

Israel and Palestine: Assault on the Law of Nations?

Israel and Palestine: Assault on the Law of Nations. By Julius Stone. Baltimore: Johns Hopkins University Press, 1981. Pp. xiii, 223. \$17.50.

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Despite the critical importance of the Israel-Palestine problem and the complexity of the legal issues surrounding it, there is a dearth of writing on the central issues of international law involved, and the little that is there is marred by selectivity and bias. Perhaps scholars fear that any fair characterization of their opponents' contentions will be cited out of context, like a quote from a critic in a theater advertisement. Opposing views are caricatured or ignored. And since the criticism scholars justly receive is equally one-sided and negative, the writer may feel relieved of the burden of fashioning truly persuasive counterarguments.

One opens Professor Julius Stone's latest book with a hopeful feeling: is this at last a good piece of scholarship on the Middle East? Stone's credentials, as he states in this book, are impressive:

The present writer's concern with the sociology of international law—to the relation of its socioeconomic, political, and psychological substructure to its surface manifestations, is of long standing. It goes back to his Master of Laws thesis about "The Doctrine of Sovereignty and the League of Nations" at the University of Leeds in 1930, and has continued through books on *Legal Controls of International Conflict* . . . and other writings. He has also contributed much in the last decade to the literature on particular legal aspects of the Arab-Israel conflict.¹

The "socioeconomic, political, and psychological substructure" Stone examines turns out to be simply the 1973 Arab oil boycott. He argues that

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1. J. STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* 6 (1981) [hereinafter cited by page number only].

this Arab “weapon” so tainted majorities voting for anti-Israel resolutions in the General Assembly of the United Nations (U.N.) that those resolutions amount to an assault on the law of nations. By calling for self-determination for Palestinian Arabs and the establishment of a Palestinian state, the resolutions, Stone contends, have created a nonexistent problem.

I. The Arab Oil Weapon and the U.N. “Assault on the Law of Nations”

Before the boycott, there was no problem of a separate Palestinian homeland, Stone insists, because Palestinian Arabs had their natural homeland in Jordan.² The problem was created by General Assembly resolutions passed after 1973 by states “under extreme duress such as threats of deprivation of essential oil supplies.”³ Since such coercion “must be unlawful” when used to compel the foreign policy of sovereign states, the Arab oil boycott “was an invasion of the sovereign prerogatives of the third states by the use of coercion no less extreme than most conventional military aggressions.”⁴ The oil boycott, Stone concludes, was “economic aggression, *stricto sensu*,”⁵ and thus “probably constituted a threat or use of force forbidden by Article 2(4) of the [U.N.’s] charter.”⁶

One need not be an expert in socioeconomic substructures to know that the oil boycott has undoubtedly influenced nations toward a pro-Arab position since 1973. But was the boycott illegal? Was it a threat or use of force in violation of the most fundamental prohibition in the U.N. Charter?

Stone fails to consider the widespread use of economic muscle by other powers to influence U.N. votes in particular and foreign policy generally. The United States, for instance, has for many years “bought votes” in the U.N. through its foreign aid programs; it has prohibited grain sales to the Soviet Union from time to time, in hopes of changing the latter’s policies;

2. Stone writes:

[T]he origins and present position of the Arab state of Jordan in Palestine rebut the very claim that the Palestinian people lack a homeland. Not only did the state of Jordan arise in Palestine over Jewish protest at the expense of the home allocated for the Jewish nation; it also inexorably became, by the same course of history, a Palestine Arab state. . . . With or without the West Bank, Jordan is unambiguously Palestinian territory; and the vast majority—something over 60 percent—of its inhabitants consists of Palestinian Arabs. Moreover, the number of Palestinians within this extended Jordan constituted a majority of all Palestinians.

P. 23.

3. P. 36.

4. P. 37.

5. P. 36.

6. P. 38. The Charter of the United Nations states that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2, para. 4.

it has engaged in many acts of apparent "economic aggression." Yet no one claims that these actions were illegal; and even if such food or oil boycotts were questionable, perhaps as human rights violations, they still would not necessarily constitute a threat or use of force under Article 2(4). Though Stone claims that the oil boycott is economic aggression, as that term was used by "many participating States" in the discussions leading up to the 1974 U.N. Resolution on the Definition of Aggression,⁷ the resolution itself omits any mention or intimation of economic aggression. The states arguing for the inclusion of such boycotts in the definition of "aggression" lost.⁸

The U.N. resolutions decried by Stone did focus world attention on the Palestinian Arabs, but it is wrong to conclude that through these resolutions the new holders of oil wealth created the Palestinian problem. Prior to 1973, the Palestinian Arabs were simply ignored by the other Arab states.⁹ The unprecedented wealth accruing to some Arab states as a result of the formation of the Organization of Petroleum Exporting Countries did not suddenly sensitize them to the plight of the Palestinian Arabs. Nor were these states lying in wait, *pace* Stone, to use their new boycott to coerce other nations to aid the Palestinians. Rather, the very human problem of the Palestinians could simply no longer be ignored.¹⁰

II. The Palestinian "Problem" and the Jordanian "Solution"

The real reason a "problem" was created for Israel after 1973 was that the Palestinian Arabs became identified as an entity. The General Assembly resolutions, whatever their legal effect, helped create the aura of inchoate nationhood for the Palestinians.

As long as the Palestinian Arabs could be dealt with as a large group of

7. P. 37.

8. Stone mentions that the Soviet Union, in particular, has long called for inclusion of "economic aggression" in the definition of aggression. Pp. 36-37. But he fails to mention that the Soviets have also wanted to include "cultural aggression" in the list of proscribed activities. In fact, the Soviets may have simply tried to overwhelm the enterprise of defining aggression by universal inclusivity.

9. In 1970, Professor Michael Reisman called attention to the problem:

The only group in the contemporary Middle Eastern situation with a legitimate grievance is the Palestinian Arabs. By a complex convergence of circumstances, they have been denied the opportunity for self-determination and for twenty years have lived in the most degraded conditions. Despite constant expressions of verbal sympathy, they have been despised by the other Arab peoples and have learned to despise themselves An equitable solution to the problem of the Palestinian Arabs is not only an exigent moral demand but also a crucial requirement for increasing stability in the Middle East.

M. REISMAN, *THE ART OF THE POSSIBLE* 44 (1970).

10. Inconvenient as it may be for Stone's oil-boycott thesis, the General Assembly's first Palestinian resolution was Resolution 2672, of December 8, 1970, which recognized that the "people of Palestine are entitled to equal rights and self-determination." The war of October 1973 and the terrorist activities of the Palestine Liberation Organization (PLO) beginning in 1970 also contributed to increased world attention to the plight of the Palestinian Arabs.

stateless persons, they could be moved around and relocated among the various states in the Middle East. Israel has consistently been willing to negotiate with other states, no matter how indirect their interest in the Palestinians. Israel adopted this stance during and after the Camp David talks, when it was willing to address the fate of the Palestinians, as long as the Palestine Liberation Organization (PLO) was not present.

Stone's book parallels in legal language this real-world finessing of the Palestinians. His approach reduces international law to a law among nations; non-national groups such as the Palestinians have no status in such a scheme. Trying to give them one creates the problem. In Stone's view, the sovereign prerogatives of Israel have to be given the same status as is given to the prerogatives of Lebanon, Jordan, Syria, Egypt, and the other established states in the area. No one else has any standing. Legally speaking, the Palestinians do not exist. To pretend that they do is to assault the law of nations.

III. The Legal Framework of the Mandate Regime

The central unresolved issue in the Arab-Israel conflict is what to do with the Palestinians in the West Bank and the Gaza Strip. Stone's solution cedes these lands to Israel; Palestinian Arabs who do not like Israeli rule can move to Jordan. Although Jordan administered the West Bank from 1948 to 1967, it acquired no title, according to Stone, since its entry was illegal. Hence, Jordan's claim to the West Bank is no better than Israel's, and Israel is "under no obligation to hand 'back' automatically the West Bank and Gaza to Jordan or anyone else."¹¹ This chain of reasoning is valid only if one interprets "anyone" as *any other state*. The only title superior to Israel's lies not with some other state but with the Palestinian Arabs themselves. If they do not count under the "law of nations," Israel's occupation and control over the West Bank and the Gaza Strip is not defeasible by any superior right.

Stone's "solution" seems prescient. Israel's incursion into Lebanon in the summer of 1982 and its successful dispersal of the PLO have shifted attention eastward to Jordan. Prime Minister Begin seems determined to annex the West Bank and to expel discontented Palestinians to Jordan. This policy would be abetted by the historical treatment of Jordan in Stone's book.

Under Stone's interpretation, there were two claimants to the territories removed from Turkish hegemony after the first World War: the "Jews" and the "Arabs."¹² The Balfour Declaration of 1917 committed the Brit-

11. P. 52.

12. P. 14.

ish government to "the establishment in Palestine of a national home for the Jewish people."¹³ This "Palestine" in 1917 comprised 46,399 square miles on both sides of the Jordan River. Stone calls this a "minute fraction" of the total land to be taken from Turkey and argues that "that tiny fraction was then reduced by four-fifths in 1922, to create in Palestine what is now called the State of Jordan, leaving the share of the Jewish people . . . as 10,871 square miles—or about one two-hundredth of the entire territory distributed."¹⁴ Because the State of Jordan "arose as a last-minute encroachment on the already small allocation to the Jewish nation,"¹⁵ its formation was intended to provide a "reserve of land for Arabs across the Jordan."¹⁶ Hence Jordan has a "duty . . . as an Arab state in Palestine to accommodate the Palestinians."¹⁷

Stone's reconstruction is a castle of sand in the Sahara. In the first place, there were, in addition to the Arabs and Jews, other claimants to the territories removed from Turkey. The Kurds, Armenians, Assyrians, and Chaldeans all received promises of autonomy from the Allies.¹⁸ Promises were made by many governments on many levels as various religious-ethnic groups chose (and sometimes switched) sides in the waning years of World War I.

Nor did the Balfour Declaration "allocate" Palestine to the Jews, as Stone claims. By its terms, it allowed for a Jewish national home "in" Palestine. The declaration goes on to assert that it is "clearly understood that nothing shall be done which may prejudice the civil and religious rights of the existing non-Jewish communities in Palestine."¹⁹

Stone also fails to mention that when the state of Jordan was provided for in 1922, the Turkish territories had not yet been given over to the Allies. This cession occurred only in 1923 with the Treaty of Lausanne.²⁰ All pre-1923 maneuverings represent at best statements of intent, not binding commitments. When the Allied powers met in the League of Nations, they decided that the initial plan to include all of the land formerly under Turkish hegemony in one mandate proved unworkable and decided on administrative grounds to split the lands east of the Jordan River from the Mandate. This effectively gave Jews a smaller area to which they might emigrate. Nonetheless, one cannot conclude that this solution bound

13. P. 146.

14. P. 17.

15. P. 23.

16. P. 22.

17. P. 23

18. See R. STAFFORD, *THE TRAGEDY OF THE ASSYRIANS* 74-81 (1975). The Assyrians later claimed the British reneged on their promise of a homeland. *Id.* at 74.

19. P. 146.

20. P. 152.

the state of Jordan to admit Palestinian Arabs from the other side of the river to provide room for Jewish emigration.²¹

Moreover, the figures given by Stone—the Jews only received one two-hundredth of the land of the former Turkish territories—are quite misleading. Presumably, the Zionists could have received a much larger area had they wanted to settle in an uninhabited part of those vast territories. Neither Jews nor Arabs were much interested in the expanses of desert land included in Stone's statistics.

The new Palestine Mandate was also a most unusual arrangement. All the other mandates set up by the League of Nations were trust arrangements designed for the welfare of the "inhabitants" of the territories. But the Palestine Mandate explicitly envisaged immigration to the newly created territory. Consequently, a unique and intractable problem arose for the British authorities in Palestine. Throughout the 1920's and 1930's, increasing Jewish immigration led to rioting by Palestinian Arabs which had to be suppressed by military force. Though the British responded by restricting Jewish immigration, the situation continually worsened. The end of World War II brought another wave of Jewish immigrants, most of them illegal. Britain could no longer contain the problem. A U.N. partition resolution was passed in 1947, giving fifty-seven percent of Palestine to the Jews, who represented one-third of the population. The partition, however, was never implemented. The British pulled out, Israel proclaimed its statehood, the Arab nations invaded, and by 1949 Israel had won a military victory and additional territory in Palestine. Hundreds of thousands of Palestinians became refugees.

For quite divergent reasons, neither the Palestinian Arabs nor the Israelis have wanted to focus on or give legal credit to the history of Palestine as a League of Nations Mandate. To the Arabs the entire history of the Middle East in the twentieth century is of Jewish encroachment upon their homeland. The Balfour Declaration, the Mandate, the declaration of the existence of Israel, and the periodic wars from 1948 to 1982 are symptomatic of Western interference, usurpation, and conquest.

On the other hand, Stone's book echoes the current Israeli downgrading of the history of the Mandate. For the more that history is cited, the more legitimate appear the claims of Palestinian Arabs to the West Bank, the Gaza Strip, and East Jerusalem. Palestinian Arabs, after all, inhabited those territories in 1922, when the Mandate was created; additionally, the Mandate was intended to protect the Arabs as well as to provide a homeland for Jews. Stone's strategy, like the Israeli government's, seems plain:

21. There is some force, though, to the argument that with the splitting-off of Jordan, a stronger Jewish claim could be made to the remaining territory.

if Israel intends to annex the West Bank, the Gaza Strip, East Jerusalem, or other territories, the less said about the international law of the Mandate the better.

IV. Nature of the Palestinian Claims

Both sides are wrong. The Arabs are being monumentally foolish, and Stone is betraying a life of scholarship to peddle a political position. All of it seems of a piece. The PLO has steadfastly refused to recognize the legitimacy of the state of Israel,²² thus giving the Israelis a ready and effective excuse not to negotiate. As a result, the PLO has undercut its own claim to legitimacy and has set back the cause of the Palestinian Arabs. And the Palestinian Arabs, instead of basing their legal defense on the terms of the Mandate, or even those of the Partition, have rallied behind self-determination as their international-law banner. Unfortunately, however, "self-determination" is a most elusive, undefinable, and, ultimately, unhelpful concept. There are hundreds of minority enclaves in nations throughout the world, each proclaiming a right of self-determination and a right to an independent "homeland."²³ But the problems of such claims are as intractable as they were for President Lincoln in 1861, when he denied self-determination to the South. Self-determination, in short, has an emotional ring, but as a legal concept it is about as helpful as the term "people's democracy."

The Palestinian Arabs have not suffered at the hands of international law in the twentieth century, despite their emotional assertions to the contrary. In 1917 the Ottoman Empire had been sovereign over Palestine for four hundred years. If the Turks had decreed that Jews from all over the world could immigrate to Palestine, the Palestinian Arabs could not have objected under recognized principles of international law. With the defeat of Turkey in World War I, sovereignty passed to the Allied Powers. They could have annexed the Arab lands. Instead, they created mandates that soon became independent Arab nations. Since the Allies had the power to annex these lands, they had the power to attach conditions to the mandates' independence. If one of the conditions of the eventual independence of Palestine was a mandate regime that allowed for Jewish immigration, again there could have been no legal complaint.

Nor do the Palestinian Arabs have any legal basis to complain about the U.N. partition plan of 1947. Even though the partition gave fifty-seven percent of Palestine to the Jews, who numbered only one-third of

22. PLO chief Yassir Arafat reaffirmed as recently as 1980 that "[t]he destruction of Israel is the goal of our struggle." P. 20.

23. Hannum & Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858 (1980).

the population, the General Assembly was providing for future Jewish immigration to Palestine. With the withdrawal of Great Britain as Mandatory administrator, it was inevitable that the Jews would set themselves up a state. Perhaps the Palestinian Arabs should have done the same. That they failed to do so is no argument against the wisdom or legality of Israel's action.

The Palestinian Arabs would be better advised to stand on international law as it is, and not as they would have it be. A scrupulous insistence on the Mandate as furnishing the best title to Palestine, a recognition that Israel has the same right to exist as any nation, a repudiation of terrorist tactics aimed at innocent civilians, and a willingness to live in peace with Jews in the Middle East would go far toward establishing the legitimacy of the Palestinian claims to the West Bank and the Gaza Strip.

V. Stone's Statism

When one picks up a book by a scholar who has been an authority on international law since 1930, one is entitled to expect something more than a partisan plea. To be sure, Stone mentions the Mandate, but only in passing.²⁴ He also mentions, briefly, most of the other legal arguments that have been advanced in support of the Palestinian position. When those arguments are poor, Stone attacks them frontally; when they are sound, he resorts to "fairness" in support of the Israeli position.

My principal objection to Stone's work, however, is of a different order. He trades on an eighteenth-century conception that "inter-national law" is a law solely and exclusively among sovereign nations. In that view only nations have rights, duties, or standing. The journalists, politicians, and public relations personnel who retain that older concept of international law constitute Stone's target audience. To them he waves credentials, festoons Latinisms, reiterates legal buzz words, and switches between law and "fairness" with the ease of an amateur magician.

Professor Stone trades upon the veneer of legal respectability that exists for the position that nations are the exclusive subjects of international law. He ignores such crucial twentieth-century developments as the recognition given to minority groups by the Permanent Court of International Justice in the early 1920's,²⁵ the status of international organizations and their personnel,²⁶ and the recent developments in the international law of human rights that accord significant standing to individuals vis-à-vis gov-

24. Pp. 121-23, 132-33.

25. See N. FEINBERG, *LA JURISDICTION DE LA COUR PERMANENTE DE JUSTICE DANS LE SYSTÈME DE LA PROTECTION INTERNATIONALE DES MINORITES* 73-97 (1931).

26. See *Advisory Opinion, Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174.

ernments.²⁷ Stone's partisan purpose is transparent: the State of Israel is to be considered an entity, entitled to a full and equal share of international rights, whereas the Palestinian Arabs are a nondescript collection of individuals causing trouble for the legitimate states of the Middle East.

Stone's position denies Palestinian Arabs both their human rights and their status as a beneficiary of the Mandate regime. The position amounts to a defense of statism, and herein lies its real danger. In the last few years, Israeli policies have become increasingly expansionistic. Prime Minister Begin has publicly expressed a desire to absorb the West Bank and has annexed the Golan Heights. His armies presently occupy the southern half of Lebanon. The post-World War II international legal order was erected to stop this sort of territorial expansionism, but statist policies can become intoxicating as they succeed. Statism can build up a self-justifying momentum, though it truly constitutes an assault upon the law of nations. For Professor Stone to justify a statist position so late in the twentieth century is equivalent to Machiavelli's softly advising the King to be more ruthless.

27. See H. LAUTERPRACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 3-19, 27-47, 61-72 (1950); D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).