

# Muddying the Waters: A Reply to Kay and Kern on the Statehood of Palestine and the ICC – Part I

[opiniojuris.org/2019/08/09/muddying-the-waters-a-reply-to-kay-and-kern-on-the-statehood-of-palestine-and-the-icc-part-i/](https://www.opiniojuris.org/2019/08/09/muddying-the-waters-a-reply-to-kay-and-kern-on-the-statehood-of-palestine-and-the-icc-part-i/)

August 9,  
2019



*[Victor Kattan is a Senior Research Fellow of the [Middle East Institute](#) at the National University of Singapore where he heads the [Transsystemic Law Cluster](#). He is also an [Associate Fellow of NUS Law](#). This is the first part of a two-part post.]*

The [post](#) in Opinio Juris submitted by Steven Kay QC and Joshua Kern of 9 Bedford Row based on their [Article 15 Communication](#) to the Prosecutor funded by the [Lawfare project](#) and [UK Lawyers for Israel](#), is an attempt to muddy the waters concerning Palestine's referral to the International Criminal Court (ICC). Contrary to what the authors assert, Palestine's legal status as a non-member state at the UN, and its capacities to act as a state, in the context of a longstanding and legally dubious belligerent occupation, is not ambiguous. Nor is its territorial claim indeterminate. Only Palestine has sovereign legal title to the territories occupied by Israel in June 1967. This title has been recognised by the vast majority of states.

The authors correctly note that the law of occupation “produces title neither for an occupant nor for any other party”, but they also claim that “Israel maintains a legitimate but disputed claim” to the territories it occupied in June 1967. They go so far as to suggest that some of the settlement blocs established in the West Bank are in fact in Israel, and accordingly “the OTP [Office of the Prosecutor] should tread with caution so as to avoid interference in the internal affairs of a non-State Party [read Israel] absent a Security Council mandate”.

Therefore, far from accepting that the law of occupation cannot produce title for an occupier, the authors appear to accept that Israel may have a legitimate sovereign claim to parts of the West Bank. This claim makes a complete mockery of the law of occupation.

### *Israel Was Not the Only Sovereign Administrative Unit in Palestine in 1948*

When Israel declared independence in May 1948, it was not, as the authors claim, the only sovereign administrative unit in Palestine. Nor did it assert sovereignty over all of the territory of mandate Palestine. As I previously explained in *Opinio Juris*, the Provisional Government of Israel accepted the territorial provisions of the UN Partition Plan in solemn statements made before the world community no less than five times between 1947 and 1949.

On 12 May 1949, Israel signed the Lausanne Protocol, where the Director General of Israel's Foreign Ministry appended his signature to a map of Palestine that was identical to the frontiers in the 1947 UN Partition Plan. In explaining why he agreed to sign the Lausanne Protocol, Walter Eytan wrote the following telegram to Foreign Minister Moshe Sharett:

we could not reject the November 29th resolution outright as a ‘base de travail’, as this would have been the first time that Israel had rejected the resolution upon which its legal existence is based and which was invoked as recently as six weeks ago to justify our occupation of the Negev down to Elath. We were asked to give the Commission our reply before 10 o'clock this morning, as it was clear to us that if we refused the Commission's proposal telegram would reach Washington and Lake Success within three hours announcing Israel's refusal to consider November 29th as a working basis, with murderous effects on our prospects of admission.

(See W. Eytan to M. Sharett, Lausanne, 9 May 1949 in Yemima Rosenthal (ed.), Documents on the Foreign Policy of Israel, Volume 4, Israel State Archives (Jerusalem, the Government Printer, 1986), pp. 29-32 at p. 30.)

Even after Israel joined the UN it did not claim sovereignty over the West Bank. In the negotiations in Lausanne that followed, Israel informed the Palestine Conciliation Commission established by General Assembly Resolution 194 (III) that the future of the West Bank was to be decided by the Arab States, the Arab inhabitants of the territory,

and the refugees (see UN doc. A/927, 21 June 1949, p. 8, para. 29). In other words, in 1949, Israel accepted that the future of the territory was a decision for the Arab states and its inhabitants.

Israel did not advance a claim to the West Bank until 29 December 1967, that is, almost one month *after* the UN Security Council had adopted [Resolution 242](#) based on the argument that it had better title to the West Bank than any other claimant. Yet as argued below, it was clear to the international community that Jordan had sovereignty over the West Bank. Moreover, Resolution 242, and customary international law prohibited the acquisition of territory by force, which prevented Israel from acquiring valid title to any of these territories.

### *How a Palestinian State Came to be Established*

To understand how a Palestinian state was established we need to appreciate the state of relations between the Palestinian people and the Kingdom of Jordan. This is because when Israel captured the West Bank in the June 1967 war there was already a state in the territories that Israel occupied. That state was the Kingdom of Jordan, which was in effective control of the territory. There is little doubt this state satisfied the Montevideo criteria for statehood.

We must remember that the Kingdom was a union comprised of two peoples that had come together as one. The [Act of Union](#) that was adopted following elections held in both banks of the river Jordan on 11 April 1950, in which all Palestinian residents of those territories, including the refugees, participated, was based “on the right of self-determination and on the existing de facto position between Jordan and Palestine, their national, natural and geographic unity and their common interests and living space”. It is worth recalling when reading this sentence that the Arab League’s [position](#) was that a Palestinian state had emerged in May 1948. The Act of Union was also adopted “without prejudicing final settlement of Palestine’s just case within the sphere of national aspirations, inter-Arab cooperation, and international justice”. The Act was adopted by a parliament that represented “both sides of Jordan”.

Significantly, before Israel occupied the West Bank in June 1967 it never challenged Jordanian sovereignty over that territory. As Allan Gerson observed, “Israel, between 1949, when it signed the Armistice Agreements with Jordan, and 1967, when it conquered the West Bank, never challenged the lawfulness of Jordan’s control of the West Bank”. (See Allan Gerson, *Israel, the West Bank and International Law* (Frank Cass, 1978), p. 80.) In the first year of Israel’s occupation in 1968, the Hebron and Bethlehem Magistrates continued to hold that sovereignty over the West Bank was still “vested in the Kingdom of Jordan”.

The Kingdom of Jordan held sovereignty over the West Bank from 1948 to 1988. During Israel’s occupation of the West Bank and Gaza from 1967-1988, Jordan established a Supreme Committee for West Bank Affairs and a Ministry of Occupied Territory Affairs to formulate administrative, financial, and social policy in the West Bank. Jordan continued

to pay the salaries and pensions of civil servants in the West Bank. The Jordanian dinar (the national currency) was the legal tender in the West Bank. Palestinians from the West Bank were represented in the Jordanian parliament until 1988 when Jordan dissolved that parliament to redraw the electoral map to include only East Bank districts after it recognised a Palestine state. Many Palestinians also held senior positions in the Jordanian government.

Jordan and the PLO even signed an agreement in 1985 based on the “special relationship” between Jordan, the Palestinian people, and the PLO. Article 2 of the agreement provided for the establishment “of an Arab confederation”. This confederation was to be established between “the two states of Jordan and Palestine”. In other words, King Hussein was signalling that he was willing to modify the union by which the Palestinian people owed their allegiance to King Hussein by establishing a reciprocal relationship that recognised the Palestinian people’s right to establish a Palestinian *state* in a confederation with Jordan. In other words, King Hussein recognised that sovereign legal title to the West Bank remained vested in the Palestinian people that was to be exercised by their political representatives.

However, in 1988, in the midst of the first Palestinian Intifada (or uprising), King Hussein dissolved the union when title to the West Bank was vested exclusively in the Palestinian people. The PLO, their legitimate political representatives, promptly proclaimed an independent state over the territories occupied by Israel in June 1967. This was acknowledged by more than 100 countries—including Jordan. The Palestine National Council then confirmed its previous resolutions with regard to the privileged relationship “between the two fraternal peoples of Jordan and Palestine, together with the fact that the future relationship between the States of Jordan and Palestine will be established on the basis of a confederacy and of free and voluntary choice by the two fraternal peoples, in corroboration of the historical ties and vital common interests which link them”. After Jordan recognised the Palestinian state proclaimed in 1988, the PLO office in Amman became the Embassy of Palestine to Jordan. Palestine has since opened embassies with many states.

It must be emphasised that Palestine was not formed under belligerent occupation. A state already existed before that occupation began, i.e. before 4 June 1967. What happened is that during Israel’s occupation the union between the Palestinian people and the Kingdom of Jordan came to an end when King Hussein recognised the Palestinian people’s exclusive title to the territories occupied by Israel in June 1967 by recognizing a Palestinian state.

# Muddying the Waters: A Reply to Kay and Kern on the Statehood of Palestine and the ICC – Part II

[opiniojuris.org/2019/08/09/muddying-the-waters-a-reply-to-kay-and-kern-on-the-statehood-of-palestine-and-the-icc-part-ii/](https://www.opiniojuris.org/2019/08/09/muddying-the-waters-a-reply-to-kay-and-kern-on-the-statehood-of-palestine-and-the-icc-part-ii/)

August 9,  
2019



*[Victor Kattan is a Senior Research Fellow of the [Middle East Institute](#) at the National University of Singapore where he heads the [Transsystemic Law Cluster](#). He is also an [Associate Fellow of NUS Law](#). This is the second part of a two-part post.]*

## *Recognition of Palestine's Statehood*

Since 1988, 138 states (72 per cent of UN members) have recognised a Palestinian state in the territories occupied by Israel on 4 June 1967. The UN General Assembly has also adopted resolutions acknowledging the existence of that state. The difference between the General Assembly resolution adopted in 1988 and the resolution adopted in 2012, is that by 2012, the Palestinian people had long been exercising self-governing powers in substantial sectors of the West Bank, and the General Assembly resolution explicitly recognised a Palestinian state.

Whereas the effect of the 1988 resolution was to acknowledge the proclamation of a Palestinian state, thereby validating the Palestinian people's exclusive title to the territories occupied by Israel in 1967, the effect of the 2012 resolution was to accord

Palestine observer state status in the UN, which gave it plenary powers, for example, to sign and ratify treaties.

### *UN General Assembly Resolutions can have dispositive effects*

While UN General Assembly Resolutions are normally only recommendations, they can have dispositive effects, especially when the resolutions concern territory over which the UN has a special responsibility (such as trust territories and former mandates). Several organs of the UN were engaged by the 1947 UN Partition Plan, including the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, and the Secretariat. Resolution 181 (II) was not only directed at the mandatory power but “to all other Members of the United Nations” that were expected to adopt and implement the plan.

The UN Partition Plan represented a special agreement between the United Nations and the Mandatory Power that sought to alter the status of the mandate by transforming it into two independent states linked by an economic union with Jerusalem set aside as a *corpus separatum*. Where there has been an agreement between the UN and a mandatory power, obligations may arise, as the International Court of Justice (ICJ) conceded in its 1950 Advisory Opinion on the status of South West Africa. To quote a former ICJ Judge, the UN Partition Plan “constituted a valid measure of a high organ of the United Nations acting in the full plenitude of its rightful jurisdiction”. (See Hersch Lauterpacht, “Declaration on the Assumption of Power by the Provisional Government of the Jewish Republic” 84(1) *The British Yearbook of International Law* (2014), pp. 47-51 at p. 48). In the words, of the ICJ concerning another administered territory, the resolution arguably had “definite legal effect”.

### *The obligation to eradicate colonialism*

The UN General Assembly also has a special responsibility to eradicate colonialism. This arises from the principle of self-determination in the Charter of the United Nations, in UN General Assembly Resolution 1514 (XV), and state practice. As the ICJ recently observed in its Chagos opinion, “the General Assembly has a long and consistent record in seeking to bring colonialism to an end”. “So long as decolonization remains incomplete” observed Vice President Judge Xue, “this mandate has no temporal limitation under the Charter”.

Decolonization is one of the main subjects of the Special Political and Decolonization Committee (Fourth Committee) of the General Assembly. This includes responsibility for ending the occupation in Palestine. Therefore, contrary to the claim made by Kay and Kern, the former ICC Prosecutor was correct in his 3 April 2012 assessment that: “In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1)”.

## *The Territory of the State of Palestine*

Kay and Kern claim that the exercise of ICC jurisdiction would “require the OTP to demarcate a border for jurisdictional purposes”. They argue that Palestine’s sovereign legal title is “indeterminate” and “presents a fundamental and immutable jurisdictional obstacle” with respect to a potential settlements case, for example, because it is not clear that the settlements have been established in the territory of the State of Palestine.

What is unclear to Kay and Kern has been clear to the UN Security Council. Consider Security Council Resolution 2334, which reaffirmed that: “the establishment by Israel of settlements in the *Palestinian* territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace” (emphasis added). Remember that the Security Council adopted this resolution knowing that Palestine had been given observer *state* status in the organization.

The same Security Council resolution also made it clear that it would “not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations”. Evidently, Palestine’s borders are the 4 June 1967 lines.

## *Another Red Herring*

The argument that Palestine cannot purport to be a state because it lacks effective control over all of its territory is another red herring, when it is Israel that is preventing the Palestinian people from being able to exercise self-determination over its territory. The Latin maxim *ex injuria jus non oritur* (a right does not arise from injustice) is frequently invoked, but it has never been more apposite to invoke it in relation to current Israeli policy.

In assessing the criterion of governance under the Montevideo convention, it is necessary to make a distinction between the existence of title to territory and the exercise of authority over territory. As John Dugard and David Raič explained: “An exclusive right to exercise authority without necessarily an actual exercise of authority may occur where there has been a transfer of sovereignty (as in many cases of decolonisation) or in cases of the exercise of an applicable right to external self-determination”. They add: “Such a title may compensate for a lack of effective governmental power during the process of the state’s empirical establishment, especially when the lack of effective governmental control is a result of unlawful conduct by the central authorities of the parent state”. (See John Dugard and David Raič, “The role of recognition in the law and practice of session” in Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, 2006), p. 136.

Israel is *not* Palestine's parent state. However, an argument could be made that Palestine's title to the territories occupied since 4 June 1967 compensates for the lack of effective governmental power over all its territories (such as Area C) given that the lack of such control is the result of unlawful conduct by Israel. For five decades, the Government of Israel has persistently refused to abide by UN Security Council and General Assembly resolutions demanding that it withdraw from the territories that it occupied on 4 June 1967 and to desist from altering the demographic composition, character and status of that territory.

It has been argued that title to the territories occupied by Israel on 4 June 1967 had already belonged to the Palestinian people who had formed a political union with Jordan in 1950. In 1993, after Jordan had acknowledged the Palestinian people's exclusive title to those territories by recognizing a Palestinian state, Israel agreed to allow the PLO, their political representatives, to establish institutions to exercise self-governing powers in the West Bank and Gaza. This was pursuant to the Declaration of Principles (DoP), in which Israel and the PLO agreed that the aim of the negotiations was to establish a Palestinian Interim Self-Government Authority for the Palestinian people in the West Bank and the Gaza Strip, "for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338". It was also agreed that the negotiations would "lead to the *implementation* of Security Council Resolutions 242 and 338".

It was no secret that the PLO wanted to establish an independent state at the end of the interim period. Just as the implementation of Resolutions 242 and 338 in the Camp David Accords led to a complete withdrawal of Israel's armed forces and installations from the Sinai Peninsula, it was expected that the implementation of Resolutions 242 and 338 following the Oslo Accords would lead to a full withdrawal from the territories Israel occupied on 4 June 1967 – at the end of the interim period scheduled for 4 May 1999. The final contours of the establishment of that state was of course, subject to agreement, but it did not mean that one side could postpone those negotiations indefinitely or make claims to the territories that it had already agreed to withdraw from when it signed the DoP.

### *The Futility of Talking for the Sake of Talking*

In 2011, when the State of Palestine applied for membership of the UN, it had become clear to the Palestinian leadership that the negotiations had reached an impasse. Moreover, they had been told by the IMF and the World Bank that their institutions were ready for independence. It was therefore reasonable for them to apply for UN membership, which they did. Yet Kay and Kern, and those whom they advise, repeatedly insist that "the question of sovereign legal title to the disputed territories is a matter that can only be resolved by agreement with the relevant parties". But the territories are not disputed in the legal sense as the question of sovereign legal title is clear. They remain occupied territories as the ICJ explained in paragraph 78 of its Wall Advisory Opinion. What has changed is the recognition that Israel is occupying a Palestinian *state*.



Finally, the claim by Kay and Kern that a resolution over the status of the territories can only be resolved in an agreement between Israel and the Palestinian leadership is not incontestable. When South Africa argued that negotiations had not been exhausted in the UN before the General Assembly purported to terminate the mandate over South West Africa in 1966, the ICJ explained that: “In practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise”.

# The Waters Were Already Muddy: A Rebuttal to Victor Kattan

 [opiniojuris.org/2019/08/15/the-waters-were-already-muddy-a-rebuttal-to-victor-kattan/](https://opiniojuris.org/2019/08/15/the-waters-were-already-muddy-a-rebuttal-to-victor-kattan/)

August 15,  
2019

*Steven Kay QC is Head of Chambers at 9 Bedford Row. Joshua Kern is a barrister at 9 Bedford Row).*

On 3 July 2019, we submitted a [communication](#) to the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) (summarised [here](#)) 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 ([here](#) and [here](#)) 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. Dr 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.

Dr 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 Dr Kattan’s argument relies on inconsistent and unsustainable legal and historical claims. Dr 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)*

Dr 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.

Dr 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 Dr 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 Dr 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*

Dr 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). Dr 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* (see Bell and Kontorovich, here; cf. Zemach, here).

#### *The "fusion" of Jordanian and Palestinian sovereignty*

Dr 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 (whose Article 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* (2<sup>nd</sup> 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.