INTER ARMA SILENT LEGES

A Review Article of
Stone's *Legal Controls of International Conflict?*

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I.

The maxim chosen as the title of the present review-article may be said to have represented in a large measure the truth about the conduct of warfare in the era before Grotius. Subsequently, the Grotian influence started a process that rendered — or seemed for many years to be rendering — this maxim less and less in accordance with the facts. Now, the world is once more in a period in which it is said that the old maxim has recovered all its force and vigour. Total war and modern weapons — particularly nuclear weapons — it is suggested, have rendered the laws of war obsolete or impossible of application under modern conditions; more — these conditions in certain of their aspects are such as to be intrinsically incapable of regulation by any rules at all.

An analogous claim is made in the field of neutrality. War is now illegal in all those cases where it is not waged in self defence, the enforcement of the United Nations Charter or authorized regional arrangement against aggression, or in virtue of some other clear legal right. The aggressor is therefore an outlaw. He has no rights, and cannot claim as against non-participating countries the observance on their part of the rules of neutrality. Those who resist him are freed from the obligations normally incumbent on a belligerent — and in particular are not bound to respect the position of non-participants as neutrals, or to accord them the benefit of the rules of neutrality. There can be no neutrals, it is said. Countries may indeed, on one ground or another, be able to avoid — or even claim as of right to avoid participation in actual hostilities against the aggressor. But they cannot claim to be "neutral" as a matter of status. Short of fighting, they must give the resisting side what help they can, and must not complain if, in the interests of countering aggression, liberties are taken with their trade, their nationals, their waters, their air-space and even their territory.

Ideas of this kind, purposely stated here in somewhat extreme form, underlie much of the thinking of the man in the street on the subject of war, its status and incidents. How far is he justified in his assumptions? Many of these propositions contain a considerable element of the truth, though few could be

[1] *Legal Controls of International Conflicts*, by Julius Stone. London, 1954. Stevens and Sons, Ltd. lv + 851. £4/4/0 (New York ed. by Rhinehart & Co., 1954. $12.).

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accepted unreservedly. As regards the conduct of hostilities, although it is demonstrably wrong to say that the laws of war are, in general, obsolete or no longer applicable, it would be true to say that in certain fields modern conditions have created a situation in which the object for which the rules were framed can no longer be realized through those particular rules, and must now be sought by other means. As regards neutrality, it is undoubtedly correct to say that the concept of "just" and "unjust" war — of aggressive or defensive war, which, despite the Covenant of the League and the Kellogg Pact was not definitely admitted before World War II, is now accepted and established; and that it has certain legal consequences both in the field of neutrality and in that of belligerent rights, whether as against neutrals or other belligerents.

"*Inter arma silent leges*" — It is part of the purpose of Professor Julius Stone's remarkable book to provide an answer to some of the questions raised by this maxim when propounded to-day. The result is a work of outstanding interest and importance — one of the first in which a full and comprehensive treatment of the traditional law of international conflicts is combined with a systematic attempt to set it against the background of the circumstances in which that traditional law is now liable to have to be applied. Even where — as is sometimes the case — Professor Stone does no more than state a problem, the international lawyer will often have cause to be grateful to him for perceiving its existence and making clear its character.

There is a further sphere in which the maxim "*inter arma*" is now seen to have a new and certainly unexpected relevance — that of the law of peace itself: for no longer is "war" confined to actual hostilities. The "cold-war" brings the element of conflict into the very law of peace, and creates problems of a novel character. The effect is not so much to raise a query as to the continued validity and applicability of the ordinary rules of the international law of peace, as to create a marked divergence between the professions and the practice of governments and their advisers — between the law as taught in the schools and set out in the text books, and the law as applied in specific circumstances to concrete cases. On this matter Professor Stone throws a revealing light, and demonstrates convincingly the extent to which the actions of statesmen, diplomats and officials, while not violating the rules, may yet evade or "by-pass" them.

II.

Professor Stone's general method is of considerable interest. In a preface he states that one cause leading to the writing of his book was his "deep sense of dissatisfaction . . . with the ever-widening incongruity between international law as formulated even on paper of the highest authority and the actual conduct of inter-State relations: between, in particular, its rules as formulated by publicists and its rules as applied by State officials." But Professor Stone rejects as inadequate or unsatisfactory to bridge this gap both of the main approaches to that task that have hitherto been employed. It is not enough on the one hand merely to illustrate theoretical concepts and abstract rules by reference to concrete cases that have occurred in the past. Such illustrations or references to facts are apt to be selective, and do not sufficiently show the interaction between precept and practice. But equally unhelpful is the iconoclastic attack on the basic dogmas and postulates of international law, or particular branches of it. Such attacks leave the orthodox system still standing, and they ignore the real nature of the challenge to it, which is not theoretical but practical. Professor Stone's object therefore is to give a full and all round treatment of the traditional law

governing international disputes and conflicts, both of peace and war, "in a manner which surveys concurrently both the materials *of the system*, and the materials *which challenge the system*". The method employed constitutes a species of dialectic. In twenty-six Chapters devoted to the various branches of the law of disputes and of war, he gives a straightforward though most penetrating and illuminating account of the principles and rules that make up the traditional text-book system. Taken by themselves, these Chapters amount to an orthodox treatise on the international law of war and conflicts. In this part of the book, despite his originality of treatment and fertility of ideas, Professor Stone remains orthodox, and even perhaps conservative, in his actual conclusions as to what the law is and what it is not.

Side by side, however, with these Chapters of straightforward exposition, there are thirty-four "Discourses", one or more of which is appended to individual Chapters or groups of Chapters. In these Discourses, Professor Stone in effect shows the law in action — or alternatively shows the conditions under which it has to operate at the present time. The text-book solution of problems is therefore accompanied by material showing that in many cases this is not the solution given to such problems in practice — or alternatively that in the practical solution the problem is evaded altogether. It is in the interaction between these Discourses and the Chapters that the novelty of the book lies. Nevertheless it is the Chapters, represnting in themselves a remarkable contribution to the study of the law, that constitute the real backbone of the work.[2]

Two or three innovations in arrangement may be noticed. Professor Stone attaches particular importance to the subject of economic warfare, in the light of which alone he considers that the operations of modern naval warfare can be understood,[3] and deals in consequence with a considerable part of the law of neutrality before dealing with the combatant law of land, sea and air warfare. Similarly, he considers that the topics of prisoners of war and belligerent occupation of enemy territory, usually considered as part of the rules of land warfare, can more satisfactorily be treated as part of the general question of the international protection of individuals subjected to a belligerent's power — a category which also includes the treatment of civilian persons in war time.

III.

The substantive foundation of Professor Stone's book is his view as to the "obstinately crucial role" in international life played by war — or rather by conflict generally. Failure to realize this has led to the law of peace being regarded as the staple law between States — disputes, conflicts and war being regarded as exceptional, and mere temporary disturbances. This has led to a neglect of the law of war, and consequently to a failure "to adjust the life preserving rules of war-law to contemporary conditions, leading to breakdown at many points. Human life has thus been left increasingly exposed to the unmitigated violence of the belligerents . . . " Here Professor Stone touches on a vital point going to the root of the real nature of the laws of war, and his view

[2] To give but one example — no one familiar with the workings of the United Nations can fail to appreciate the brilliance and extreme utility of the Chapters in which the provisions of the Charter relating to the functions of the Security Council, the Pacific Settlement of Disputes and "Enforcement Action" are analyzed and expounded.

[3] This view is perhaps a little too categorical. It is certainly true of most of the naval operations of World War 1 (but cf. the Dardanelles, Jutland, etc.). So far as the United Kingdom was concerned, it was largely true of World War II also. But the very extensive and major naval operations of the United States in the Pacific were essentially of a military character and constituted the whole foundation of the process of reclaiming the Japanese conquests that eventually led up to the surrender. The same may be said of Anglo-United States naval operations in the Mediterranean, and afterwards in the English Channel, as part of the process of the Allied invasion of Europe in the period 1943-45.

may be compared with that expressed by Professor Lauterpacht in the following passage:[4]

> We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This and not the regulation and direction of hostilities, is its essential purpose. Rules of warfare are not primarily rules governing the technicalities and artifices of a game. They have evolved or have been expressly enacted for the protection of actual or potential victims of war.

Nor does the evil stop at the neglect of the law of war itself. Failure to recognize the "war-in-peace" conditions of the present day creates, as Professor Stone says, "an 'either-peace-or-war' dichotomy that leaves no room for rational examination of the over-all conflict, the 'neither-peace-nor-war' which dominates our actual world". Consequently, phenomena such as "non-belligerency", "cold-war", mass "volunteer" participation by troops in hostilities in which their government professes not to be involved, are thus removed from scientific attention.

In addition to these considerations, Professor Stone, together with a school of authorities to whom he refers,[5] tends to see in international conflict (even if it were reduced — as the aim would be — to merely pacific or non-armed conflict) the only *actual* means of effecting unagreed but necessary changes in the international order, given the absence of any effective legislative, judicial or executive organs with compulsory powers governing an integrated world-community. On this basis, the law regulating the conduct and settlement of international conflicts both in peace and war, becomes of primary importance. But the number and variety of the topics dealt with by the author makes a connected account of their treatment impossible here, and it must suffice to comment on a number of selected points that have particularly impressed or interested the present reviewer.

IV.

The problem of "non liquet". The Author brings out the fact that *non liquet* is not a practical problem[6] in international adjudication, because not a single case has occurred in a century and a half of modern arbitration in which any international tribunal has actually pronounced a *non liquet*, or in which a litigant State has sought to prevent a decision or procure its annulment on that ground. Yet in the present reviewer's opinion, he rightly concludes that the problem exists in theory, and that it is not satisfactorily disposed of by such arguments as that a *non liquet* cannot arise because, by international law, everything is permitted to States which is not forbidden to them. Even though it can be said that, in an actual litigation, the claimant or plaintiff State must prove its case, so that unless it can show its action (or failure to act) to be supported or justified by international law, the decision must go against it (i.e. there can never not be *a* decision) — doubts and lacunae nevertheless remain. It may not be correct to assume that everything not infringing a positive prohibitory rule is necessarily lawful and permitted to States.[7] Even if it were so, and on that

[4] (1952) "The Revision of the Law of War", 29 *B.Y.B. of Int. L.* 363-64.

[5] E.g. Quincy Wright, *A Study of War*; J. L. Kunz in numerous articles in the *American Journal of International Law*; K. Singer, *The Idea of Conflict*; H. Kallen, *The Place of War in the Education of Free Men*; etc.

[6] But also that it might become so if a great extension of international adjudication were to result as a consequence of the adoption of widespread compulsory jurisdiction.

[7] Cf. on this whole subject the latest article in the present reviewer's series on the

ground the claimant or plaintiff State failed for want of adequate proof of a supporting rule, this failure could be registered as effectively by a finding of *non liquet*, as by a finding in favour of the defendants as such. Finally, the argument is in any case only valid for contentious procedure, and would not *per se* prevent a *non liquet* arising over a request for an Advisory Opinion, or in other cases where it cannot be said that either party is definitely in the position of plaintiff or defendant.[8]

Relative Merits of the League of Nations and United Nations Security Systems. It is refreshing to see a blow struck for that much abused institution, the League of Nations. In a striking analysis of the relative effectiveness of the peace-preserving machinery of the two organs, Professor Stone reaches the conclusion, supported by very convincing reasoning, that the League technique was superior to that of the United Nations, which is indeed now being driven to adopt methods (not directly contemplated, though not forbidden, by the Charter) which are in fact very similar to those of the League. According to this view, the principal reason for the eventual failure of the League to prevent war, and in particular World War II, lay in circumstances external to itself — more especially the double fact that the chief peace-preserving Power, the United States, was never at any time a Member, and that some of the chief war-mongers or potential war-mongers did not belong to or left the League.[9]

However that may be, Professor Stone correctly points out that the unanimity rule in the League was, by virtue of Article 5, paragraph 1, complete —extending even to the parties to a dispute and therefore theoretically a much more severe impediment to action than the united Nations voting rule, for every Member had a "veto". Techniques were developed, however — such as the assumption of tacit agreement for any proposition not objected to, or received *sub silentio* — which in practice largely mitigated this handicap. On the other hand, the League Council had no power to bind Member States, even by a unanimous decision: whereas if the United Nations Security Council can reach an un-vetoed decision, this is binding on Member States by virtue of Article 25 of the Charter.[10] Professor Stone shows, however, that in practice this has proved a weakness to the United Nations, and that the looser League system was more effective. The essence of that system was that although decisions of the Council were not, as such, binding, and it was left to each Member to decide for itself if a breach of the Covenant had occurred, yet any Member that did so decide was specifically empowered (and in certain respects 'obligated'[11]) to take action against the Covenant breaker.[12] The United Nations

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Jurisprudence of the International Court of Justice to appear in the forthcoming issue of the British Year Book of International Law for 1953.

[8] As for instance in the *Miniquiers and Ecréhos Case* before the International Court, when neither side could rely on mere failure by the other to prove its title, but must affirmatively establish its own title.

[9] If much has also to be attributed to lack of sufficient will to maintain peace on the part of Member States, this was itself partly a by-product of the sense of isolation and uncertainty induced by these absences and defections. Let the United Nations be imagined to-day without the United States.

[10] Unless, of course, the Security Council Resolution takes the form of a recommendation only, or some other form having that effect. It would seem that under Chapter VI (and unless the case also comes under, or passes on to Chapter VII) only recommendatory action is possible. As Professor Stone himself points out elsewhere, an apparently mandatory form of words such as "calls on" or "calls for" may be deceptive. Although it may have "an imperative ring, the Charter, on its face, attaches no . . . obligation to a "call", except (as in Article 41) a "call" to apply measures which the Council has "decided" to employ."

[11] I.e. as regards severing trade, financial and personal intercourse with the Covenant breaker.

[12] Moreover, a special technique of voting in the League Assembly on the question of whether there had been a breach of the Covenant made it very difficult in practice for any

Charter does not directly do this — with the result that in the absence of a binding decision of the Security Council (which must now be regarded as improbable in all important cases), Members of the United Nations are under no positive obligations at all, except the negative and qualified one, under Article 2, paragraph 5, of the Charter, not actually to assist the peace-breaker.[13] Worse, the Charter can hardly be said specifically even to *authorize* any *positive* action, unless such authority can, by what Professor Stone rightly calls "tortuous paths of interpretation", be derived from the language of Article 1, paragraph 1, of the Charter — which, however, states a purpose, not an obligation — a purpose, moreover, that is obviously intended to be given effect to by means of the provisions of Chapter VII, and these are a matter for the Security Council. Hence the resort to the saving in respect of "collective self-defence" contained in Article 51 — and, as Professor Stone correctly says, Article 51 was never intended as, and is not in any real sense a means of positive action for the *enforcement* of peace and security. It is an "escape clause" to meet a situation in which peace and security have broken down, because no positive action to enforce it proves possible. It comes "not to fulfil the Charter, but because, alas, the Charter remains unfulfilled".[14]

Hence also the resort to such devices as Assembly action under the "Uniting for Peace" Resolution. Professor Stone concludes that by such means the United Nations has been "forced back, as it were, from the ambitious plan of an organic union into a loose system of co-operation on the League plan, but lacking the clear legal basis of that plan." He adds:

> It was assumed that the League system would have worked better if the power of binding Members by a decision that breach of the peace had occurred had been vested in the League Council; such a power was therefore vested in the United Nations Security Council. The effect of this vesting has in fact been to paralyse enforcement action. And only after six years of floundering, and of the undermining of the Security Council's authority, have the Members stumbled upon the truth that if collective peace enforcement can be built at all, it is only on the basis of techniques of quick consensus and common action of individual States standing ready for the moment of crisis. Even now in the form of the "Uniting for Peace" Resolutions this is regarded as a truth hard won in the desperate circumstances of east-west controversy. Yet this is the very central lesson of the League experiment which could have been read and learned before 1945. If it is not even now understood, other important lessons may also have to be learnt at a cost no less high and unnecessary.

The Legal Basis of the Korean Action. Professor Stone does not consider that the Security Council's resolutions of June and July, 1950, constituted the

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but the Covenant breaker itself and its immediate supporters not to accept, in appearance at least, a Report of the Council that a breach had occurred.

[13] A very eminent authority, very experienced in such matters, Sir Eric Beckett, until lately Chief Legal Adviser to the United Kingdom Foreign Office, has said (*The North Atlantic Treaty . . .*, at 35) " . . . where the Security Council cannot decide on its conclusions, it is perhaps rather difficult to say that there is any legal obligation under the Charter for a State . . . to be anything else except neutral."

[14] Professor Stone has some very interesting remarks on Article 51. He is right in characterising the form of the Article as a reservation rather than as a grant of a right. Yet, as he points out, customary international law hardly knows of any right of *collective* as opposed to individual self defence. Collective self defence under customary law would normally mean the right of two or more States, *both or all of which are actually attacked,* to combine for common resistance and succour. The so-called right of a State which is not itself directly attacked to go to the aid of one that is, is not so much self defence as the ordinary right to go to war for a legitimate and non-aggressive purpose. However,

strict legal *foundation* of the Korean action, though they may have constituted its origin and moral basis. The legal foundation he finds rather in the right of all Member States to take individual action for the maintenance or restoration of peace and security, provided nothing inconsistent with any provision of the Charter is thereby involved in the given case. He bases this view on the following considerations: (a) that strictly "the absence of a Security Council member[15] would prevent the gathering from *being* the Security Council within Article 23"; (b) that the Security Council cannot reach a "decision" binding on Member States of the United Nations under Article 25 in the absence of one of the Permanent Members, at least if that Member subsequently signifies its dissent from the resolution concerned (as did the Soviet Union in this case);[16] (c) that in any case the Security Council resolutions did not take the form of decisions but of recommendations, and did not constitute "enforcement" action under Chapter VII. In these circumstances the Members of the United Nations could not be said to be carrying out any direct Charter *obligation* in acting. The Security Council resolutions really amounted simply to a species of *authority* to act, if Members were willing to do so. The resolutions might be regarded as a sort of licence or guarantee that such action, if taken, would be regarded as consistent with the Charter and not as involving hostilities violative of it. It has already been seen[17] that the Charter contains no direct or, as it were, specific authority to Member States to act in such circumstances. But such authority can be regarded as implied, where nothing inconsistent with the Charter would be involved, and the purpose is the preservation of peace and security — particularly where a resolution of the Council or Assembly recommends the action concerned and, so to speak, guarantees, or at least affords evidence of its justifiability. Here in short is the whole legal basis of what is now known as Assembly "Uniting for Peace" action. Alternatively — though in Professor Stone's opinion less satisfactory — a legal basis for such affairs as the Korean action can be found in the right of collective self-defence under Article 51 of the Charter. But in that case, for reasons already given,[18] the action "would not be United Nations at all, but only action in default of United Nations action . . ." Thus as *United Nations action,* the Korean affair has to be regarded as voluntary collective action, impliedly authorized by the Charter in furtherance of the Charter purpose of maintaining peace and security, and as it were vouched for as justified for that purpose by an appropriate Assembly or Security Council resolution.

Article 51 is always interpreted in the sense that such action is (collective) "self-defence", and it may therefore be more satisfactory to regard it as actually granting, than as merely reserving, this right. This is rather Professor Stone's conclusion. These doubts as to the existence under customary law of any "right" of collective self-defence, in the sense imported into the Charter by Article 51, coupled with the reservatory form of the Article, go some way to explaining (though they do not justify) the Soviet argument that such organizations as N.A.T.O. are not really consistent with the Charter.

[15] It will be recollected that earlier in the year the Soviet representative on the Security Council had "walked out" and not returned, on account of the continued recognition of the credentials of the Nationalist Chinese representative and the refusal to recognize those of the Pekin representative.

[16] The practice which has grown up in the Security Council of regarding a resolution as adopted provided no Permanent Member votes *against* it — i.e. contents itself with an abstention (and this despite the fact that Article 27, paragraph 3, requires a *concurring* vote of the Permanent Members) — is based on the view that silence implies consent. This inference may be legitimate if the Member concerned is present on the occasion, but is much more difficult to draw if the Member is absent. In the Korean case, however, the Soviet Government subsequently signified positive dissent.

[17] *Supra* under the rubric "Relative Merits of League of Nations and United Nations Security Systems".

[18] *Loc.cit.*

V.

Forbidden Weapons or Methods of Warfare. In the second half of the book, Professor Stone, in addition to a thorough-going treatise on every aspect of the laws of war and neutrality, shows how modern scientific and technological developments, while not destroying these rules, have created conditions tending to inhibit the realization of the need for further action in regard to them. "Push-button" warfare, by means of guided missiles and other methods of remote control, places not merely physical distance between the actor and the effects of his actions, but also a psychological barrier to the full apprehension of those effects. This extends to the general public, who may find it difficult to regard those who carry out an atom bomb attack — even an illegitimate one — as bearing the same kind of personal responsibility as the soldier who massacres civilians on the capture of a city. The "depersonalisation of the destructive process" is thus inimical not only to the humanisation of war in general, but also to the attempt to mitigate the results of new methods of warfare. The effects of this process are enhanced by the ideological character which modern warfare tends to be motivated by or to assume—approaching the fanaticism and consequent iconoclasm of wars of religion. Another factor enhancing it is the doubt whether international law defines the *permitted* means of violence or merely the *prohibited* means. In practice, Professor Stone thinks, it seems to be the latter — which means that a new weapon is not unlawful until found or declared so to be. This is unlikely to occur unless and until the Powers conclude (as perhaps they have in the case of gas) that the disadvantages of its use outweigh its advantages. It was comparatively easy to accept limitations on the use of weapons operating within a small range and with limited destructive force. A much greater degree of restraint, or (as it were) sacrifice is necessary to abstain from the use of weapons believed to be possibly war-winning. The prohibition on the use of such things as expanding (dum-dum) bullets has been observed because their military value as compared with an ordinary bullet was virtually nil, and the suffering caused out of all proportion to the advantage gained. This is not the case with many modern weapons that undoubtedly do inflict peculiar suffering.[19] These are grim reflexions, but they need to be faced by those who hope to mitigate the impact of warfare on the individual combatant.

Analogous factors influence the degree to which observance of the laws of neutrality can be expected. In an era in which major wars do not occur (and this was broadly true of the nineteenth century), at least one and perhaps several of the great maritime Powers are likely to remain neutral in any war; and they will then insist on a strict observance of the rules of neutrality, which in those circumstances tend to reach a high degree of precision and amplitude. In an era of world wars involving all or most of the Great Powers, the reverse tendency is prevalent. The rules of neutrality are by various devices whittled away to almost nothing or, in the last resort, frankly ignored on some such basis as reprisals or military necessity. Professor Stone — almost the first author of any general treatise on war law to give adequate scope and place to economic warfare as a separate branch of the law — brings out this factor very well.

[19] It may yet be found that the military value of certain modern weapons, e.g. "napalm" bombs, and certain other kinds of incendiary weapons, is insufficient to justify their use, having regard to the suffering caused.

Civilians as a Military Objective. There is still general agreement that attacks on the civilian population *as such* (leaving out of account for the moment the war-material-producing "work-force"), directly aimed at breaking civilian morale — i.e. *mere* terror raids — are illegitimate. This view has again been expressed very recently by Professor Lauterpacht[20] who, while recognising the practical difficulty, in what are probably the great majority of cases, of distinguishing between a terror raid as such and an attack on arms production, considers that nevertheless

> . . . it is in that prohibition, which is a clear rule of law, of intentional terrorization — or destruction — of the civilian population as an avowed or obvious object of attack, that lies the last vestige of the claim that war can be legally regulated at all . . . It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object *per se* would inevitably mean the actual and formal end of the law of warfare.

Professor Stone, while not denying the theoretical validity of this view, considers that the distinction involved is illusory[21] — and that by confusing the issues it hinders rather than helps the effort to create some genuine immunity for what might be called civilians pure and simple.

The truth is, in Professor Stone's view, that a great part of the civilian population have now to be regarded as "quasi-combatants" — the "work-force" engaged on war production, the running and maintenance of communications, distribution, etc. — (this includes merchant seamen engaged in the carriage of war supplies and justifies submarine warfare as such, though not necessarily sink at sight measures). Professor Stone considers (and it is certain that the *actual* bombing policy of all the major belligerents in World War II was based on this view) that the "work-force" must now be regarded as a legitimate object of attack *per se*. Here he differs in an important respect from Professor Lauterpacht, who considers that war workers should only be liable to attack while identified with — i.e. when actually *at* — the plant, railway yards, docks, etc., or on the ships, where they work, and not when "off-duty" — the attack on them being in fact incidental to the attack on the plant, etc. Professor Stone considers this view illusory. The proximity of workers' dwellings to their place of work would alone render it impracticable.[22] Moreover, if, as is very likely in the future, all war production went underground, attacks on the "work-force" when off duty would not only be the only means of attacking that force, but also the only means of putting the plant itself out of operation.

Professor Stone sees the remedy in some form of segregation of genuine civilians pure and simple (the aged, ill, children, etc.) under the guarantee and supervision of a Protecting Power, and points out that this was successfully done in China during the Sino-Japanese conflict in 1937-8, though the idea was rejected in World War II as liable to abuse.[23]

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[20] *Op.cit. Supra* n.4, at 368-9.

[21] The probable truth is that belligerents will never waste bombs, aircraft and valuable air personnel on *mere* terror-raids. The terror is incidental to or at the least combined with some more concrete objective.

[22] It has to be borne in mind that the very effectiveness of anti-aircraft and other defences has tended to force high flying attacks that must necessarily be directed against the *area* containing the plant, as the only way to reach the plant itself.

[23] While the evacuation policy followed by most belligerents in the War constituted an embryo step in this direction, it may be permitted to doubt if it could be pursued very far in practice. The "work-force" requires, in order to exist, a large body of non-industrial workers also living in the immediate vicinity. Short of organizing the existence of the work-force on a semi-military basis — with life in barracks, etc. and issues of army rations, it is difficult to see how this secondary body of workers and many of their dependents could be dispensed with.

Legality of the Atom Bomb. The foregoing observations suggest that, in the absence of international agreement to ban it, the atomic or nuclear weapon cannot be considered illegal in itself. This is broadly the view both of Professor Lauterpacht [23a] and of Professor Stone. Certainly it has not been treated or regarded as such by States, and if the considerations set out under the rubric "Forbidden Weapons" above are correct, the absence of any prohibition would seem to place the weapon in the category of the non-forbidden. Despite its affinities in certain respects with the gas weapon, it is too different in others to be susceptible of similar treatment; and whether it can be said to come within the category of weapons that "uselessly" aggravate suffering, according to the St. Petersburg Declaration of 1868, must depend on the view taken of the meaning of the word "uselessly". Certainly it is not a weapon the military value of which can be regarded as small or insufficient in relation to the suffering it causes. This problem can probably only be met by an international agreement.

The Illegality of War. All the above somewhat pessimistic reflexions lead on to the question of the whole status of war itself — for it is becoming increasingly clear that only by a total abolition of war — or a reduction of it to minor local hostilities — can any satisfactory remedy be found for a situation that has in many respects outrun the capacity of the laws of war to regulate (though it would be wrong to assume that in many fields these laws are not still capable of adequately governing the conduct of hostilities, and Professor Stone brings this out very clearly). It is therefore encouraging that our era has seen the re-emergence of the Grotian concept of the "just" as opposed to the "unjust" war — that aggressive war is no longer, as it was until a comparatively short time ago, nevertheless legal; and that on the contrary its planning and execution is now an international crime. Wars will not thereby automatically cease to occur — but, in such a climate of opinion, they will be rendered less likely.

Nevertheless, the fact that a war may be illegal can only have certain limited consequences as regards its *conduct*, though considerable consequences may ensue as to its after-effects. Professor Lauterpacht has convincingly demonstrated[24] that it is not a practicable proposition to deny to an "illegal" belligerent the benefit of the ordinary laws of combatant warfare in the field, the rules as to treatment of prisoners of war, and so on. Regulations of this sort are primarily for the benefit, not of States, but of individuals not directly responsible for the war. Moreover, the obvious ability of the aggressor to retaliate in kind renders it in the interest of all that these types of rules should continue to be observed on both sides.[25] On the other hand, there is room for discrimination against the aggressor State in other ways. Neutrals may not be bound to accord it full belligerent rights, or to observe towards it all the duties of neutrality, and may on the other hand be entitled to relax their neutrality in favour of the aggression-resisting States.[26] There may also be grounds for discriminating against an aggressor after the war is over, in a number of matters affecting title to property, liability for war damage, and so on.[27] It is perhaps one of the

[23a] *Op.cit. supra* n.4, at 369-370.

[24] Oppenheim, *International Law* (7 ed.) §61; and see the present reviewer's *Juridical Clauses of the Peace Treaties*, in Hague *Recueil des Cours*, 1949, at 9-12.

[25] In addition to these factors, it may often not be certain who the aggressor is, or this may be in dispute or genuinely in doubt, particularly where different sets of belligerents are involved or came in. It may only be possible to establish this finally much later. In the meantime, some rules must apply.

[26] On one view the status of neutrality would disappear, and only the faculty of non-participation in the actual hostilities would remain.

[27] See Lauterpacht, *Festschrift für Hans Kelsen (1953);* and the present reviewer's *Juridical Clauses of the Peace Treaties, loc.cit.* at 71-72. (But of course the war has to be won first!)

few criticisms that can be made of Professor Stone's book that he deals with these matters somewhat cursorily. Admittedly they open up a new, extensive and almost wholly unexplored field. On the other hand, in a valuable Chapter and two Discourses on that much neglected topic Belligerent Occupation of Enemy Territory, Professor Stone does go into the question how far the legality of a war affects the duties and rights of the occupant, and correspondingly those of the population towards the occupant — and concludes (rightly, in the present reviewer's opinion) that it has no effect and is irrelevant.[28]

Post-War Repatriation of Unwilling Prisoners. Professor Stone,, while recognizing the desirability of meeting the case of the *bona fide*[29] unwilling repatriate, and believing that the Prisoners of War Convention can be interpreted so as to permit of this, draws salutory attention to certain considerations that were apt to be overlooked in the heat of the Korean affair. It is not only the interests of the unwilling repatriate that have to be taken into account. Most prisoners earnestly desire repatriation, and they are usually greatly in the majority.[30] So important was it thought to safeguard their interests against possible misrepresentations or pressures on the part of the captor State, that no specific exception to the unconditional obligation to repatriate on the conclusion of hostilities was introduced into the Convention, and in addition a general clause was included according to which prisoners could not renounce their rights under the Convention.[31] An unqualified admission of a right not to repatriate unwilling prisoners might make heavy inroads on this position, and, as Professor Stone says, unless adequate safeguards can be devised, it may be necessary "to require even forcible repatriation of the few in order to ensure against fraudulent detention of the many".

In addition (though Professor Stone does not say very much about this), the prisoner's own State is concerned in the matter — and not merely for humanitarian reasons. The prisoner is still a member of the armed forces of his country, which has therefore an interest in recovering the use of his services. Unwillingness to be repatriated could easily become a means of desertion, or at any rate evasion of military service.[32]

VI.

The foregoing comments can, in the limited space of this review, give but little idea of the range and variety of the topics dealt with by Professor Stone, in which practically all the principal modern problems of international life and inter-State relations are considered in their appropriate legal setting.[33] Still less can it reflect the depth and fertility of the treatment given them. It must suffice

[28] The rules of belligerent occupation are partly for the benefit of the occupant, but partly and mainly (and in certain particularly important respects) for that of the population. It is obvious that an occupant State cannot be expected to carry out the duties if it is not entitled to the rights, and if the population are not bound by any duties towards it.

[29] It is necessary to make this reservation in order, for instance, to prevent the allegation of probable political persecution being made a pretext for evasion of the prisoner's military obligations to his own State.

[30] This has invariably been the position in the past. It might, however, be found in "ideological wars" that a majority of communist prisoners did not desire repatriation.

[31] In the Korean case, the necessary exception was regarded as implied, e.g. the ordinary concept of repatriation did not include repatriation by force; the provision was intended in the interests of the prisoner, and the opposite result would be produced if he were to be sent back to political persecution; the clause said "shall be *released* and repatriated", and if forcibly repatriated the prisoner would not be released, but would have to be kept under detention — and so on.

[32] The real test seems to be whether the prisoner can fairly be said to be in the position of a genuine refugee seeking political asylum.

[33] E.g., additionally to those discussed above, and without seeking to be exhaustive, the topics of arbitration and judicial settlement; the use (and avoidance) of the "double-veto"; Chinese representation in the United Nations; the domestic jurisdiction issue;

to say that this is a book that should be read by every student, and possessed by every practitioner in international law. The present writer will regard it as a valuable addition to his library — but it will seldom be "on the shelf"!

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ideological warfare, propaganda and broadcasting; the definition of aggression; guerilla and Home-Guard formations, underground workers, spies, saboteurs and civilian resistance generally, "non-belligerent volunteer" State forces; 'war zones' at sea and the destruction of merchantmen; problems of the termination of hostilities under modern conditions — and many others.