BOOK REVIEWS

Israel and Palestine. Assault on the Law of Nations, by Julius Stone. The Johns Hopkins University Press. Baltimore and London. 1981. xiii + 223 pp. $24.50.

This latest book by Professor Stone is of exceptional importance. Its main thrust, as the dual title suggests, is to examine the present state of international law, taking the Israel/Palestine situation as an example.

On the very first page, in the Preface, Professor Stone makes some interesting remarks about the role of ambiguity in international relations. "Ambiguity", he says, can serve "the critical purpose of providing, for parties deeply at variance on basic issues, a framework that can accommodate at present the specific matters on which they can agree, as well as (for the future) the movement of their positions from time to time on the critical matters on which they now differ. Ambiguity of this kind is dynamic. It moves in time between the poles of rapprochement and estrangement, love and hate". For that reason, as the author well observes, the Treaty of Peace of 26 March 1979 between Israel and Egypt is better described as a "peace process" rather than a "peace settlement". Events have certainly proved this view correct.

Only a few pages further on the author makes the telling observation that operations within the frame of resolution 377A(V), adopted by the General Assembly of the United Nations on 3 November 1950, are better described as "dividing for war" than "uniting for peace" — the designation usually given to the resolution — thus confirming the scepticism he expressed about this resolution nearly thirty years ago.[1] From there he passes on to the main theme of the book, which is that "the General Assembly is rapidly becoming a committee to execute the will of the Soviet and Arab oil-producing nations, manipulating the numerically overwhelming votes of African and Asian States" — a view the author had already expressed on a previous occasion.[2]

It is Professor Stone's contention that since 1973 the "oil weapon" has been used systematically with the aim of subverting both the State of Israel and international law generally, and that "the main materials and process for this operation are accumulations of resolutions in the General Assembly, claims that they are lawmaking, and the diversion of the resources of the United Nations, through committees of that body, to the tasks of eroding the rights of the selected target".[3] He then proceeds to list some of the important legal issues raised by this operation. These include the legal effect of resolutions of the General Assembly; the principle of

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[1] J. Stone, *Legal Controls of International Conflict* (1954), Discourse 14, 266-284.
[2] J. Stone, *Conflict through Consensus* (1977), 174.
[3] *Israel and Palestine. Assault on the Law of Nations* (1981), 5.

"sovereign equality" of Members of the United Nations; the principle of *ex iniuria non oritur ius* in its application in international law; and the principle of self-determination. It may be observed in passing that each of these topics would deserve a book in itself.

As regards self-determination, Professor Stone's contention is that there has been a certain continuity in the application of this principle since its early expression in President Wilson's Fourteen Points; that the principle was applied after World War I for the benefit of both the Jewish and Arab peoples; that the territorial allocation then made to the Arabs was more than a hundred times greater in size, and greater still as it has turned out, in resources, than that to the Jews; that when Palestine was granted to the Jewish people, there was no separate "Palestinian nation", the Arabs residing in Palestine simply being considered part of "the Arab nation"; and that in 1922 about four-fifths of the territory allocated to the Jewish people was excised through the establishment of the separate Hashemite kingdom of Transjordan (later called Jordan), so that "the principle of self-determination now being used as a weapon for attacking or even dismantling the State of Israel is the very principle of which that State is among the earliest historic expressions".[4] Professor Stone follows this up with the argument that one of the purposes of establishing the kingdom of Transjordan was to provide a reserve of land for Arabs across the Jordan, with the consequence, in his view, that it cannot be maintained that "the Palestinian nation", even if such an entity did emerge in the 1960's, lacks a homeland. That homeland, he says, is Jordan, which is "unambiguously Palestinian territory",[5] and the vast majority of people living there are Palestinian Arabs and also constitute the majority of all Palestinians. Finally, on this issue, Professor Stone contends that, if the Palestinians have suffered a wrong, it has been at the hands of the other Arab States rather than Israel. Whereas, under its Law of Return, Israel provided homes for 700,000 Jews as a first responsibility of the new State, the Arab States, despite their vast territories, have not made corresponding efforts on behalf of the Palestinian refugees, if indeed a person who moves from Cisjordan to Transjordan, "to live within a similar cultural, demographic, linguistic, religious, and even climatic environment"[6] can be called a refugee at all.

Professor Stone is of course arguing a case, and it is not part of this review to pronounce how strong or weak that case is. What emerges from this part of the book is that the key question, from the point of view of international law, is the intertemporal aspect in the application of the principle of self-determination. Professor Stone is on strong ground when he castigates the failure of various United Nations studies on the Middle East question to recognize that aspect. The principle of self-determination was supposed to bring about a greater degree of harmony and stability in international relations. That result, he maintains, will not be achieved if

[4] *Op. cit.*, 18.
[5] *Op. cit.*, 23.
[6] *Op. cit.*, 25.

established States — indeed Members of the United Nations — founded according to the principle of self-determination are to be "exposed forever thereafter to revision of boundaries or even destruction, at the behest of some later-born competing entity".[7]

If the application — or, as Professor Stone would argue, the distortion — of the principle of self-determination constitutes the assault on Israel's right to exist, the assault on international law generally takes the form of a gross exaggeration of the contention that resolutions of the General Assembly are legally binding. This is a hoary issue which has been around since the early days of the United Nations, and it is one on which there is no simple answer. That is to say, although it is accepted that in general resolutions of the General Assembly are not legally binding, there are circumstances in which such resolutions may be law-making, and it all depends on the circumstances. In the present case it is being argued by opponents of Israel that various resolutions of the General Assembly bearing upon the Palestinian issue have legal force. Especially is this maintained with regard to Resolution 3236 (XXIX), adopted on 22 November 1974, which referred to "the inalienable rights of the Palestinian people in Palestine" and recognized the Palestine Liberation Organization as the appropriate claimant in respect thereof; and also Resolution 34/65B adopted on 29 November 1979, which purported to declare that the Treaty of Peace between Israel and Egypt had no validity. The present reviewer would have no hesitation in agreeing with Professor Stone that these are quite unacceptable assertions of the General Assembly's authority. The recognition of States, governments and territorial situations is a matter for individual States and not the international body whilst, within the limits of the principles of *jus cogens* as stated in Articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969, States retain freedom in the matter of treaty-making.

Professor Stone also raises the question whether, even assuming that certain resolutions of the General Assembly might be mandatory, their legal validity could be undermined if it could be shown that they had been adopted under duress — in this case a threat to cut off the supply of oil. The question is an interesting one and may need to be further examined. The argument would be that a resolution adopted under such duress would not satisfy the requirement of *opinio iuris sive necessitatis*. On the other hand Article 52 of the Vienna Convention only goes so far as to say that "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations". This raises the question, which has been much discussed, whether economic coercion can amount to "a threat or use of force" in terms of the Charter. Suffice it to say here that a party alleging duress has a heavy burden of proof to discharge. In the *Fisheries Jurisdiction Case*, where an accusation of duress was made, the International Court of Justice declared that "a court cannot consider an

[7] *Op. cit.*, 19.

accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support".[8]

Professor Stone attaches much importance to the use of the "oil weapon" by the Arab States as a means of influencing majorities in the United Nations. This review is being written at the time of the "oil glut", which has thrown OPEC into at least temporary disarray. Yet the same sort of majorities continue to be registered in the United Nations. It is possible, perhaps even likely, that the glut will be temporary and that OPEC will once again wield the oil weapon. But it seems that it would be wise not to put too much emphasis on the petroleum situation as the main cause of the revolution which has taken place in the United Nations since it adopted resolution 181 (II) on 29 November 1947. This was the resolution which provided for an Arab State, a Jewish State and an internationalised City of Jerusalem "to come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed".

Protagonists of both the Arab and the Israeli cause have to tread warily in regard to the resolution of 1947. Arab States rejected that resolution at the time and Arab spokesmen have always regarded it as invalid; yet today they see some merit in it in that the territory of the Jewish State envisaged in the resolution is much smaller than the territory over which Israel now exercises control. As for Israel, while the resolution certainly gave United Nations approval to its emergence as a State, Israeli spokesmen have always stressed that their State does not owe its existence to that resolution, but rather to the fact that Palestine was the birthplace of the Jewish people; that international recognition was given to the right of the Jewish people to return to Palestine through the Balfour Declaration and the League of Nations mandate; that the Jewish contribution to the victory over Nazi Germany entitled the Jews to form a State which would be a Member of the United Nations; and that the Jews had exercised their right to self-determination through establishing the State of Israel in May 1948. Professor Stone's view of the resolution is that, if it had been allowed by the Arab States to come into effect, "its effect would have been to allocate sovereign titles *inter alia* to Israel, the proposed new Arab State, and the proposed *corpus separatum*" (that is the City of Jerusalem), and it "would . . . have bound the State of Israel and the Arab States, including the new Arab State once it was established, on the basis of the rule *pacta sunt servanda*". In view of the events of 1948, however, there was no agreement and the resolution had no effect in vesting and delimiting titles.[9]

Following his practice in earlier works, Professor Stone includes two "Discourses" on relatively specialised topics. The first of these Discourses concerns the *Elon Moreh Case*; and the second concerns problems involving Judea and Samaria (the West Bank), and the relevance to these problems of the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War (the Civilians Convention).

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[8] *I.C.J. Reports 1973*, 3, 14.
[9] *Israel and Palestine* (1981), 62-63.

In *Elon Moreh*[10] the Supreme Court of Israel held that the customary law of belligerent occupation did not permit the requisition of land for a Jewish settlement in Judea, because the initiative towards the requisition, and a predominant purpose of carrying it out, went beyond measures of military security.

The decision has been interpreted in some quarters as implying that Israel's title in Judea, and indeed in the West Bank as a whole, is regarded even by Israel's highest tribunal as no more than that of a belligerent occupant. Professor Stone, however, maintains that that interpretation is not correct and that the misunderstanding arose because of the way the case was argued. He insists that Israel can base sovereign title in the West Bank on a number of grounds, such as (i) effective and stable control, without resort to unlawful means, of an area where there was a "sovereignty vacuum"; (ii) in cases of disputed sovereignty, that State is entitled which can establish the best title; (iii) the State in possession of territory to which no other State has a supportable claim is entitled to claim sovereignty and to take the step of formal annexation; and (iv) territories subject to a League of Nations mandate whose disposition has not otherwise been determined remain subject to the obligations of the mandate, which in this case was the establishment of a Jewish national home. However, in the author's view, Israel refrained from making an unequivocal claim of sovereignty over the West Bank in order not to provoke the Arabs, and in order also to keep the way open for peace negotiations. He argues further that, since Israel did not formally claim sovereignty, "the only alternative status that existing international law seemed to offer was that of belligerent occupant".[11] As he goes on to explain, "the customary law of belligerent occupation seems, by its very terms, applicable only where reversionary sovereign rights are vested in the ousted State" (that is, Jordan). But Professor Stone maintains that Jordan had no territorial title whatever in Judea and Samaria and that, "even as a former belligerent occupant, her standing was vitiated by illegality".[12] Whilst admitting that the official position of Israel on Judea and Samaria has "often seemed ambivalent",[13] he nevertheless admires the Israeli judges for taking the unusual step of denying their own government's authority in an important respect.

In the second Discourse, Professor Stone discusses the general question whether Article 49 of the Civilians Convention forbids the settlement of Jews in the West Bank. Article 49 forbids an occupant to deport protected persons from occupied territory to the territory of the occupant or of any other country (paragraph 1), and also forbids an occupant to deport or transfer parts of its own civilian population to the occupied territory (paragraph 6). The author contends that the purpose of Article 49, drafted in the light of Nazi atrocities committed in the Second World War, is to prevent impairment of the economic situation of, and the

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[10] *Dweikat et al.* v. *Government of Israel et al.* H.C.J. 390/79.
[11] *Israel and Palestine* (1981), 171.
[12] *Ibid.*
[13] *Op. cit.*, 172.

racial integrity of the native population of, the occupied territory, and is also to prevent inhuman treatment of the occupant State's own population. Seen in this light, Professor Stone does not consider that the settlement of 20,000 Jews amid 700,000 Arabs, partly for purposes of military security, and having also the result of improving rather than impairing the economic situation of the occupied territory, amounted to a violation of Article 49, whilst it would be the height of irony, he maintains, if a provision, the purpose of which was "to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*", were to be interpreted so as to compel the Government of Israel to use force to keep *judenrein* areas which had been scheduled as parts of the Jewish National Home.[14]

As has already been indicated in this review, Professor Stone is pleading a case, and he does so with much force. Whatever conclusions the reader of this work may come to as regards the strength of this case, he cannot but admire the thoroughness which has gone into the preparation of it and the scholarly way it is here presented, both as regards the Israel/Palestine issue and as regards the wider thesis of the assault on the law of nations.

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[14] *Op. cit.*, 180.

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