

BOOK REVIEW

SELF-DETERMINATION, STATEHOOD, AND THE LAW OF NEGOTIATION: THE CASE OF PALESTINE

Robert P Barnidge, Jr
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There is an old anecdote about the Troubles in Ireland which tells of a terrorist poking a gun into the window of a car and demanding to know whether the passengers were Catholic or Protestant. On being told that the passengers were Jewish, the terrorist hesitated for a moment and then wanted to know whether they were Jewish Protestants or Jewish Catholics. I quote this in the context of the conundrum as to whether it is possible to write a completely non-partisan anodyne book on legal aspects of the Arab–Israel conflict. I am not sure it is possible. What is possible, however, is to write a book that is partisan and yet academic. Julius Stone’s 1982 book¹ provided an academic analysis of the legal issues from a Zionist perspective and Victor Kattan attempted to do this in 2009 from a Palestinian viewpoint.² Barnidge’s tour de force of academic research into the role of international law in the Arab–Israel conflict is therefore a very welcome development. To a large extent, the book presents the legal aspects from a Zionist point of view, but does so in a scholarly manner with meticulous research, buttressing every point with legal and academic references.

Like ancient Gaul, the book is divided into three parts. The first part is a chronological history and analysis of the international law issues involved in the Arab–Israel dispute. The second part deals with the role of negotiation in settling the dispute. The third and final part discusses the attempts by the Palestinians to achieve membership of the United Nations (UN). Although the link between the three parts is fairly tenuous, each part is, in itself, innovative, thoughtful and thoroughly referenced.

The first part of the chronological study commences with the dissolution of the Ottoman Empire after the First World War and the institution of the League of Nations mandate system. Barnidge makes the point that, at the time, the concept of self-determination ‘had not juridically crystallised’ (p 13) and ‘did not (yet) exist as *lex lata*’, and that therefore ‘it is doubtful that the

¹ Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Johns Hopkins University Press 1981).

² Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891–1949* (Pluto Press 2009).

principle of self-determination existed in general international law at the time the Covenant was adopted' (p 14). The author sees the mandate system as basically no more than 'political self-government for the concerned populations' (p 16). Barnidge raises the possibility that the non-application of the Jewish national home clauses to Transjordan may have been illegal since it was 'a constructive transfer of a part of Palestine to a foreign power' (p 19) and a 'truncation of the Jewish national home' (p 20).

The book emphasises that, at the time the Mandate was created, the Arab population of Palestine regarded itself as 'part of Syria as a whole, as part of the Arab world' (p 22), considered that 'any distinct national identity for Palestinian Arabs *qua* Palestinian Arabs was, at best, in *statu nascendi* during the Mandate' (p 26), and that in fact all the Arabs of the Ottoman Empire saw themselves as one people and viewed the borders laid out by Britain and France as being 'arbitrary' (p 21). Interestingly the author reports that the 1937 Report of the Peel Commission reinforced the view that the Arabs of Palestine, as late as 1937, still saw themselves as part of 'Southern Syria' (p 30). The author continues to note that the 1947 UN Special Committee on Palestine report demonstrates that even after the Second World War, the Arab population of Palestine did not see itself as being a 'distinct people' (p 37) and that 'the Mandate years were a period in which Palestinian Arab national identity was primarily pan-Arab, and more specifically, pan-Syrian' (p 42). The book goes on to provide extensive academic references to the fact that the Arabs of Palestine and the Arab states were not willing to accept any Jewish political entity in Palestine and used force to try and prevent the creation of Israel.

This reviewer believes the author makes a very cogent argument that there was no legal right of self-determination at the time the 1922 Mandate was created and that the Arab inhabitants of Palestine at the time did not consider themselves to be a separate people. This is important as a counter to the argument that the Mandate stipulation of creating a Jewish national home in Palestine was a violation of the right of self-determination. I am not sure, however, how relevant the issue still is today as, since the end of the Second World War, self-determination is clearly a legal right and all states, including Israel, recognise the Arab Palestinians as a people.

Although the author states clearly that 'the Arab side was unwilling to entertain a negotiated settlement with its Jewish counterparts, much less any other peaceful means of dispute settlement' (p 52), nevertheless efforts were made to reach a settlement and the second part of the book enumerates these international efforts. The first major international attempt referred to in the book was the appointment of a UN Mediator, Count Bernadotte who, in September 1948, presented a 'Progress Report'.³ The Report affirmed,⁴ *inter alia*, that:

[T]he right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return.

³ 'Progress Report of the UN Mediator on Palestine', UN Doc A/648 (1948), 89.

⁴ *ibid*, Conclusions 3(e).

The Report called for transferring the southern part of the country, the Negev, to Arab control⁵ and maintaining Jerusalem under effective UN control. A final recommendation of the Report was to set up a UN conciliation commission. Bernadotte, however, was assassinated by members of the Lehi group a day after he completed his report. The UN General Assembly, in its Resolution 194,⁶ adopted to a large extent the recommendations of Bernadotte's Progress Report, including his recommendation to set up a conciliation commission. The author comments that the mandate of this commission 'was as confused as it was vague' (p 61). I think the author's criticism is an understatement. The conciliation commission set up by the UN General Assembly in 1948 was very far in its concept from the accepted idea of a conciliation commission; it was created without consultation with the parties; its members were official representatives of states who clearly represented the political position of the states that appointed them. Above all, the commission was given a mandate that reflected the political view of the UN General Assembly. This mandate, which included the internationalization of Jerusalem, was totally unacceptable to Israel – hardly a promising premise for conciliation.

Another clause in the mandate of the conciliation commission was Article 11, which read: 'refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date'.⁷ This Article has come to bedevil anybody trying to reach an agreed resolution of the Israel–Palestinian dispute. In the experience of this reviewer, Article 11 has made it extremely difficult to reach a pragmatic solution to the refugee problem as the Palestinians always insist on some reference to implementing the Article, a non-starter as far as Israel is concerned. The reference to Resolution 194 in the, otherwise very promising, 2002 Arab League peace initiative⁸ has made it impossible for Israel to accept the initiative as an agreed premise for negotiations. An interesting footnote to this issue is, as pointed out by the author, that 'it is not clear whether this [Article 11] was meant to benefit Arab or Jewish displaced persons, or perhaps both' (p 62). As part of the meticulous research reflected in the book, the author points out that at least one delegation to the UN General Assembly, New Zealand, explicitly referred to 'most generous compensation to all those who had been displaced, both Arabs and Jews' (p 62, n 150).

In his concluding chapter to the book, Barnidge writes that 'it is not altogether clear how the intervention of outside actors actually contributes to peace settlements' (p 182). This reviewer thinks that might be too negative a statement. United States mediation was undoubtedly helpful, if not vital, in achieving the Israel–Egypt Peace Treaty. There might even be room for a process of conciliation in the future. Perhaps the classic definition of the task of a conciliation commission is as follows:⁹

⁵ *ibid*, Conclusions 4(i).

⁶ UNGA Res 194 (III) (11 December 1948), 'Palestine – Progress Report of the United Nations Mediator', UN Doc A/RES/194 (III), art 2.

⁷ *ibid*, art 11.

⁸ League of Arab States Peace Initiative, 2002, art 2, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empa/dv/1_arab-initiative-beirut_/1_arab-initiative-beirut_en.pdf.

⁹ Geneva General Act for the Pacific Settlement of International Disputes (entered into force 28 April 1949) 71 UNTS 101, art 15(1).

The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

The International Law Institute defined the task of a conciliation commission more succinctly as to 'proceed to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted'.¹⁰ Conciliation, when undertaken by the parties and not dictated by an international organisation, can be a very useful mechanism for settling disputes. It requires abiding by the regular procedure by which each side appoints a conciliator and three or more 'neutral' conciliators are appointed by agreement. The object of conciliation is to make recommendations which, in the opinion of the conciliators, are likely to be acceptable to both parties.¹¹ The conciliators' report is not binding on the parties thus, unlike arbitration, it leaves the final decision to the parties themselves. Sometimes, however, it may be politically easier for a party to accept a compromise proposed by a neutral body than to propose one itself or to accept a proposal by the other side. Barnidge concludes his book with the statement that 'Israel and the PLO [Palestine Liberation Organization] will have to forego certain claims and cure certain breaches if they are to reach a final settlement' (p 188). It may be recalled that the 'Oslo' Declaration of Principles stipulates: 'Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties'.¹² In view of the difficulties encountered by Israel and the Palestinians in attempting to reach agreed compromises, there might be room, in the future, for the parties to agree to consider a conciliation procedure.

The author provides numerous authorities to make the point that the 1967 Arab League Khartoum declaration of 'no peace with Israel, no recognition of Israel, no negotiations with it'¹³ was a reflection of the consistent rejectionist position of the Arab states and of the Palestinians. The author sees, I believe correctly, UN Security Council Resolution 242¹⁴ as a turning point where, for the first time, the Arab states accepted the principle of a peaceful settlement to the dispute, albeit without specifying a particular means of dispute settlement. The lack of specificity as to procedure was remedied six years later, after the Yom Kippur War, when UN Security Council Resolution 338¹⁵ spelt out the need for 'negotiations' 'under appropriate auspices' in order to implement Resolution 242. The author concludes his summary of the period up to 1973 by stating (p 77):

¹⁰ Regulations on the Procedure of International Conciliation, 11 September 1961, *Annuaire, Institut de Droit International*, art 1, http://www.justitiaetpace.org/idiE/resolutionsE/1961_salz_02_en.pdf.

¹¹ *Handbook on the Peaceful Settlement of Disputes between States*, UN Office of Legal Affairs, Codification Division, UN Doc OLA/COD/2394 (1992), paras 140–67.

¹² Israel-PLO Declaration of Principles on Interim Self Government Arrangements, 13 September 1993, art XV(2).

¹³ League of Arab States, Khartoum Resolution, 1 September 1967, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20khartoum%20resolutions.aspx>.

¹⁴ UNSC Res 242 (22 November 1967), UN Doc S/RES/242.

¹⁵ UNSC Res 338 (22 October 1973), UN Doc S/RES/338.

The Arab World no more recognised the legitimacy of Jewish self-determination at the end of this period, in 1973, than it did at the beginning, in 1948. From an Arab perspective, the Jews remained a - religious minority in a land that was both foreign to them and where they were unwelcome, not a 'people' with a right to self-determination.

In a subsequent chapter the author analyses the emergence of the Palestinian people, represented by the PLO as a recognised international legal entity. The author points out that the frequent UN General Assembly resolutions affirming the Palestinian right of self-determination invariably failed to mention the Jewish right of self-determination and by such refrain the resolutions 'effectively endorsed Palestinian self-determination at the expense of Jewish self-determination' (p 87). The author even surmises that the absence of an explicit reference to a Jewish right of self-determination 'conflicted with self-determination as a *jus cogens* norm' (p 84).

The survey of the 1978 Camp David Accords points out that the Israeli recognition of the 'legitimate rights' of the Palestinian people was 'juridically significant' (p 90) but that there was no reference whatsoever to a right of self-determination. This reviewer adds that the Egyptian position, however, had always been that Palestinian rights included the right of self-determination.¹⁶ For those who place their belief in UN political bodies it is perhaps salient that the author reminds readers that the UN General Assembly roundly condemned the Camp David Accords.¹⁷ Many have seen the 1988 PLO Declaration of Independence as the beginning of Palestinian recognition of the need to accept Israel's presence in the Middle East. The Declaration was indeed the first time the PLO apparently endorsed UN Security Council Resolution 242; however, the author points out that the PLO Declaration also described Israel as a 'colonialist, racist Fascist State' and that such language was 'hardly a convincing olive branch to the Jewish State' (p 98). It may be of interest in the present political dialogue that the PLO 1988 Declaration referred to a 'Jewish State'; however, as the author writes, the PLO was undoubtedly 'using the phrase as a statement of fact (as to what Resolution 181 had intended to have ushered into being) rather than with a view to bestowing legitimacy upon the State of Israel as a self-described Jewish State' (p 99).

In his analysis of the 1993 Israel-PLO 'Oslo' Declaration of Principles and the 1995 Interim Agreement, Barnidge reaches the conclusion that what was involved was only 'internal self-determination for the Palestinians' (p 107) and points out that there was no explicit reference in the agreements to independence or even to self-determination. The analysis also examines the legal status of the Oslo Agreements, reaching the conclusion – correct in the opinion of this reviewer – that although they were not treaties in the classic sense, they 'inaugurated a legal relationship between Israel and the PLO that both parties intended to be governed by international law' (p 141).

¹⁶ See, eg, the Egyptian proposal for an agreed draft statement, 17 January 1978, item 7, reported at <https://history.state.gov/historicaldocuments/frus1977-80v08/d180#fn:1.3.2.1.184.5.2>.

¹⁷ 'Question of Palestine', 12 December 1979, UN Doc A/RES/34/65 (B-D).

In the chapter dealing with the mechanisms for peaceful settlement of disputes, the author devotes most of his study to the process of negotiations, arguing that there is an international law of negotiations. Included in such law are the principles of ‘due diligence’, ‘estoppel’, ‘acquiescence’ and ‘unilateral declarations’ (p 184). There is undoubtedly an obligation that negotiations should be conducted in good faith, although this reviewer has doubts that we can, as yet, talk of a law of negotiations as such. The book quotes the Permanent Court of International Justice dictum that ‘an obligation to negotiate does not imply an obligation to reach an agreement’.¹⁸ The author argues that the Oslo Accords and subsequent agreements ‘reaffirm a process of negotiation’ (p 151) but do not specify a fixed result. Although there is no general requirement in international law to negotiate disputes, the author analyses cases where there was an explicit requirement to negotiate. He further studies the issue of the obligation to act in good faith and when negotiations can be said to have taken place and failed. This issue, of course, has relevance to the Arab–Israel dispute. The author postulates interestingly (p 152):

While Israel and the PLO remain obliged not to act prejudicially with respect to such permanent status issues as the final status of the territories and settlements, they remain free to make claims with respect to them when doing so cannot reasonably be said to preclude a final settlement and when the assertion of such claims takes place within the context of negotiations.

However, the author makes clear that ‘[i]t is difficult to see how a party that has agreed to negotiate a dispute can be said to be in compliance with the international law of negotiations when it, in this case, the PLO, openly refuses to engage with this body of law’ (p 170). In the opinion of the author, the PLO’s negotiating tactics have been in violation of the law of negotiations. Furthermore, the author adds: ‘For one party to precondition the resumption of negotiations upon its prior positions having been addressed would be to fall foul of the international law of negotiations’ (p 171).

As regards the Palestinian application for admission to the United Nations in autumn 2011, Barnidge notes that it ‘reflected Palestinian frustration with the bilateral negotiation imperative’ (p 162), and that ‘Palestinians continue to claim that negotiations have proved futile and what is required is international intervention’ (p 169). He then proceeds to examine international law regarding permissible counter-measures in response to a violation of an agreement. The author examines whether it was a lawful Palestinian counter-measure against Israel, setting out that counter-measures are intended to induce the other party to comply with its obligations. He reaches the conclusion that since the Palestinian actions ‘were lodged, quite calculatedly, in defiance of negotiations with Israel, it is difficult to see how the Palestinian applications can be properly seen as inducements to Israeli compliance’ (p 177). Barnidge reaches the unequivocal conclusion that ‘the Palestinian applications were internationally wrongful’ (p 175).

An interesting final note in the book is the author’s comment that neither side has claimed that ‘the other party’s actions had amounted to a material breach’ of the Oslo Accords. (p 179). Such

¹⁸ *Railway Traffic between Lithuania and Poland*, Advisory Opinion (1931) PCIJ (Ser A/B) No 42, 12.

a claim would have justified a position that the Oslo Accords are no longer in force; neither side apparently wants to cross this Rubicon.

Barnidge's book should be on the bookshelf of every reader who follows legal issues in the Middle East. This reviewer, for one, will be placing it, along with a book reflecting the Palestinian legal narrative, on the required reading list for all students studying courses on the role of international law in the Arab–Israel conflict.

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