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Editorial

The Birth of Israel and Palestine – The Ifs of History, Then and Now; Junior Faculty Forum for International Law; The Last Page and Roaming Charges; Eric Stein RIP; In this Issue

The Birth of Israel and Palestine – The Ifs of History, Then and Now

Given the promised September UN move by the Palestinian Authority it is of interest to recall some of the circumstances surrounding the birth of Israel. There are some interesting historical parallels and some differences. In public opinion and Hollywood movies, Israel was born with a UN midwife: UNGA Resolution 181, the famous Partition Resolution of 29 November 1947 (<http://www.youtube.com/watch?v=ZpNpueivtWQ>). The Resolution called for, *inter alia*, the creation of two states, the internationalization of Jerusalem and . . . wait for it . . . an economic Union within the whole territory! ‘De Facto Solidarity’ was not, apparently, invented with the Schuman Declaration.

Arab states spoke forcefully against the Resolution and, obviously, voted against it *en bloc*. Not only did they not recognize Israel in the sense of declining diplomatic relations – they argued the very illegitimacy of Israel as a state. In furtherance of this position, in the lawfare (only the term is new, not the praxis) that immediately erupted, Arab scholars spent much ink on dismissing any legal significance to that Resolution – essentially arguing the general non-binding nature of General Assembly resolutions. (You don’t see that argument about UNGA Resolution 181 being made too often today by the Arab protagonists in the ongoing lawfare.)

Many Israeli scholars readily conceded the point. Indeed, they argued, it was not within the power of the General Assembly as such legally to sanction the creation of a new state, though, of course, the Resolution was politically very important. Israel came into being, it was argued, when it declared independence on 15 May 1948 upon termination of the British Mandate over Palestine. The birth of the new state under international law was the result, it was claimed, of the widespread and representative recognition of it by the states of the world community. On this reading, Israel came into being not on the morrow of the November 1947 Partition Resolution, but in May 1948. Politically, the timing of the declaration of independence was not without

internal Israeli controversy, with some noted intellectuals, a minority (among them Martin Buber), seeking some kind of settlement talks with the Arabs before taking that decisive step. Equally interesting was the content of the Declaration. It embraced, *inter alia*, the UN Partition Plan:

THE STATE OF ISRAEL is prepared to cooperate with the agencies and representatives of the United Nations in the implementation of the Resolution of the General Assembly of November 29, 1947, and will take steps to bring about the economic union over the whole of Eretz-Israel. (<http://www.brijnet.org/israel50/decl-eng.htm>)

The Arab invasion of Israel on the morrow of the Declaration put an end to all of that. There is much historical controversy regarding that period and like most literature about the Conflict you can guess the conclusion simply by looking at the name. Many scholars are, demoralizingly, both partisan and entrenched in their views. But legally speaking, I have no doubt in my mind that had the nascent Palestine declared *its* independence at the same time as Israel did, it would have been recognized by an even greater number of world states, and Palestine would have been born then and there in the now defunct Partition boundaries. Even if this would not have prevented the war of the Arab states against Israel, the outcome of that war would not have been an Armistice Agreement with Jordan but with Palestine. Why did this not happen? I leave that to the historians to duke out. Still, one cannot but express some sadness given the last 60 years and more of bloodshed.

Israel's first bid to become a Member of the UN in the Autumn of 1948 failed in the Security Council. It was only a year after its establishment, in May 1949, that Israel was admitted to the UN (UNGA Resolution 273 of 11 May 1949).

It is clear, thus, that one should not conflate admission to the UN with the birth of a new state. Admission to the UN is, of course, the most emphatic proof of statehood (though the Taiwan mess is a reminder that even the most perspicacious propositions can have some cloudiness), but it is not necessary. Statehood without membership has not been all that uncommon in the history of the Organization. Israel was a state before it was admitted to the UN.

It is also curious to see that the debate between the declaratory and constitutive schools of recognition still rages both in the literature and in the practice and statements of states. (I find the Lauterpacht solution as unconvincing today as it was when he articulated it, though it too, strangely, has not yet been fully interred.) If one is to take an empirical and legal realist approach, it would seem that the birth of states is not all of the same cloth. In some situations, such as decolonization, recognition is, indeed, declaratory. But in more controversial situations, want it or not, recognition, widespread and representative, if not ontologically constitutive, is legally a necessary condition. It is really hard to explain the different paths of, say, Bangladesh and the Turkish Republic of Northern Cyprus with any other hypothesis. Does anyone doubt that if the TRNC had received widespread recognition it would have been a member of the club?

And so it was with Israel, and so it is and will be with Palestine. I refer you to the exchange in *EJIL* in 1990 between Francis Boyle and James Crawford following the

1988 Palestinian declaration of independence. In determining the subsequent legal status of 'Palestine', from a legal realist perspective, all legal arguments become secondary in the face of the practice of recognition/non-recognition. Had there been widespread and representative recognition at that time, it would have been Palestine, not 'Palestine'. Justly or unjustly, that recognition was not forthcoming, and a birth turned into a miscarriage.

To judge from press reports the Palestinian Authority is planning a different approach to that of Israel. It appears that they plan to collapse the process into one step – seeking admission to the UN and folding recognition into that vote. It is a somewhat risky policy. If successful and Palestine is admitted, its statehood would be confirmed *ipso facto* and *ipso jure*. Likewise, even if unsuccessful, one should, legally, be able to count all favourable votes on admission, as a priori recognition. (How could you vote for admission without implying recognition?) However, how would one assess the no votes – against recognition? Against membership? And would not failure to be admitted be interpreted as failure to achieve statehood? Never a dull moment in the Middle East.

Junior Faculty Forum for International Law

An Annual Junior Faculty Forum for International Law is a new and much needed venture in the international law calendar to be convened by Dino Kritsiotis, Professor of Public International Law at the University of Nottingham, Anne Orford, Michael D. Kirby Professor of International Law at the University of Melbourne, and myself. The Forum is designed as an annual event to allow international legal scholars, in the first six years of their academic career, an opportunity to discuss a working paper, idea or set of arguments, by being paired with a senior scholar in the field of international law who will be assigned to comment on the paper when it is presented to the Forum. The inaugural Forum will be hosted by the Jean Monnet Center for International and Regional Economic Law & Justice at NYU. It will take place in New York City in May 2012, and, to mark the importance of this initiative, selected presentations from the inaugural Forum will be invited to appear in *EJIL*.

Full details and application procedures may be found at www.annualjuniorfaculty-forumil.org/

The Last Page and Roaming Charges

We have had nice reactions (not by everyone) to The Last Pages and Roaming Charges. I would like to remind those of our readers who also dabble in poetry or photography not to hesitate and submit their work for consideration. Kindly email: ejil@eui.eu.

Eric Stein RIP

It is with infinite sadness that we mark the passing of Eric Stein, my friend and mentor of many years. As a scholar Eric made signal contributions to the fields of

International, comparative and European law. His career spanned the vital moments of the 20th century: a Jewish escapee from Czechoslovakia to the USA he served with the American Army in Europe, was involved with both the nascent UN and then, prophetically, with the nascent project of European Integration. As a human being, his life, alongside his wife Virginia, was rich and marked by an uncommon generosity of spirit and endless intellectual curiosity and energy. He died a young 98 years old. In our Last Page we publish a Poem written by Eric Stein.

In this Issue

We begin this issue with four articles which, each in their own way, return to the foundations of international law. The first two contributions challenge the traditional statist paradigm informing our contemporary understanding and conceptualization of international law. While Rafael Domingo, based on a careful analysis of the Roman and Enlightenment roots of international law, advocates for the creation of a new global cosmopolitan paradigm, Monique Chemillier-Gendreau, by revisiting the theoretical contribution of the French Reims Doctrine, calls for the reactivation of a critical approach to international law. The following two contributions focus on specific regimes of international law and shift the compass more to the South. Solomon Ebobrah analyses the positive contribution that complementarity can have towards fruitful inter-institutional relationships and the effectiveness of the African human rights system. Then Juan Marchetti and Petros Mavroidis offer a geology of the GATS negotiations and aim to shed light on its rationale through careful examination of the interaction between developed and developing countries before and during the Uruguay Round. This is a foundational piece.

In our occasional series, *The European Tradition in International Law*, orchestrated for this issue by Christian Tams, tribute is paid to the singular life and work of the international scholar and political activist: Walther Schücking. Following Christian Tam's Introduction, Frank Bodendiek, Mónica García Salmones, Ole Spiermann and Jost Delbrück depict a vibrant portrait of Schücking's multi-faceted life: the scholar, the idealist, the judge, in other words: the *intellectuel engagé*.

To follow, we invite you to pause for a moment and contemplate *Roaming Charges: Moments of Dignity - Polish Youth on Warsaw's Pilsudski Square*.

Our journey in international law continues with two occasional series: *Critical Review of International Governance* and *Critical Review of International Governance and Jurisprudence*. The first features an article by Ronagh McQuigg, who seeks to answer the ever-green question: 'How Effective is the United Nations Committee Against Torture?' In the second, Stefano Piedimonte Bodini examines the legal implications of anti-piracy operations within the framework of the European Convention on Human Rights.

In this issue's *EJIL: Debate!*, Alexander Orakhelashvili replies to Dapo Akande and Sangeeta Shah's objection – which they formulated within the framework of a

symposium on sovereign immunity published in *EJIL* issue 21:4 (2010) – to his position that a state engaging in violations of *jus cogens* has no entitlement under international law to claim immunity before foreign courts. The rejoinder offered by Dapo Akande and Sangeeta Shah shows that the conceptualization of state immunity, beyond the question of primacy of *jus cogens* over state immunity, is in itself an issue open to debate that *EJIL* is happy to host. This, in our view, is one of those occasions where we are reassured that the debate format can yield results which otherwise would be hard to come by.

In this issue we publish a *Review Essay* by Reut Yael Paz that touches on a son's captivating account of the life of his father, both being eminent international lawyers: Elihu Lauterpacht's *The Life of Sir Hersch Lauterpacht*. Furthermore, for the first time, we publish a more comprehensive *Literature Review Essay* by Stephan W. Schill on the literature and sociology of international investment law.

The issue concludes with the poem *The Poplars of East and West* by the late Eric Stein.

JHHW

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