A REFLECTION ON THE VIEWS OF JULIUS STONE AND THE APPLICABILITY OF INTERNATIONAL LAW TO THE MIDDLE EAST

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Abstract

This paper explores the views of Professor Julius Stone on the principles of international law as he perceived them to apply to the Middle East. This paper is neither an indictment of Stone or his substantive views, nor a detailed exploration of the situation in the Middle East. It is more a meditation on the relationship between method and motive. The conclusion reached in this paper challenges the notion, at least when it comes to issues concerning the Middle East, that Stone was a humanist; he was indeed something much more profound, he was fallibly human. Stone was a man endowed with the highest faculties of human reason. Passion, however, remained as much a part of him as it does the rest of mankind.

I INTRODUCTION

In the last book published by Professor Stone in 1985, *Precedent and Law*, the late Professor, when reflecting on the reasoning process adopted by judges lamented that 'the heart of judgement still holds deep mysteries'.[1] It is in the spirit of exploring such mysteries that this study is presented.

The technical correctness of Professor Stone's application of international law is an issue that can be fruitfully engaged with

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1 Julius Stone, *Precedent and Law* (1st ed, Sydney: Butterworths, 1985) 105.

independently.[2] This, however, is not the purpose of this present study. This study seeks to take a step back and reflect upon the methodology and motivating forces driving Stone to take the opinionated stands he adopted. With the exception of a few emotive exhortations, such as portions of his pamphlet *Stand Up and Be Counted*[3] addressed to Sir Isaac Isaacs, Stone's approach to international law in this context appears to be rigidly formal and dispassionate.

In testimony to the depth and scope of Stone's work, the approach adopted in this paper to exploring the application of a formal legal approach to international law utilises Stone's own renowned and original work in the jurisprudence of law, logic and *legal formalism*.[4] The thesis long championed by Stone was that judges, while appearing to abide by a declaratory theory of law in fact engage in a process of creating law. Within the vast corpus of his jurisprudential work, Stone contended that the appearance of formalism masked the pre-dispositions and latent prejudices that nevertheless infiltrate judicial decision-making.[5] This insight may help explain how Stone himself approached issues of legality upon the question of Palestine.

Authority comes from objectivity and as Stone explained, sometimes the 'is' of objectivity is confused with the 'ought' of subjective prejudice, with the highest sin being the presentation of subjective views in the top hat and tailcoats of an objective assessment, even if done so unknowingly.[6] In the view of Professor Stone, the common law judicial system and its process of legal reasoning was guilty of this disingenuousness,[7] yet when appreciating Stone's work on Palestine one cannot help but make ostensibly similar observations.

The first portion of this paper attempts to establish that the methodology adopted by Professor Stone in applying international law to the Middle East was rigidly formal and criticises it on the basis of Stone's own 'leeways

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2 See Dr Ben Saul, 'Apologist, Formalist of Jurist Par Excellence: Julius Stone and the Question of Palestine in International Law' (Paper presented at the Julius Stone Centenary Conference, Sydney, Australia, 7 July 2007).

3 Julius Stone, *Stand Up and Be Counted: An Open Letter to the Right Honourable Sir Isaac Isaacs* (Sydney: Ponsford, Newman and Benson, 1944) 14.

4 See generally Stone, above n 1. *Precedent and Law* represents the zenith of Stone's work in this field and explores in detail the relationships between law as a system of rules and the method of logical application.

5 Stone, above n 1, 58-59.

6 Stone, above n 1, 196-197.

7 Stone, above n 1, 158-159. Stone did not see judicial law-making as a bad thing. In fact Stone supported the views of John Austin and Oliver Wendell Holmes that this function needs to be acknowledged and can actually be an effective means of implementing social controls through the process of law-making.

of choice' arguments. The second and more interesting component of this paper asks simply - why? With such stated bias on the subject of Israel and Palestine, why did Stone immunise his professional work on the subject from such passions? Was it impeccable professionalism or scholarly disingenuousness of the highest order? For a scholar that preached of the justice and humanity required of law, the rigidity and surgical precision of Stone's application of international law and doctrine to the Middle East leaves one with a feeling that certain incongruence exists in the body of Stone's work.

The obvious target for critics of Stone's work (and perhaps more so his views) on the Middle East would be that given his stated sympathies, Stone proceeded from pre-determined conclusions and reverse-engineered a line of reasoning to validate such prejudice. That is, Stone was an advocate or apologist, not a scholar in this particular context. The basis for this accusation rests on the premise that if Stone had honestly looked at the context and human consequences of the international legal order he argued should apply, he must have been aware of the hardships that would arise to the incumbent population of Palestine. Therefore the formal legal method embodying a rigid, detached and impersonal application of doctrine would have, it may be argued, insulated Stone from having to face the reality of popular displacement in Palestine in furtherance of the Zionist cause he championed. Or perhaps even more damningly, Stone was aware of such consequences and used the weight of ostensibly objective analysis to further this end as the lesser of two evils in an attempt to aid world Jewry in the dark period after the Holocaust. Along this line of criticism, scholarship thus ceased to be an end in itself but a means to a greater end.

Such criticisms, however, lack the depth required to appreciate Professor Stone's work in this field. Admittedly, this paper was originally inspired along the path of such criticism but its conclusions were ultimately drawn more towards an endearing understanding rather than an undermining of Julius Stone.

The opening quote from Victor Gollancz in Stone's famous pamphlet *Stand Up and Be Counted* reads ' … before I am either an Englishman or a Jew I am a man …'.[8] It is this conclusion that is herein drawn. Above being an Englishman or an Australian, a Jew or a Professor, Julius Stone was a man. A man plagued by isolation, professionally and intellectually. A man who, it is documented, faced personal experiences of anti-Semitism, both within the Sydney legal establishment and at

8 Stone, above n 3, 1.

Oxford.[9] And a man who had an acute sense of class-consciousness.[10] For Stone, Israel represented something to belong to and something 'just'.[11] For a man who spent so much time searching for a basis upon which to define the word 'justice',[12] it was the 'justice' that he saw in the establishment of Israel that blinded him to its consequences on the civilization it displaced and the apparent limitations in this context of a formal legal approach to such a subjective and contentious issue of which Stone himself was so personally invested.

II Legal Formalism and the Application of International Law

The traditional declaratory theory of law holds that once given facts are ascertained, the application of the law (which itself is known or discoverable) provides a resolution to a dispute.[13] The opposite of a formal legal approach to solving problems is an approach where context, actors and consequences are all factors considered in deriving a solution. This latter approach does not lend itself to certainty or predictability, both pre-requisite structural requirements for any legal system that is to embody some elements of fairness or non-bias. As Professor Stone argued, legal formalism could itself mask a latent exercise in power (unknown perhaps even to he or she who exercises such power) rather than provide for transparency and predictability.

This present study of Stone's approach to international law in the context of the Middle East is not critical of the formal approach to international law adopted by Professor Stone. It seeks rather to explore, upon the same basis of the critique of legal formalism offered by Stone, the approach of Julius Stone himself. Did the ostensibly formal approach of Professor Stone mask any latent predispositions that influenced

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9 Leonie Star, *Julius Stone an Intellectual Life* (1st ed, Sydney: Sydney University Press, 1992) 3-4, 14, 43-4, 59-60, 62-3, 190, 245-6, 248.

10 See Jonathan Stone, 'The Role of Universities: Views of a Scholar of the Last Century' (Paper presented at the Julius Stone Centenary Conference, Sydney, Australia, 7 July 2007). Professor Jonathan Stone is the son of Professor Julius Stone and spoke dearly of his father's working class origins in England.

11 See generally Stone, above n 3. The language and substance of this pamphlet reflected the immediacy and intimacy Stone felt for the status of Israel. The zeal with which Stone attacked Sir Isaac Isaacs was not and indeed, should not, be taken as a personal rebuke of Sir Isaacs. See Godfrey Lee 'The Battle of the Scholars – The Debate between Sir Isaac Isaacs and Julius Stone over Zionism during the World War II' (2008) 31 (1) *Australian Journal of Politics and History* 128-134 for a recent appraisal of the controversy.

12 See Julius Stone, *Human Law and Human Justice* (1st ed, Sydney: Maitland Publications, 1968).

13 See John Smillie 'Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand' (1996) 1 *New Zealand Law Review* 254, 255-259.

Stone's scholarly positions on the issues? Given the below explored discrepancy in factual analysis reflected in Stone's work, the only other conclusion one may reach points to the intentional misrepresentation of the underlying factual realties of the Middle East upon which Stone applied the relevant legal principles of international law. Such a conclusion must, however, be rejected for it accords not with the integrity Julius Stone personified. The conclusion offered herein is that Julius Stone, like the judges he himself studied, perhaps unknowingly imbued his analysis with personal predilections when the process of reasoning presented a 'leeway of choice'.

In his 1981 book *Israel and Palestine:Assault on the Law of Nations*,[14] Stone criticised numerous United Nations ('UN') publications.[15] The publications in question explored the plight (and in many cases endorsed the rights) of displaced Palestinians.[16] The treatment afforded by Stone was intensely scholarly in criticising the operations of the UN generally, but also specifically as it operated in the mid-late 1970s against as he perceived it Israeli interests.[17] The fundamental premise Stone sought to dislodge was that there was in existence historically, a distinct group of people known as Palestinians, a concept integral to the international legal precept of self-determination. The theme of a fictitious Palestinian entity was treated in an earlier pamphlet published by Stone in 1970 entitled *Self Determination and the Palestinian Arabs*. 'Palestinianism', as Stone called it, had to be 'examined as dispassionately as possible'.[18]

There are several aspects within the corpus of Professor Stone's treatment of international law as it applied to the Middle East that may be examined as a reflection of how Stone's pre-dispositions may have influenced his conclusions despite his adoption of a formalist methodology in the name of objective transparency. For example the legality of the 1967 or 1973 wars, the displacement of Jews from Arab countries during the 1948 war and the status of Israeli settlements

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

15 *The Origins and Evolution of the Palestine Problem (1978)* (ST/SG/Ser F/1); *The Right of Return of the Palestinian People* (ST/SG/Ser F/3, 1979); Thomas Mallison and Sally B Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, UN Doc ST/SG/Ser F/4)(1979).

16 Stone, above n 14, 5.

17 Stone, above n 14, 76-79.

18 Julius Stone, *Self-Determination and the Palestinian Arabs* (1st ed, Sydney: Bridge, 1970) 3. In this pamphlet, Stone argued that Arab Palestinian nationhood or an Arab Palestinian entity was only born in the late 1950s and only really took shape after the 1967 war. See also Stone, above n 14, 69-75.

under international law are all issues Stone addresses in his writings.[19] In exploring each issue closely certain analytical and methodological patterns begin to emerge, particularly in the ascertainment of applicable underlying facts in a given situation upon a given issue. The most obvious of these patterns, however, is that all ascertained facts upon which Professor Stone premised his conclusions supported the case of Israel despite there being quite clear evidence pointing in conflicting directions.

The approach of Professor Stone to the issue of self-determination for Jews and Arabs in Palestine serves as an imperfect yet sufficient illustration in exploring the way in which Stone's passion for Israel may have influenced his factual delineations when faced with leeways of interpretation.

A *Self-Determination*

Self-determination has historically been a contentious issue in international law.[20] As an accepted part of the international legal framework, self-determination only began to take real shape in the post World War II era of decolonisation.[21] Given the British mandate up until the late 1940s in Palestine, self-determination for Jews and Arabs could have indeed been seen in the context of the overall decolonisation movement. As a doctrine of international law, self-determination is a nuanced principle requiring a deep and textured understanding of the ethno-political realties underlying its invocation and recognition. More so in the Middle East, given the history of ever-amplifying divisions between Jews and Arabs in Palestine over the course of the twentieth century.

Despite the sensitivity required generally in the application of the doctrine of self-determination, in dealing with self-determination as a part of international law, Stone displayed an unmistakably strict formalism. An extended extract from Professor Stone's *Israel and Palestine* is warranted in highlighting this point:

> [T]he facts relevant to a correct application of the self-determination doctrine go back to 1917 … It is clear that its application is predicated on certain findings of fact. One of these is the finding that at the relevant time the claimant group

19 The merits of Stone's international law arguments upon these issues have been the focus of recent critical studies. See especially Saul, above n 2.

20 Robert McCorquodale (ed), *Self-Determination in International Law* (1st ed, Aldershot: Ashgate/Dartmouth, 2000) xi-xiii.

21 Wolfgang Danspeckgruber (ed), *The Self-Determination of Peoples: Community, Nation, and State in an Interdependent World* (1st ed, Boulder: L. Rienner Publishers, 2002) 5. See generally also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1st ed, Cambridge: Cambridge University Press, 1995).

> constitutes a people or a nation with a common endowment of distinctive language or ethnic origin or history and tradition, and the like, distinctive from others among whom it lives, associated with a particular territory, and lacking an independent territorial home which it may live according to its lights.[22]

Professor Stone identified the relevant period for the application of the legal test of self-determination as 1917. This in itself is a questionable proposition as self-determination was still in its conceptual infancy.[23] Nevertheless, this paper is more concerned with understanding the legal approach of Professor Stone rather than the substance of the arguments proffered. Upon the strict application of the self-determination test, Stone concluded that the Arabs in Palestine were not entitled to self-determination whilst the Jewish population was so entitled. This conclusion was based on the pre-requisite finding of fact that the Arabs of Mandate Palestine (west of the Jordan River) did not constitute a 'nation' or 'peoples' within the stated definition.[24] This essential determination of fact is not as objectively conclusive as Stone presented it to be, making the applicability of the self-determination doctrine by Stone a sufficient illustration in exploring the basis upon which Stone's formal analysis proceeded.[25]

The criteria set down by Stone as the basis for satisfying the definition

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22 Stone, above n 14, 10.

23 See Theodore Woolsey, 'Self Determination' (1919) 13 *American Journal of International Law* 302-305 extracted in Robert McCorquodale (ed), *Self-Determination in International Law* (1st ed, Aldershot: Ashgate/Dartmouth, 2000) 191-195.

24 Professor Stone uses the expression 'peoples or nation'. The present prevailing understanding of self-determination uses the expression 'people' although it is used as a term of art and continues to pose difficulties in terms of its definition. See Martin Dixon, *International Law* (1st ed, London: Blackstone Press Limited, 2000) 155. Dixon notes many may argue that Palestinians may constitute one of the last remaining 'peoples' with a claim to self-determination in the classic sense. For the purpose of this paper, Professor Stone's language of 'peoples or nation' will be the basis of analysis.

25 See Yehoshua Porath, *The Palestinian Arab National Movement Vol I 1918-1929* (1st ed, London: Cass, 1974); Yehoshua Porath, *The Palestinian Arab National Movement Vol II 1929-1939* (1st ed, London: Cass, 1977); Muhammad Muslih, *The Origins of Palestinian Nationalism* (1st ed, New York: Columbia University Press, 1988); Rashid Khalidi, *Palestinian Identity* (1st ed, New York: Columbia University Press, 1997). Whilst Porath's conclusions are not as sympathetic to the Palestinian side in identifying a unique nationalism, they do, however, reveal a dynamic Arab nationalist movement in Palestine since at least the end of World War I of which Palestinian Arab national independence was a strand; a strand overlooked by Stone. The work of Muslih and later Khalidi are more conclusive on this point. They confirm the existence of a distinct Palestinian nationalism originating even before the First World War in various forms. Although Stone did not have the advantage of reading these works as they were published after his death, many of the archival sources drawn upon by Muslih and Khalidi were available to Stone (with the important exception of some private sources accessed by the authors in Arabic).

of a 'nation' or 'peoples' is easily satisfied with even the most cursory observations of the characteristics of the Palestinian people at the relevant time.[26]

The pivotal element in Stone's derivation of a statement of international legality on the question of self-determination in Palestine for Arabs and Jews was the idea of a 'peoples or nation'. As many noted political scholars on nationalism have argued, concepts of nationhood and nationalism are mere constructs, an idea reflected in the title of Khalidi's work *Palestinian Identity: The Construction of Modern National Consciousness*.[27] As quoted by Khalidi, political scientist Ernst Gellner even goes as far as to posit that

> nations as a natural, god-given way of classifying men, as an inherent … political destiny, are a myth; nationalism, which sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and often obliterates pre-existing cultures: that is reality.[28]

Nationhood and nationalism understood as a construct and not an eternal feature of social nature thus renders this concept dangerously imprecise and perhaps too tenuous to be regarded as 'an objective fact' to be utilised in any purported formal legal analysis. The idea of a 'nation' or 'peoples', however, is the basis upon which Stone derives conclusions on the applicability of self-determination. This, it is argued,

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26 Anyone who speaks Arabic would recognize the distinctive dialectic of a Palestinian as opposed to an Iraqi or an Egyptian, especially the Arabic spoken by peasants '*fel'ahin*' (which also incorporates a vast range of colourful and unique words and expressions often tinged with a subtle and endearing sense of humour). Palestinian cultural ceremonies and feasts also reflect a distinct and admittedly flavorsome uniqueness. Many Palestinian family names are also the names of geographical features associated with a family's land holdings in Palestine, or original place of origin in Palestine. Palestinian art and pottery are also linked with the land of Palestine, for example, Palestinian embroidery incorporates many of the beautiful floral features of Palestine's landscape. It is in fact even possible to tell which village a person is from merely by looking at the patterns in their embroidery. Professor Stone's attempt to define and dismiss the Palestinians has deep origins in European scholarship. For the leading treatment on European scholarly characterisations of the Arab Orient see Edward Said, *Orientalism* (2nd ed, New York: Penguin Group, 1978).

27 Rashid Khalidi, *Palestinian Identity* (1st ed, New York: Columbia University Press, 1997); See Eric Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (1st ed, New York: Cambridge University Press, 1990); Ernest Gellner, *Nations and Nationalism* (1st ed, Oxford: Blackwell, 1983); Eric Hobsbawm and Terence Ranger (eds) *The Invention of Tradition* (1st ed, Cambridge: Cambridge University Press, 1983); Benedict Anderson, *Imagined Communities: Reflections on the Rise and Spread of Nationalism* (2nd ed, New York: Verso, 1991). The construction of an Arab Palestinian political national identity, much like the construction of Israeli political identity (both ongoing processes), had strong political motivations and cannot be termed mere organic social manifestations. A national political identity, however, must be distinguished from a national existence.

28 Khalidi, above n 25, xii.

exposes Stone to the inadequacies of the process of logical reasoning underlying the formalist methodology especially when it is applied to a dynamic social context. The terms 'peoples or nation', it is seen, provide prime examples of what Stone would have characterised as a 'leeway of choice' in terms of their definition. Classifying a group of individuals, as a peoples or a nation may be just as subjective as, for example, classifying certain conduct as 'reasonable' in avoiding personal injury.

III Leeways of Choice

'[T]he exercise in choice is the exercise in power and power is better exercised when he who wields it *assumes responsibility for its exercise*'.
Julius Stone, *Precedent and Law* (1980)151.

A *Theory*

In a crystallisation of the sociological approach to the study of jurisprudence instilled in Stone from his time at Harvard working alongside Roscoe Pound, Stone published arguably his most important work *The Province and Function of Law*.[29] One of the consequences of Stone's association with Pound was an appreciation for the empirical or scientific approach to the study of law. This focus on methodology allowed Stone to attempt a penetration of the decision-making role of the fundamental judicial actor in the common law system – the judge. The insights Stone presented are profound and continue to shape the study of law and jurisprudence in Australia and abroad.[30]

It is indeed beyond the scope of this paper to comprehensively outline the theories devised by Professor Stone in the *Province and Function of Law*. It remains, however, necessary to draw on Stone's work in this context, for it provides the foremost framework for understanding the very conduct Stone, it is argued here, is engaging in.

Martin Krygier summed up the core of Stone's concerns succinctly

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29 Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control; A Study in Jurisprudence* (1st ed, Sydney: Associated General Publications, 1946).

30 See John Goldring 'Julius Stone and the Study of Law and Society in Australia' (1985) 2(2) *Australian Journal of Law and Society* 4. The author of this paper undertook his legal education at Macquarie University. The establishment of the Law School at Macquarie University was explicitly influenced by the work of Professor Stone and its interdisciplinary focus inspired by Stone's methods. That legacy has now all but disappeared as the Department of Public Law, the most authentic expression of Stone's approach, left the main Law School in the late 1990s.

when he noted 'law comes in words and words contain, or can be found to contain, many meanings'.[31] This realisation meant that not only was the declaratory theory of law not being realised, it was actually impossible for it ever to be realised.[32] The law, in its communicated form of linguistic symbols, is unamenable to a process of deductive reasoning in that those symbols (words) conveyed by judges as laws or legal tests are but mere pointers towards a core mental notion held by the original communicator or law giver, not an expression of that original core itself in an unadulterated form. For Stone,

> the basic reason why language is plurisignative is that words, being symbols, have no meaning in themselves. Their meaning consists of the references in the minds of persons between whom they are used as a means of communication on the particular occasion. Among the effects of this is that words may have many meanings which in turn may change through the stream of time in which they are used.[33]

According to classical logic, a conclusion may be derived from a major and minor premise and this same approach, it is held, can be applied to legal analysis.[34] However, where the definition of either the major or minor premise is contested, Stone argued, the conclusion logically derived cannot be said to have been derived objectively.[35]

Many terms in the law have contested meanings. These alternative meanings, Stone argued, created 'leeways of choice' open to judges to pursue when resolving a case. Some examples given by Stone of leeway-producing terms include phrases such as 'justifiable', 'reasonable', 'due process', 'fair', 'equal protections', 'as a general rule' etc.[36] Stone argued that these words lend themselves to more than one interpretation and it is in furnishing these pivotal, and in many cases decisive and determinative words with a definition, judges are not declaring and applying the law but actually creating it and imbuing it with their own beliefs.[37]

B *'Leeways' in the Concept of a Peoples or Nation*

Professor Stone identified the concept of a 'peoples or nation' as

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31 Martin Krygier 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9 *University of New South Wales Law Journal* 26, 29.

32 Krygier, above n 31, 28.

33 Stone, above n 1, 51.

34 See Gerard Brennan, 'The Limits on the Use of Judges' (1978) *Federal Law Review* 1, 3.

35 Stone, above n 1, 28-33, 97-108, 165-171, 223-225.

36 Stone, above n 1, 32.

37 Julius Stone, *Legal System and Lawyers' Reasonings* (1st ed, Sydney: Maitland Publications, 1968) 304. Stone argued that the growth of the common law is proof that judges make (and not merely declare) law in accordance with his thesis.

the minor premise of the dispute pertaining to the question of self-determination for the Arabs of Palestine.[38] The concept of a 'people' in the corpus of international law remains unsettled to this day and indeed open to leeways of interpretation of the kind described by Professor Stone.[39] In examining whether the indigenous Arabs in Palestine were a peoples or nation for the purpose of international law, Professor Stone relies on a number of arguments. The most prominent of these arguments is that Arab Palestinians were never a distinctive people or nation in themselves but part of the larger Arab peoples or nation.[40] Related approaches adopted by Professor Stone asserted that any Palestinian Arab identity was realised with the creation of the present day state of Jordan; furthermore the lack of a recognisable political apparatus representing the Arab Palestinians in the 1920s and 1930s proves that the Arab Palestinians were not a distinct peoples or nation as required to be understood in international law for the doctrine of self-determination to apply at the relevant time.

Whilst Palestinians possessed all the unique cultural aspects of nationhood (as defined by Stone in Part II A above), it is true they were woefully behind the Zionists in their political organisation post World War I. Apart from Palestinian politics being dominated by a few wealthy Jerusalem families, for centuries the Arab population in Palestine was essentially a peasant population, a 'society without politics' as described by Israeli historian Ilan Pappe in his *A History of Modern Palestine*.[41] This lack of a strong single representative political voice expressing the views of a population who was undoubtedly physically present seems to convince Stone,[42] that for the purpose of international law, the Arabs in Palestine were not a distinct *peoples* or *nation*. This may be illustrated, or at least implied, by Stone's designation of 1966 as the correct moment when a distinctly Palestinian self-recognition emerged; 1966 being the year when the Palestinians adopted a National Covenant as a political

38 Stone, above n 14, 9-22.

39 See generally Gellner, above n 27, 6-7.

40 Stone, above n 18, 4-6.

41 Ilan Pappe, *A History of Modern Palestine: One Land, Two Peoples* (1st ed, New York: Cambridge University Press, 2003) 20. Some researchers have even argued that this '*fell'ahein*' (peasant) identity is itself a signifier of a national identity, see Ted Swedenburg 'The Palestinian Peasant as National Signifier' (1990) 63(1) *Anthropological Quarterly* 18.

42 Even the physical presence of the Arab Palestinians in Palestine has historically been denied by some Zionist revisionist scholarship that adopted the idea that Palestine was 'a land without a people for a people without a land'. This discredited perspective continues to feature in Zionist accounts of the history of Palestine, even among notable Israel advocates such as Harvard Law Professor Alan Dershowitz in his book *The Case for Israel* (1st ed, Hoboken, NJ: Wiley, 2004) 22-25; Cf John Rose, *The Myths of Zionism* (1st ed, London: Pluto Press, 2004) 80-117: Rose comprehensively examines and dismisses this Zionist claim as a politically motivated myth.

platform.[43] The Palestinians thus fell into the trap countless indigenous cultures have experienced, that is, their existence in the forum of international politics was non-existent because they were not individual participants in its operations. Stone exploited this cruel reality of the late colonial international order by adopting its tenets in confirming the claims of Israel in international law. In doing so, Stone was justifying the dereliction of the Arab Palestinians from the international process, as they displayed no united political front.[44] On this point it can be seen, Professor Stone accepted that this was what the legal order provided. Stone asserted what the law 'is' and did not engage with whether this is what the legal order 'ought' to be or provide.[45]

The more dominant of Stone's arguments in addressing the idea of peoplehood or nationhood in this context does not rest on the denial of a Arab Palestinian peoples or nation *in toto* at the relevant time, but rather Stone asserts that the Arabs in Palestine were part of the greater Arab-nation.[46] As such, Stone argued that 'the essential point is not whether self-determination was a legal right in 1919, but rather that, whatever it was, it was duly applied in parallel to the claims of the Jewish people and the Arab people in the Middle East'.[47]

According to Stone, the colonial carve up of the Middle East after the First World War gave expression to competing claims for self-determination with the undifferentiated Arab nation obtaining the

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43 Stone, above n 14, 18.

44 Cf Porath (1977), above n 25, 20-39, 162-166. Porath notes that there was in existence a body known as the Arab Executive ('AE') that purported to represent Arab interests in Palestine. However, the AE was relatively weak and plagued by family rivalries. In 1936 the Higher Arab Committee ('HAC') was established, but this too was no match for the advanced stages of organisation within the Zionist camp.

45 See generally, Stone, above n 14. Admittedly, Stone did concede that when one deals with international law one is not dealing with the rights of humans but rather the rights of states. See Julius Stone, *Social Dimensions of Law and Justice* (1st ed, Sydney: Maitland Publications, 1966) 174. This precept was not questioned by Stone in this context and indeed was a central basis for denying any Palestinian claims to land or self-determination.

46 See Muslih, above n 25, 211-224. Muslih's conclusions acknowledge the Pan-Arab nationalism being advocated by Palestinian notables and elites in the interwar years. Muslih, however, argues that the reason it did not succeed in gaining widespread acceptance among Palestinians was the plain fact that Arab Palestinians were different from other Arabs and had different and localised concerns, one of which was of course the growth in Zionist immigration. A distinct Palestinian nationalism also prevented Pan-Arab nationalism gaining a decisive foothold in Palestine.

47 Stone, above n 14, 16. Professor Stone did not appreciate that a Palestinian being referred to as only an Arab, even before 1948, is as objectionable a proposition as a Scot, Welshmen or Englishman being classed as only a British subject and not a member of their own particular national group.

majority of the land distributed by the victorious *Entente* powers, and the equally valid Jewish claims receiving a minority of the land.[48]

A related interpretation of the status of the indigenous Arab Palestinians offered by Stone as applicable under international law is that the present state of Jordan is properly the expression of an Arab Palestinian nationality – if it exists at all.[49] The principles of international law are thus, in this context, also fulfilled as Arab Palestinians can exercise self-determination in Jordan. It is true that Palestinian and Jordanian Arabs share a special kinship, yet no Palestinian would voluntarily forsake his/her ancestral home for Jordan just as a Jordanian would not leave his/her familial homeland to dwell west of the Jordan River. This reality, Stone did not acknowledge. It is also true that political statements have historically been made by prominent figures referring to the idea that Palestine and Jordan are one and the same, and Stone of course pounces on these proclamations.[50] But what Professor Stone again fails to acknowledge is that in order to understand these statements of pacification, one is required to appreciate the historically volatile political situation within Jordan between indigenous Jordanians and the Arab Palestinians. Enough blood has unfortunately been shed to underscore this point.[51] The trip between Jerusalem and Amman may be physically shorter than that between Melbourne and Sydney, but in many ways it is much further, as distinct and recognisable cultural borders must be crossed.

A final formulation suggested by Professor Stone in interpreting whether Arab Palestinians constitute a 'peoples or nation' under international law is that many Arabs in Palestine showed more allegiance and identity with their specific regions (such as Haifa, Tulkuram, Jerusalem, Nablus or Jericho) rather than with a common Palestinian entity.[52]

Irrespective of which one of the various arguments offered by Professor Stone one accepts, the conclusion is always the same. The term 'peoples or nation' did not apply to the Arabs of Palestine in a way that would allow the doctrine of self-determination to arise in their favour at the

48 Stone, above n 18, 4-6.

49 Stone, above n 14, 22-25.

50 Stone, above n 18, 9.

51 See generally Joseph Massad, *Colonial Effects: The Making of National Identity in Jordan* (1st ed, New York: Columbia University Press, 2001). See generally also Christopher Dobson, *Black September: Its Short, Violent History* (1st ed, New York: Macmillan, 1974).

52 Stone, above n 18, 9.

relevant time in question. A proper, or even 'correct',[53] application of the international normative framework would thus require the given facts (the minor premise) to be applied to the settled law (the major premise) in deriving an objective conclusion. Based on Stone's approach, the facts are as follows, two peoples or nations sought self-determination after World War I, a Jewish national group represented by the Zionist movement and a Pan-Arab national group. The Arabs in Palestine were either part of the Pan-Arab nation, or alternatively reflected their own regional identity. With respect to the applicable precepts of international law, the doctrine of self-determination required that groups who satisfy the criteria of a 'peoples or nation' are entitled to independence and self-rule.[54] Given the major and minor premises stated, the dispassionate formal application of international law to the given facts thus results in a justifiable denial of self-determination west of the Jordan River for the indigenous Arab Palestinians and the alternative recognition of self-determination for the Zionists upon this same land. The available conclusions are either the Arab Palestinians were given self-determination in the other Arab states constructed, or were not entitled to self-determination at all given their disparate status. All conclusions however, provide no recourse in international law to the expulsion of local inhabitants from the land they had cultivated and occupied for generations.

One of the fundamental points Professor Stone strived to convey in a lifetime of work in jurisprudence was that, a social system, such as a legal system, which is devoid of acknowledging the human element, is undesirable because it marginalises the weakest and most vulnerable in society. It hurts those who are unable to partake in the system directly by excluding their considerations. This is despite it often being claimed that the system actually operates to the benefit of the weak by controlling powerful players through the imposition of set rules and standards.[55]

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53 Stone, above n 1, 22. Stone was uncomfortable with phrases such as 'good law' or 'correct law' as he perceived such expressions to confuse an assessment of the soundness of the logical derivation of the conclusion with a substantive moral assessment of the legal consequence of the conclusion.

54 Although self-determination did not officially become part of international law until the late 1950s in conjunction with the push towards decolonisation, the notion was first born around President Woodrow Wilson's fourteen point plan of 1918. In the context of Palestine, the *King-Crane Commission*, dispatched in 1919 to the former Ottoman provinces in order to inform the direction of US policies at the Versailles Conference noted that the prospects for self-determination of the existing non-Jewish inhabitants of Palestine would be compromised if a Jewish state was to be realised in Palestine.

55 See Stone, above n 45, 589-609.

In this instance it was the Arab population of Palestine who were the most vulnerable to this system of international law that was, according to Stone's analysis, legitimating their dispossession. If the true voice of the Palestinians was to be heard, one had to listen to the discontent reflected in the great peasant revolt of 1936-39. Much like the popular uprising of the late 1980s, the revolt spoke of the unwillingness of the Palestinian peasant to be subjugated and to give up his/her home without a struggle. The frustration expressed by the peasants was directed not only against the seriously damaging effects of British and Zionist policies, but also against uninterested Arab absentee landlords and a distant Arab leadership. This voice, according to Professor Stone, did not require hearing in the forum of international law at the relevant time upon a strictly formal approach to international law.

Why then did a scholar who endlessly warned of the potential dangers of legal formalism reflect all the characteristics (good and bad) of this jurisprudential approach to his own interpretation of international law when addressing the situation in the Middle East? Why did Professor Stone not reflect on the consequences of the declaratory legal method in this context? Professor Stone did not only know the dangers and consequences, he is the one who brought them to the attention of the common law world.

IV 'Justice' and Formalism

A *Justice in the Face of Jewish Suffering*

A major philosophical preoccupation that transcended the boundaries of all of Stone's chosen fields was the ever-present ideal of 'justice'. Professor Julius Stone truly believed Zionism and the cause of Jewish nationalism as 'just'. This notion of justice coloured all of Stone's work on issues pertaining to the Middle East. The applicability of the doctrine of self-determination, for example, was built upon the unwavering belief that it was 'just' for Jews to have a homeland in Palestine given their suffering in World War II. As noted by the Honourable Justice Michael Kirby,

> the most that Stone taught was that judges should be honest and transparent in their exposure of the considerations of legal policy and principle, as well as the legal authorities, that influence their decisions.[56]

Stone's application of international law to the question of Palestine, however, was largely presented in a formal and dispassionate manner.

56 Michael Kirby, 'HLA Hart, Julius Stone and the Struggle for the Soul of Law' (2005) 27 *Sydney Law Review* 323, 334.

Anyone unacquainted with Stone or the issues in dispute in the Middle East, upon being exposed to Stone's work, would be presented with seemingly objective, precise and conclusive resolutions to the most intractably difficult political issues in the world today. Stone did express passion for Zionism and Israel, but the tone and tenor of his legal arguments were strictly devoid of emotionalism or any disclosure of predilections.[57]

In his tributary oration to the memory and legacy of Professor Stone, former New South Wales Governor and Supreme Court Justice, Gordon Samuels talked of Stone's passionate support for Israel. Samuels commented on Stone's deployment of 'the compelling power of objective argument sharpened but not distorted by the impulses of his own heart'.[58] Stone's passion for the Jewish cause was well known and the late Professor was unapologetic about the fierceness of his views. As Kirby J recently recalled,

> the closest that Stone came to a passion of the heart, was his fiery loyalty to the state of Israel. For Stone, this was a cause touching his emotions.[59]

Justice Kirby, who was a former student of Professor Stone, also recalled that the intensity of Stone's convictions even led some colleagues to 'express fear even to discuss Israel with him'.[60] The precision and power of Stone's intellect was directed towards the realisation of 'justice' as he perceived it. Yet, as per the famous proverb, 'justice is blind', it must also be acknowledged that for those that seek to pursue its promise, justice may also be blinding.

It is argued here that the hope Professor Stone placed in Zionism as a salvation for the Jewish people was especially acute in his particular case owing to personal and professional circumstances. It is neither suggested nor even implied that Stone held any antipathy towards any particular ethnic group. In fact the opposite is the more compelling understanding, given Stone's outspoken stance on apartheid in South Africa and his general concern with a concept of 'human justice' in the context of international law and domestic affairs.[61] As such, the question duly posited

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57 Any of Stone's work on the issues related to the Middle East will testify to this assertion.

58 Gordon Samuels, 'Julius Stone' (1985) 9 *University of New South Wales Law Review* 9, 12.

59 Kirby, above n 56, 332.

60 Kirby, above n 56, 332

61 See J S Moyes, Morris West and Julius Stone in Charles Stokes (ed), *White Australia?: Time for Change* (1st ed, Sydney: Anglican Press, 1963). Even in this informal gathering of immigration reform advocates, Stone was at pains to avoid 'emotionalism' (at 22) and ensure that the outcome of the immigration debate on the 'White Australia Policy' is decided by the light of reason, not by racial prejudice.

in the context of Stone's approach to matters dealing with the Middle East is whether the heart led the mind or the mind merely confirmed the feelings of the heart.

The answer suggested herein contemplates Stone's personal experiences of alienation and anti-Semitism in Sydney as well as at Oxford. This relegation to the status of an 'outsider' expressed itself in many ways. As described by Dr Leonie Star in her outstanding biography of Professor Stone, at the time of Stone's appointment at Sydney University, the legal profession exerted tremendous influence over the teaching of law.[62] Law graduates from Sydney University were given a doctrinal education in preparation for either the Sydney or London Bar. Julius Stone's sociological approach to law was somewhat 'out of place' in the Phillip Street Law School that is so closely established to the heart of the Sydney legal establishment. Part of the resistance may also have arisen from a misunderstanding of what Stone's methods and perspectives upon the law actually entailed. As former Prime Minister Bob Hawke conveyed of Stone's views of the original pressure exerted against his appointment to the Sydney Law Faculty, Stone thought that many of his critics 'in good faith mistook 'sociology' for 'socialism''.[63] Both his approach to the law and his Jewish heritage marked Stone out from the professional and academic legal mainstream in Sydney.[64]

Given such ostracism, Stone perhaps felt a sense of belonging inspired by his Jewish identity and in the cause of Israel. For someone in Julius Stone's station in life Israel may have stood for more than merely a party to an international dispute. The conjectures herein made of the intimacy Stone felt of these issues and the psychological elements driving Professor Stone are partly based upon the discontent and disappointment Stone reflected and expressed towards former High Court Justice and Governor-General of Australia, Sir Isaac Isaacs.[65] Israel, as a cause, not only perhaps abated the isolation Stone felt, but may have also touched on Stone's acute awareness of his lower-class origins in Leeds. In his personal rebuke of Sir Isaacs, for example, Stone, on several occasions, emphasised the lack of support for Israel demonstrated by Sir Isaacs and other 'Jews with a happy lot'.[66] What was always the more dominant influence on the views adopted by Professor Stone, however,

62 Star, above n 9, 56.

63 Robert Hawke, 'Julius Stone – Humanist, Jurist and Internationalist', Inaugural Julius Stone and Reca Stone Memorial Lecture (1986) 9 *University of New South Wales Law Journal* 2, 3.

64 Star, above n 9, 1-80.

65 Stone, above n 3, 14. Stone talks of Sir Isaacs' indifference to the plight of their 'brethren'.

66 Stone, above n 3, 15-16.

was the national affinity Israel inspired. Being an avowed Zionist, Stone was a zealous Jewish nationalist and in this regard belied his humanist reputation.

The moral authority attributed to international law was well understood by Professor Stone.[67] Even more so, Stone appreciated the authority derived from objectivity in legal analysis – especially when reflected in judicial decisions. This intuitive understanding of authority in the context of reasoned discourse, as well as the belief that international law may be seen as representing some higher moral framework may also have shaped Stone's work on the Middle East.

Stone was 'almost obsessed' with the concept of 'justice' and its relationship to manifestations of positive law.[68] As such, when the desperate plight of European Jewry became known to Stone, a feeling of injustice naturally arose (as it did amongst the entire world); the protection of Jews thus became the inimitable and concrete manifestation of 'justice' that was branded in Stone's mind and heart. Positive law, on this basis, had to be aligned with the cause of Israel if Stone's jurisprudential beliefs were to be honestly upheld. This, it is submitted, pre-disposed Stone to certain conclusions in his *bona fide* objective analysis of Palestine. For Stone, all that was needed was an analytical vehicle capable of conveying the desired conclusions with the requisite authority, as well as maintaining the scholarly honesty and integrity that Stone so often preached and practised. These were two ends that did not necessarily coincide. The dilemma this situation posed crystallised into a legal analysis on Palestine, relentlessly sharp and seemingly objective, almost to the point of mechanical detachment. Despite crystals appearing beautifully transparent, they however remain notoriously difficult to see through.

B *Understanding Stone's Formal Approach*

Professor Stone's approach to international law on the question of

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67 Julius Stone, 'International Law and Contemporary Social Trends: Some Reflections' (1956) 29 *Rocky Mountains Law Review* 149, 156-166. In this deeply insightful article into the thoughts of Professor Stone, grave concerns are voiced for the fate and future of humanity given the technological advances witnessed by Stone's generation. Stone sees man in a 'disrupted phase in his moral heritage' and identifies international law as having to be necessarily studied for its potential utility as 'an effective humanity-wide social control'. In a way, Stone could be interpreted as lamenting a loss in spirituality in the technologically advanced world and proposing international law as part of a higher moral order that needs to be rediscovered (or preserved). On this basis, aligning international law with the aims of Zionism, for Stone, took on a secular imperative akin to divine justification in a religious context.

68 Goldring, above n 30, 6-7.

Palestine was distinctly formal in its application. The facts underlying Stone's application of international law were understood in a way that rendered international law always supportive of the cause of Israel. Many of the 'facts' Professor Stone relied upon, however, were based on indeterminate categories open to leeways of interpretation. The principal example of the latter position can be seen in Professor Stone's approach as to what constitutes a 'peoples or nation' for the purpose of self-determination as explored above.

Professor Stone either knew of these linguistic apparatuses and how to manoeuvre within them to the advantage of his views, or alternatively Professor Stone just did not perceive the indeterminacy in their meaning. To imbue Professor Stone with the sinister 'inside' knowledge of how formalism can be abused is a blatant charge of intellectual dishonesty. This is unjustified. In a sense the conclusions offered in this paper are redemptive of Professor Stone in that it is argued that many of the misconceptions, omissions and skewed interpretations present in the factual foundations of Professor Stone's work were influenced by the blinding passion Stone felt for the plight of world Jewry.

It could be argued that, the intellectual objectivity the methodology of legal formalism stood as a strong counterweight to Stone's own admittedly bias views. As such the legal analysis of Professor Stone may have been sound but the foundations of his analysis had a built-in or structural bias.[69] An awareness of his own bias may have indeed sharpened Stone's focus in terms of his application of legal analysis. Yet the palette on which Stone presented the legal framework he saw as applicable was the world in its desperate state after the Second World War; a world Stone perceived as populated by men on the brink of self-destruction. It was a world coloured and influenced by the personal emotions and public concerns of Professor Stone. And it is from within this perceived world that Professor Stone extracted the factual evidence necessary to the application of international law.

Professor Stone did not, as it could very well be argued, use his understanding of the convenient shelter formalism may provide, to proffer personal arguments in the veneer of an objective analysis. Much like the legal reasoning process adopted by the judges Professor Stone spent so much time exploring, Stone's own reasoning process was not disingenuous. It may have been flawed, or at least skewed, as to its factual foundations, but it was nevertheless honest. Stone, perhaps, could not perceive his own predilections as, for him, the seriousness of the situation facing world Jewry did not require reflection, it required

69 See Saul, above n 2.

action. Inspired and orientated by the notion of 'justice' represented by Zionism, Stone imbued all indeterminate words or concepts with a meaning sympathetic to his beliefs. As such, when applying the ideal of self-determination, for example, the contested definition of a 'peoples or nation' naturally included the Zionists in Palestine and excluded the incumbent peasant Arabs.

Another example of this approach may be seen in Stone's treatment of Israeli settlements under the Fourth Geneva Convention. The Convention makes provisions that an 'occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies'.[70] Upon a strict reading of this provision, Israeli civilian settlements in the West Bank and Gaza would be unlawful. However, on this point Stone looks to the drafting history of the particular provision and notes that the original purpose of the Convention was to address the Nazi deportation of German Jews to death camps in occupied Poland and other occupied territories. Professor Stone posited that for this very same provision to be used against the Jewish state would push 'irony' to the level of 'absurdity'.[71] Employing this purposive approach to interpretation, however, is rejected as Professor Stone again presents the case for Israel in a formalist manner. According to Professor Stone's assessment of the applicable facts, the West Bank was not an occupied territory to which another state held claim. Israel is thus not an occupying power pursuant to Article 49(6),[72] thus rendering this particular Article of the Convention inapplicable to the case of the Israeli presence in the West Bank. The fact that the international framework that Professor Stone was implementing gave no voice to the incumbent Arab population (it only considered state actors) seemed of no consequence. The system was again ignoring those that were most vulnerable and Professor Stone seemed to dispassionately partake in its operations and perpetuation.

Whilst the work of Professor Stone on the dispute between Israel and the Palestinians was close to heart, it was always overshadowed by Professor Stone's more profound work and interests in jurisprudence and international law. Thus from a pragmatic point of view, *strict formalism* was a time-efficient approach by which Stone could discharge the duty he may have perceived as incumbent upon himself. Professor Stone applied given rules to given facts and came up with a conclusion. Thus the position and prestige of Stone's professorship could add to the authoritative perspectives a formal approach would convey. Much like the common law judges, Stone was able to present

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70 Fourth Geneva Convention, Article 49(6).

71 *International Law and the Arab-Israeli Conflict: Extracts from "Israel and Palestine – Assault on the Law of Nations" by Julius Stone* (1st ed, Bellevue Hill, N.S.W: Jirlac, 2003) Ian Lacey (ed), 14-15.

72 Stone, above n 14, 177-181.

an argument as to what the law fundamentally 'is' and how it 'applies' without having to grapple with the deeper philosophical questions of what the law 'ought' to be. Thus if the application of international law further marginalised and silenced the displaced Arab population of Palestine, that was a consequence of the legal framework and not an issue properly considered by a dispassionate observer applying the existing law to a given set of facts. In this context, moral questions were to be contemplated independently of the international legal framework, even though Stone especially advocated their amalgamation into the study of international law.[73] On the question of Palestine in particular there was no quarrelling with Stone as to morality. Moral positions, it seemed, had already been settled.

Although less likely a motivating source directing Stone to adopt a formalist approach, internal Zionist politics may provide another reason Stone sought to project a definite basis within international law for the existence of Israel within the limits of the British Mandate over Palestine. By the end of the Second World War divergent strands within Zionism had yet to be completely settled.[74] Although there is now a mainstream Zionist belief that Israel should be secured within its June 1967 borders, there remains distinct dissent within Zionist ranks as to the scope of the Jewish state. Of particular prominence in the period when Stone was writing was the Zionist strand adhering less to the visions of Theodore Herzl and its labour leanings and more so to the extreme nationalism of Vladimir Jabotinsky.[75] Many Jewish intellectuals of the period abhorred Jabotinsky and the extremist legacy he helped establish in opposition to the socialist wing of the Zionist movement. Indeed when Menachen Begin, an ideological descendant of Jabotinsky and later Prime Minister of Israel (June 1977 - October 1983), visited the United States in 1948, a list of prominent Jewish intellectuals wrote an open letter to the editors of the *New York Times* opposing the visit and accusing Begin of heading an Israeli political party that was akin to the Nazi party.[76] One of Jabotinsky's aims was to establish a Jewish state on both sides of the Jordan River. Whether Stone's formalism was also meant to give weight and authority to the socialist wing of Zionism is unclear. It did nevertheless provide a basis in international law refuting the maximalist claims to territory

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73 See Stone, above n 45, 174.

74 See generally Walter Laquear, *A History of Zionism* (1st ed, London: Weidenfeld and Nicolson, 1972); See generally also Ehud Sprinzak, *Brother Against Brother: Violence and Extremism in Israeli Politics from Altalena to the Rabin Assassination* (1st ed, New York: The Free Press, 1999).

75 Sprinzak, above n 74, 34. Sprinzak notes that David Ben Gurion, the first Prime Minister of Israel, once referred to Jabotinsky in a debate as 'Vladimir Hitler'.

76 'New Palestine Party', *New York Times*, New York, December 2, 1948. Among the more prominent names on the letter were Hannah Arendt, Albert Einstein and Sidney Hook.

held by the right wing factions within Zionist politics. There is little direct evidence, however, that Stone engaged in any meaningful way with internal Zionist politics.

Given the certainty of 'right' and 'wrong' in the case of Zionist claims, and the seemingly concrete definition of justice ascribed to the circumstances by Stone, a declaratory approach was perhaps always to be expected. It allowed a strict and honest scholar the scope to be rigorous in his legal analysis whilst still supporting the particular political ends he saw as just. *Legal formalism* provided the authority and clarity Stone desired but at the same time provided some clear scope for the incorporation of personal beliefs, albeit perhaps unknowingly. The formalist approach was perhaps a compromise. The adherence to the declaratory approach to legal reasoning was neither a sophisticated ploy utilised by a man well versed in the ways of legal illusion, nor was it the result of sloppy factual research. Stone's academic standards and intellectual honesty do not conform to either conclusion. The only way in which Stone's approach on the question of Palestine can be reconciled with his character and other branches of his research is to recognise that Stone was imperfectly human, prone to passion and its distorting influences. His mind may not have allowed him to misrepresent the law or its application, but his heart did influence the way in which Stone understood and saw the world to which the law would apply.

V Conclusion

To use the phrase Professor Stone was said to have commonly used, this paper has been prepared in the spirit of 'diplomacy of scholarly discourse'.[77] A version of this paper was presented by the author at the *Julius Stone Centenary Conference* held at Sydney University 100 years to the day of Professor Stone's birth.[78] On this basis it would have perhaps been discourteous to take an overly critical tone of such an accomplished and influential scholar. Yet it would have been even more discourteous to Professor Stone's legacy to shy away from honest scholarly exploration and conjecture. Thus the final reflection inspired by this study of Professor Stone and his approach to the applicability of international law in the Middle East is a reflection on the role of the scholar.

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77 See Upendra Baxi, 'Keynote Address: Revisiting Social Dimensions of Law and Justice in a Post Human Era' (Speech delivered at the Julius Stone Centenary Conference, Sydney, Australia, 7 July 2007).

78 This paper was originally delivered by the author on 7 July 2007. Professor Stone was born on 7 July 1907.

French philosopher, Julien Benda, addressed this issue in his famous derision of European scholars published in 1928 under the French title *La Trahison Des Clercs* – The Betrayal of the Intellectuals.[79] Benda charged that 'men of letters', as he called them, had lost sight of a transcendental truth and become the mouthpieces of national interest and war-mongering. This theme is distinctly contemporary given the prominence of the 'think tank industry', particularly in the United States. Ironically and interestingly, Benda began his career by writing on the Dreyfus affair, an incident that inspired fellow Jewish writer Theordore Herzl to theorize on the Zionist project. Years later, Benda, in the *Betrayal of the Intellectuals,* pointed to bourgeois Jewish nationalism as an example of the broader nationalist disease which stands to 'those interested in the progress of peace' as 'one more arrogance which set[s] men against each other'.[80]

Stone perhaps did not believe in a transcendental truth, but a notion of truth nevertheless did form the core of Stone's beliefs. From engaging with Professor Stone's writings one is left with the strong impression that for Professor Stone, truth is something that is not divinely bestowed or revealed, his challenge to natural law philosophy speaks as much, but rather, truth is socially derived. As such, branding Stone as one of those intellectuals who gave up on universalism and consciously pursued a nationalist philosophy is perhaps inaccurate. Yet the total and unquestioned support for Israel given by Stone is difficult to reconcile with his own calling to 'readjust our vision … so we can see beyond the merely nationalised versions of Truth and Justice which have come to dominate in our age of ideologies and mass communication'.[81] It has been argued here that the pursuit of the strict legalistic approach identified as *legal formalism* was an attempt by Professor Stone, albeit unsuccessful, to overcome the nationalised versions of truth and justice held by (or in hold of) Stone on the issue of Israel and Palestine. Benda further argues, of the formal methods adopted by scholars such as Stone, that 'today all political ideologies claim to be founded on science, to be the result of precise "observations of fact"'.[82] Whilst national or group prejudice may undermine the scholarly task, it should not be doubted that a loyalty to the precepts of universalism is also a kowtow to political ideology. So then what remains as to the role of the scholar?

There seems to be two inter-related yet hierarchical types of scholarship: *critical scholarship* and the higher order *analytical scholarship*. Critical scholarship is not a means by which to perpetuate a notion of truth or

79 Julien Benda, *The Betrayal of the Intellectuals* (2nd ed, Boston: Beacon Press, 1955).
80 Benda, above n 79, 8-9.
81 Julius Stone 'Law Force and Survival' (1960) 39 *Foreign Affairs* 549, 559.
82 Benda, above n 79, 22.

justice, it is a personal exploration into those questions. It is not a method supporting, justifying or upholding political views, it is a questioning of all views and identifying, as stated by Wittgenstein, that which can be logically discussed and remaining in quiet reverence of the rest.[83] When all criticisms have been exhausted and the mind of the scholar is stripped bare, devoid of prejudice and passion, when it is in a state of submission, or what in Arabic is called – *Is'lam* or what in the western tradition is known as stoic clarity, it is then that analytical scholarship may take place.

Stone's formal approach to international law in this context was an attempt at analytical scholarship before the cleansing process of critical scholarship had run its path. Professor Stone approached the subject of Palestine from the obdurate perspective that 'there are no Arab claims, moral or otherwise, which can reasonably be held to stand in the way of righting this great wrong to European Jewry'.[84]

The greatest jurisprudential lesson that perhaps may be taken from Professor Stone's legacy will not be found in any of the volumes he so brilliantly compiled. Rather, it is submitted here, that in the efforts of the man himself on the issue of Palestine and Israel, Julius Stone consummately played out that reality which he had for so long acknowledged in the law – that reality was that, in the human condition, reason is a constituent faculty of man, yet man is not solely constituted of reason.

83 See generally Ludwig Von Wittgenstein, *On Certainty* (1st ed, Oxford: Blackwell, 1969).

84 Stone, above n 3, 17-18.