**THE WATERS WERE ALREADY MUDDY: A REBUTTAL TO VICTOR KATTAN, BY STEVEN KAYE QC AND JOSHUA KERN**

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On 3 July 2019, we submitted a communication to the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) … which argued that Palestine’s objective legal status as a non-State entity, as well as Palestine’s indeterminate sovereign territorial claim, operate as barriers to the exercise of ICC jurisdiction in potential cases. On 9 August, Victor Kattan responded on these pages by suggesting that our communication constitutes an attempt to “muddy the waters” and that Palestine’s objective legal status as a State is clear, as is its sovereign territory. Mr Kattan’s suggestion of bad faith is regrettable. Rather than demonstrate the clarity of Palestine’s status or territory, his posts further demonstrate their uncertainty.

Mr Kattan asserts that “only Palestine has sovereign legal title to the territories occupied by Israel in June 1967” and argues that to assert an Israeli claim in this territory makes “a complete mockery of the law of occupation”. Yet Mr Kattan’s argument relies on inconsistent and unsustainable legal and historical claims. Mr Kattan firstly claims that General Assembly Resolution 181(II) of 29 November 1947 is of dispositive effect. Secondly, he asserts that Israel waived its territorial claim to West Bank territory between 1949 and 1967. Thirdly, he appears to claim that following Jordan’s occupation of the West Bank between 1949 and 1967, a Palestinian State seceded from Jordan in the West Bank. This rebuttal considers these three dubious claims in more detail.

The effect of General Assembly Resolution 181(II)

Mr Kattan argues that the 1947 UN Partition Plan contained in Resolution 181(II)“represented a special agreement between the United Nations and the Mandatory Power” which was of dispositive effect. Yet it is trite that General Assembly resolutions are generally not binding and, in its own terms, Resolution 181(II) “recommended”its adoption and implementation to the UK (as Mandatory Power) and to UN Member States. It was not an agreement between them. Resolution 181(II) was, of course, vigorously rejected by Arab States who stated an objective to create a “United State of Palestine” throughout the former Mandate territory.

Mr Kattan nevertheless relies on Lausanne Protocol of 1949 to support his argument with respect to Resolution 181(II)’s supposedly dispositive effect, as well as to Israel’s supposed waiver of claims to West Bank territory in 1949. Yet the Lausanne Protocol, in its own terms, was a “working document… to be taken as a basis for discussions.” It was a “proposal” which would “bear upon the territorial adjustments necessary” for its “objectives” to be satisfied. At the Lausanne negotiations, Israel contemplated a land for peace formula and expressly excluded Jerusalem from the negotiations (see UN doc. A/927, 21 June 1949, paras. 28, 30). It is plainly wrong for Mr Kattan to suggest that the Protocol conferred a binding effect through agreement on the 1947 UN plan.

The absurdity of the suggestion that Resolution 181(II) was of dispositive effect is further demonstrated by the inconsistency with Mr Kattan’s own claim that Palestine’s territorial entitlement extends to the “the territories occupied by Israel in June 1967”, as well as by his reference to the Arab League cablegram of 16 May 1948, claiming a United State of Palestine. These claims refer to three different territories. The territory of the “Arab State” contemplated by Resolution 181(II) excludes Jerusalem and Bethlehem. The “June 1967” territory excludes, for instance, Nazareth and Ramla. The Arab League asserted a Palestinian claim to the entirety of the former Mandate. Rather than confirm the dispositive nature of Resolution 181(II), these inconsistencies reflect the inconsistent and undetermined nature of Palestine’s territorial claim.

Waiver of claims between 1949 and 1967

Mr Kattan asserts that “Israel did not advance a claim to the West Bank until 29 December 1967”, suggesting a waiver of its own claim to the territory prior to that date. This factual assertion is unsupported both by the terms of the 1949 Armistice Agreements (which were expressly signed without prejudice to the rights, claims and positions of either party), and the Lausanne Protocol itself (which was a basis for discussions). Mr Kattan seeks to rely on the Protocol as evidence of waiver. In fact, Israel did nothing between 1949 and 1967 to waive its 1949 reservations and Israel’s Government and Law Ordinance of 1948 presumed Israeli jurisdiction over the entirety of the Mandate territory. This was consistent with Israel’s sovereign claim of 14 May 1948, contained in its Declaration of Independence that established the State of Israel in Eretz Israel, and is consistent with the general principle of uti possidetis juris…

The “fusion” of Jordanian and Palestinian sovereignty

Mr Kattan claims that Jordan acquired and exercised sovereignty in the West Bank and East Jerusalem between 1950 and 1988, praying in aid the Jordanian Act of Union of 1950. He asserts that it “must be emphasised that Palestine was not formed under belligerent occupation” and that a State “already existed before that occupation began, i.e. before 4 June 1967.” However, given that Jordan’s occupation arose from a breach of Article 2(4) of the UN Charter and considering the coercive nature of Jordanian control, the law of occupation is the only appropriate normative framework which can define Jordanian effective control of the West Bank territory between 1949 and 1967. A finding to the contrary would establish a far-reaching precedent with implications in territories ranging from Cyprus, Crimea, South Ossetia, Abkhazia to Nagorno-Karabakh (not to mention the Golan Heights).

Dr Kattan cites the Hussein-Arafat Accord of 11 February 1985 (whoseArticle 2 proposed the establishment of an “Arab confederation”) as evidence that Jordan “recognised that sovereign legal title to the West Bank remained vested in the Palestinian people that was to be exercised by their political representatives.” Dr Kattan asserts that Article 2 provided for the establishment of a confederation between “the two states of Jordan and Palestine” but, in doing so, he misquotes the very provision he seeks to rely upon. Article 2 refers to the formation of “proposed”confederated Arab states of Jordan and Palestine. The provision which Dr Kattan cites as evidence of the prior existence of a Palestinian sovereign legal title is, in fact, evidence that it was “proposed” that title to West Bank territory would vest in a future Palestinian State. Dr Kattan’s argument of course entirely disregards Israel’s own sovereign claim, but this cannot be dismissed simply as colonialism. Instead, it derives from the Jewish people’s claim to a national home in and historical connection to Eretz Israel.

The basis of Israel’s and Palestine’s sovereign claims

Dr Kattan asserts that “Palestine’s title has been recognised by the vast majority of states” in order to argue that Palestine today has title to “the territories occupied by Israel on 4 June 1967.” This is even though Jordanian sovereignty was widely regarded as illegal and void (see E. Benvenisti, The international law of occupation (2nd ed. 2012, p.204)). Dr Kattan cannot have it both ways. Recognition is either constitutive or it is not. Yet, for Dr Kattan, whereas recognition cannot have been constitutive in 1950, today he suggests that it is.

This may explain why Dr Kattan further contends that Palestine’s title (alternatively or additionally) derives from a right of self-determination, which he argues crystallised in 1950 through the Jordanian Act of Union, conferring title on Jordan. Yet neither of these theories has a sound basis in international law. As we argue in our communication (paras 42 – 46), the mere fact of a right to self-determination, or recognition by other States, does not confer statehood, or title. What is required (with respect to statehood) is satisfaction of the Montevideo criteria, together with the criterion of independence. Dr Kattan neither points to a date when the State of Palestine attained independence, nor does he assert that Palestine has ever existed as an independent State.

As to territorial claims and the criterion of government under the Montevideo Convention, Security Council Resolutions 242, 338, and 2334 – as well as the 1949 Armistice Agreements and the Oslo Accords – all leave open the possibility – and probability – of Israeli sovereignty in parts of the West Bank in a final peace agreement. The English text of Resolution 242 provides that peace “should” (not “must”) include withdrawal of Israeli forces “from territories occupied in the recent conflict”, not from “all the territories occupied” in that conflict. The Security Council’s deliberations suggest that this wording was no accident, and many of the drafters intended that withdrawal “is required from some but not all of the territories” (see e.g. A. Gerson, Israel, the West Bank and International Law, 76). Resolution 338 “calls upon” the parties to implement Resolution 242, and the “land-for-peace” scheme of Resolution 242 remains the cornerstone of peace plans for the Middle East. The Oslo Accords themselves invoke Resolution 242 (and Resolution 338), not Resolution 181(II). This is further evidence both that the relevant framework begins with Resolution 242, not Resolution 181(II), and that any Palestinian right or title to exercise authority over disputed territory (and its inhabitants) is not exclusive.

Resolution 2334 leaves the question of borders open. While it refers to a Palestinian territory, it makes no determinations as to that territory’s scope. Indeed, by urging intensification and acceleration of international and regional diplomatic efforts aimed at achieving a just and lasting peace on the basis of“the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap”, Resolution 2334 leaves open the question of the status of West Bank territory in Area C and the scope of the sovereign legal title of a future Palestinian State. The fact that the Oslo Accords reserve specific territorial issues (Jerusalem, settlements, and borders) as final status issues to be resolved between the parties demonstrates that the PLO has also recognised the disputed nature of West Bank territory, as well as Israel’s good faith claims.

Conclusion

Dr Kattan’s arguments rest upon legal and factual premises that are open to question. He argues that the General Assembly’s recognition of Palestine as a non-member observer State is both declarative and constitutive of both objective statehood as well as the scope of sovereign title to territory. His posts avoid arguments highlighted within our communication which cut against his preferred outcome. This is unsustainable. Our communication was designed to warn the OTP that the background to this matter is one in which the waters are indeed muddy, and to advise that very careful attention needs to be paid to the legal and factual complexities prior to any decision to proceed.