BOOK REVIEWS

AGGRESSION AND WORLD ORDER, A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION. By JULIUS STONE. Berkeley & Los Angeles: University of California Press, 1958. Pp. xiv, 226. $5.00.

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In his preface the distinguished author refers to the "grim repulsions of the subject of international aggression and its definition." (p. vii). He goes on to say that behind these lie "a rich vein of problems and ideas of fundamental juristic and political importance." (p. vii). For this reviewer the "grim repulsions" are so much more momentous in relation to world survival than the "rich vein" that this review will concern itself entirely with the former, except for stating at this point that Professor Stone in this book, as always, shows himself to be a very thorough scholar—almost an "un-Commonwealth" one in the extent and detail of his footnoting and other documentation—and that international law is very fortunate to share him with jurisprudence.

Frankly, I have avoided as long as I decently could reviewing this book. I disagree with Professor Stone, wise senior and friend, about Suez. Suez dominates a good deal of the book. It is undoubtedly true, as Professor Stone says, again in the preface, that his formulation of the theoretical issues long preceded the Suez crisis, but the very first sub-division of the introduction is headed, "Middle East Crisis and Aggression." The orientation thus begun is continued throughout. It is possible of course to differ about the wisdom of this or that national posture in the Middle East crisis of 1956-1957 without disagreeing with a legal and jurisprudential analysis which at some points is influenced by a particular point of view as to the crisis.

Why do I disagree with Professor Stone? Is it because I think, contrary to his first main thesis, that any useful purpose would be served by codifying a detailed, technical definition of aggression? Certainly not. Professor Stone takes ninety-two pages and four chapters to show that it is probably impossible as a technical matter and certainly unwise from the standpoint of the interests of good, Western, free, promise-keeping countries to attempt to write a criminal code for international aggression. These pages are a marvelous compilation of detailed history of drafts and approaches, national positions, ploys and counter-ploys. The lesson is driven

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home with great force: Beware of Potential Enemies Bearing Definitional Gifts. Yet I doubt that the lesson is necessary—or, at least, that it is very necessary. I had always thought that the exercise of drafting definitions of aggression was considerably outside the main stream of the interests and the preoccupations of states when dealing with each other through international organizations. "On the Problems of Defining Aggression" is, I think, a more usual topic for graduate seminars in international organizations law than for staff conferences in foreign offices. If after the next Summit or otherwise the topic should again become "hot," which I doubt, Professor Stone's first series of chapters should be required reading for decision-makers. For students they should be anyway.

My difference with Professor Stone concerns the application of article 2(4) of the Charter of the United Nations. In his fifth chapter, "Aggression and the Charter," the author examines this Charter provision, which reads:

> "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."

He reports as an "extreme view" the notion that the Charter forbids national use of force with only two exceptions: (1) collective or individual self-defense under article 51, and (2) collective action called for or authorized by competent United Nations organs. He admits that the negotiating history at San Francisco supports this "extreme view" (p. 99); but, with an analytical approach reminiscent of Hans Kelsen, he writes of the words quoted above:

> "Article 2(4) does *not* forbid 'the threat or use of force' *simpliciter*; it forbids it only when directed 'against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.'" (p. 95). (Emphasized in original.)

In other words, it is arguably consistent with the purposes of the Charter for a member state to use its national forces to achieve its national objectives, provided its use of such forces is not directed against the territory or independence of the state against which such forces move! The implication is unmistakable that Britain (to preserve the "life line" she apparently did not need so badly after all or which was not as seriously impaired as she thought) and France (to put an end to subversion of Algeria from Cairo by radio and otherwise) acted within the Charter in their landing at Port Said—an operation foolhardy from the military standpoint if from none other.

With an important subsidiary conclusion of Professor Stone's I have no quarrel, viz: that the General Assembly acted wisely in failing to condemn Britain and France as aggressors and in taking into account a wide range of factors in attempting to settle the crisis. What I find worrisome is Professor Stone's teaching that the Charter is not even on its face a complete mechanism for dealing with use of national military force. The worry is not exclusively or even mainly about purely legal issues. Professor Stone, Dean Acheson, and others have posed the question, "Why did the United States in the Suez crisis turn against its oldest and truest Allies, put a terrible strain on NATO, and give tactical advantages to the Soviet bloc?" Was this evidence of that "legalistic-moralistic" outlook of American foreign policy which Kennan and others had condemned earlier? Or was it a clever—too clever and too heartless—exploitation of the difficult positions of competitors for Middle East oil and what not? Was the United States looking beyond its alliances for the present bi-polar power struggle to the day when real power would come into the hands of Afro-Asian nations? Or was it that the American military experts saw how dangerously exposed to heavy casualties the landing force at Said was and wished to head off the stirring of deeper emotions a military disaster there would bring about in Britain and France?

I do not know what answer history will give about the motivations of the Canadians, the Indians, and the numerous company of other non-Soviet states which sided against the British and French during the crisis, but I am reasonably sure that history's answer for the United States will be quite simple and quite important in the context of this review: the President was of the opinion that if this crisis was not headed off the United Nations would go the way the League did after the farce of sanctions against Italy.

Perhaps the United Nations cannot maintain the respect of mankind with Hungary in memory; perhaps it can in time regain what it lost there. But if both the Hungarian and the Middle East crises had been resolved in favor of national use of force for national ends, the Organization would have died then and there. As Ambassador Bohlen is quoted as having observed, the Middle East crisis was a political disaster for the anti-Soviet bloc because it did distract attention from the Hungarian situation. One remembers, also, the rather strange event of the President of the United States, no scholar of jurisprudence, discoursing before television on the fundamental point that two wrongs do not make a right. Finally, to be dreadfully cold-blooded about the Hungarian situation, it differed from the Port Said crisis in that the issues in dispute in Hungary were issues of fact. So were they, perhaps, regarding Israel in the Sinai campaign. In truth, the disputed issues of fact in the Hungarian situation (stipulating the far greater moral depravity of the Soviets there) were not unlike the disputed issues of fact in the invasion of Guatemala from Honduras a few years earlier. Both Hungary and Guatemala involved the grim gambit of the plaintiff disappearing before the issues of fact were settled.

It is disheartening enough to admit that international organization does not yet cope adequately with making crucial decisions of fact. Undoubtedly one of the things wrong with efforts to define aggression in an international code of crimes is that in this field the real issues will usually be issues of fact, and of subjective fact, like intent and motive, at that. But, to understate, it would probably be fatally traumatic to the United Nations to establish that the Charter does not control the use of national military force as a matter of law either. The incident at Said involved no issues of fact such as: "Did the Hungarian Government ask the Soviets in?" "Were the invaders of Guatemala from Honduras all exiled Guatemalans and, if so, where did they get their airplanes from?" Professor Stone has done well to put the case for the defense on law, not fact. I think his law is bad law, not mainly or necessarily as a matter of legislative history, plain meaning, or logic, but from the standpoint of the national interest of such a country as the United States in the United Nations Organization. In the hydrogen bomb age use of force to attain national objectives not otherwise obtainable is simply too dangerous to be considered as an alternative in national policy making. Mankind may destroy the earth even if the Charter continues to be regarded as imposing legal controls on the unilateral use of national force. Such destruction seems to me rather more certain if we reinterpret the Charter to reestablish, albeit in restricted form, the dictum of *realpolitik* that use of force is simply the pursuit of national policy by other means.

But Professor Stone points a way out, I believe, and this is the greatest of his contributions in this work. He suggests, quite rightly, that the bar on use of force tends to create pathological situations when states cannot establish their just claims and protect their vital interests, because they cannot get the United Nations to agree with their assessments of situations. Suppose such states do use force, what then? Professor Stone suggests that the competent organs of the United Nations should avoid wherever possible approaching the resulting crisis in terms of collective action against an aggressor, that the whole situation be regarded as a threat to peace and be dealt with in the broad, taking into account the whole range of issues and problems out of which the use of force resulted. This approach treats unauthorized use of force almost as a psychotic response to frustration and injustice. In princple this is sound, but I hope states tempted to use force in such situations will have care, for as any person who followed the whole Middle East crisis on television might reasonably predict, the emotions and national reactions stirred by new military adventurism might be such as to make it exceedingly difficult to count on an international frame of mind friendlier to treatment than to punishment. Perhaps it will be wiser to take article 2(4) as still meaning what it meant at San Francisco even if to do so means that states may (1) have to put up with some injustice to avoid involving the world in atomic war, or (2) put themselves to work to devise more effective means short of national use of force for the attainment of justice.

THE REGULATION OF RAIL-MOTOR RATE COMPETITION. By ERNEST W. WILLIAMS, JR. New York: Harper & Brothers, 1958. Pp. ix, 247. $4.50.

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With the enactment of the Motor Carrier Act of 1935 (now part II of the Interstate Commerce Act) [1] the Interstate Commerce Commission acquired control over both sides of the competitive struggle between the railroads and the interstate commercial motor carriers. As might be expected, this struggle, both before and after 1935, has centered largely around the system of pricing utilized by these two modes of transportation in competing for that not inconsiderable portion of the nation's traffic which by virtue of its particular characteristics is susceptible of movement by either mode. It is with this aspect of the struggle and its regulation by the Commission since 1935 that Professor Williams has concerned himself.

The basis for the author's analysis of the subject matter consists primarily of those reported decisions of the Commission which in one way or another touch upon rate competition between the rail and motor carriers. This analysis has been undertaken not merely with the object of attempting to extract those principles which the Commission itself has developed for application within this area of its jurisdiction, but with the even more elusive objective of making a qualitative judgment of the performance to date by both the Commission and the affected carriers. In the author's words, his intent "is primarily to ascertain how the Commission has been exercising its expanded authority, not from the point of view of procedure, but from the point of view of the substance of its findings and orders. Such a quest necessarily poses questions concerning the adequacy of the Commission's performance and some suggestions for its improvement. It also brings into view the attitude and behavior of the carriers of both types and may raise questions whether their policies were well adapted to assisting the Commission in its work and to aiding the implementation of the declared national transportation policy." (p. ix). In consideration of the nature of such an undertaking and presumably in deference to the Commission and to the carriers, recognition is given to the fact that the period involved "has never been blessed with 'normal' conditions." (p. vii).

Following an introductory chapter in which the relative roles of the railroads and the motor carriers, the characteristics of the competition between them, and the applicable provisions of law are briefly discussed, the great bulk of Professor Williams' efforts are given over to a rather painstaking analysis of the rail-motor rate competition cases themselves. This has been performed by segregating the cases into chapters which deal respectively with rail investigation and suspension proceedings, rail fourth section

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[1] 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1952), as amended, 49 U.S.C. §§ 313(a)(11)-(22) (Supp. V, 1958).

proceedings,[2] motor carrier investigation and suspension proceedings, and cases in which the Commission has issued minimum rate orders within the several motor carrier rate territories. Treatment of the rail-motor rate competition cases in this fashion has enabled the author to extract the controlling considerations which have evolved from the Commission's decisional process as well as to lay the foundation for his subsequent qualitative judgment of the Commission's performance. So far as the decisional principles themselves are concerned, they are easily recognized as the classic considerations which are now all too familiar to the initiated. Not surprising is the fact that the author often appears to be perplexed by his inability to reconcile apparently conflicting decisions by the Commission. This problem, inherent in the administrative process by reason of the quasi-legislative nature of the Commission's functions, the broad discretion conferred on the Commission by the pertinent statutes, the assignment of the case load to separate divisions of the Commission, the inapplicability of the doctrine of stare decisis to proceedings before administrative agencies, and the very limited scope of judicial review of Commission decisions, appears to have plagued Professor Williams as it has troubled almost every writer who has undertaken a critical analysis of the Commission's decisional pattern in a given area of its jurisdiction.

The really significant contribution of the author is contained in the last two chapters of the book. It is there that he undertakes both to discuss the relation of rail and truck rates and to appraise the Commission's performance to date. The former undertaking is conducted primarily in terms of a pervasive review of the history of the several adjustments by both rail and motor carriers of their rates on the intensely competitive petroleum, textile, tobacco and alcoholic liquors traffic. To this have been added certain allusions to the observations of other students of the problem of intercarrier competition. Most interesting, of course, is the author's effort to appraise the Commission's performance since acquiring its authority over the rates of both types of carriers. That appraisal, obviously constructed from the standpoint of the economist, is highly critical of the Commission's treatment of the problem. Charging it with having "taken a negative rather than an affirmative view of its responsibilities under the Act," Professor Williams concludes that "a study of some 900 cases is more revealing of what the Commission has not done than of what it has done by way of establishing any definite economic principles of broad scope that fit into the several theories offered by students of the problem of intercarrier competition." (p. 201). The essence of this criticism is the charge that the Commission's action in this area has been altogether too passive in that it has tended to take only those actions which are most pressing, and that in those cases in which it has acted it appears to have been motivated by a desire to preserve both the rail and motor carriers in the entire range of service in which it found

[2] 49 Stat. 380 (1887), as amended, 49 U.S.C. § 4 (1952), as amended, 49 U.S.C. § 4(1) (Supp. V, 1958).

them at the time at which they both became subject to its jurisdiction. This desire is said to have resulted in a preoccupation with the "preservation of the opportunity to compete and to secure a 'fair' share of the traffic." (p. 210). The author, on the other hand, would have the Commission aggressively define the points in this area in which regulatory action as opposed to the free play of competition is justified, clearly interpret the mandates of the national transportation policy, and more fully explore the respective areas of economic superiority of both rail and motor carriers with the object of promoting a division of the available traffic along the lines of such superiority. This, of course, is not the first time that criticism of this nature has been leveled at the Commission. The extent to which such criticism is justified—a criticism which affects the adequacy of the administrative process as well as the economic interests of the respective carriers and the users of their services—is admittedly a thorny and most controversial issue. Its resolution is not likely to be an easy matter.

A striking incident to the appearance of Professor Williams' book is the fact that present conditions regarding rail-motor rate competition point to the necessity for its early revision. The Transportation Act of 1958 added section 15a(3) [3] to the so-called rule of rate making. The most significant feature of that section is the provision that, "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." The inclusion of this language in section 15a(3) has been popularly referred to as "the closing of the umbrella." [4] Opinions as to its effect on intercarrier competitive rate cases range all the way from the railroad point of view that the Commission is now foreclosed from giving any consideration to the effect on the motor carriers of proposed rail rate reductions to the view of the motor carrier industry generally that this language effects no substantive change in the law and that it simply represents a codification in statutory form of the Commission's prior policy.

The question of its precise meaning has already been at issue in at least two important intercarrier competitive rate cases decided by the Commission.[5] However, a definitive interpretation of the language unfortunately failed to materialize from either of the two proceedings. In the first, a number of railroads published reduced rates in an effort to recapture certain sugar traffic from their water carrier competitors. The Commission found the proposed railroad reductions to be just and reasonable and at the same time issued a plain invitation to the protestant barge lines to reduce their rates so as to reestablish a water route differential below the reduced

[3] 72 Stat. 572 (1958), 49 U.S.C.A. § 15a(3) (Supp. 1958).

[4] Panel Discussion, *Revised Rule of Rate Making*, 26 I.C.C. PRAC. J. 1146, 1161 (1959); *cf.* New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945).

[5] Paint & Related Articles—Official Territory, No. I & S 7027, ICC, Aug. 27, 1959; Sugar—Gulf & South Atlantic Ports to Ohio River Crossings, No. I & S 6914, ICC, July 24, 1959.

railroad rates.[6] Shortly thereafter, the Commission decided the second case which was universally regarded by the transportation world as bringing squarely into issue the legislative purpose and the effect of section 15a(3). At issue were certain rail rate reductions on paint and related articles designed to recapture this traffic from both private and for-hire motor carriers. While finding the proposed railroad reductions to be lawful, the Commission failed to come to grips with the paramount question of the meaning of the newly enacted statutory language.[7] For this it was severely reprimanded by Commissioner Webb in a concurring opinion. Thus, the question of the legislative purpose and the effect of section 15a(3) awaits an answer in future litigation.

Interestingly enough, at least one segment of the motor carrier industry has not been adverse to the use of section 15a(3) in the interest of its members. Certain motor carriers of iron and steel articles are presently engaged in an attempt to have enjoined and set aside a recent order of the Commission prescribing a scale of motor carrier rates on these articles based on rail distances which in some instances appear to be longer than the highway distances actually traversed.[8] The issue, as might be expected, is whether that section now forecloses the Commission from establishing rates for one mode of transportation according to conditions prevailing for another mode.

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[6] Sugar—Gulf & South Atlantic Ports to Ohio River Crossings, *supra* note 5.

[7] Paint & Related Articles—Official Territory, No. I & S 7027, ICC, Aug. 27, 1959.

[8] Iron & Steel Articles—Eastern Common Carriers, 305 I.C.C. 369 (1959).

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