing nationalisms” narrative that has become ascendant in recent years. The historiography of Palestine and Israel is perhaps the most contested in the modern world, with serious scholarly chronicles on the Middle East having to rise above the clamour of polemics and nationalism that litter library shelves. Alas, the same can also be said for some of what passes as legal scholarship on the topic. Kattan's study climbs high above this din. The lasting virtue of *From Coexistence to Conquest* is its salient reminder that the failure of international law to bring about a just and final resolution to the Arab-Israeli conflict, an indelible stain on law's efficacy, was tragically well-entrenched long before 1967.