

# Public International Law

## Realism, Scepticism and the Future World Order: Some Thoughts on Julius Stone's Contribution to International Law

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"I ought, I suppose, to feel gratified as a serious student of the actual workings of international law, that so many themes first published years ago seem more pertinent today. Yet gratification has been chastened by the thought that, too often, what time has vindicated are my rejections of the optimism of some of my colleagues. What has proved right is my view that the plight of nations is too grave and retractable for rescue by facile legalism, well-intentioned verbal play, or sanguine dreams of an emergent world public order. Contrary assertions or assumptions dominated international law and relations for almost two decades after World War II. In the result I find myself lamenting, as a man, the fact that my judgments as a scholar have so soon proved to be so right."<sup>2</sup>

### INTRODUCTION

Julius Stone was Challis Professor of International Law and Jurisprudence in the University of Sydney for more than 30 years, from the time of his controversial appointment,<sup>3</sup> succeeding the first holder of the Chair, A.G. Charteris,<sup>4</sup> in 1942 until his "retirement" in 1973.<sup>5</sup> His years at

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<sup>2</sup> "Author's Preface" in J Stone, *Of Law and Nations. Between Power Politics and Human Hopes* (WS Hein, Buffalo, 1974) vii, viii (hereafter *Of Law and Nations*).

<sup>3</sup> On Stone's appointment and subsequent controversies see J Mackinolty, "Learned Practitioners" in J & J Mackinolty (eds), *A Century Down Town. Sydney University Law School's First Hundred Years* (Sydney, Sydney University Faculty of Law, 1991) 78-81.

<sup>4</sup> On Charteris see *id.*, 57, 58, 77-8. Charteris was not the first international lawyer to hold a chair in the Law School. The first Challis Professor of Law, Pitt Cobbett (1890-1909), is remembered for his *Leading Cases and Opinions in International Law* (1st edn, 1885). See JM Bennett, "Out of Nothing . . .", in *A Century Down Town* (1991) 29, 31-4.

<sup>5</sup> His "retirement" was merely technical. He became a Distinguished Visiting Professor at the newly established Faculty of Law at the University of New South Wales, as well as at Hastings Law School in California, and continued to write extensively almost until his death in 1985.

Sydney were productive and personally happy ones, and he is fondly remembered by many of his students. On the other hand, his relations with his professorial colleagues at Sydney were strained and difficult. He was "quarantined" in a separate Department, and largely excluded from the exercise of administrative power or influence within the Faculty. He lost internal debates on issues dear to him—the relocation of the Law School to the main University campus, for example.<sup>6</sup> I was neither a participant nor an observer of those disputes, which can now be left to lie undisturbed. Sufficient unto the day are the administration, and the personal and administrative disagreements, thereof. But Stone's contribution to international law is worth recalling and reassessing—because of its intrinsic interest and also because of its provenance.

As to its provenance, Chairs of the Law of Nature and Nations had been established in earlier centuries,<sup>7</sup> and many of the early classics of international law combined in their titles and their content the ideas of international law and legal theory.<sup>8</sup> But with international law increasingly seen as a separate ("positive") discipline or profession within the general field of law, and with the great increase in the materials of international law after 1900, the idea of a special linkage between international law and legal theory largely disappeared. Stone's was one of the few chairs, in the English-speaking world at least, to combine the two elements in its title, and he was almost unique among modern legal scholars in publishing major work in both international law and legal theory.<sup>9</sup> After his retirement the Challis Chair split into two, one in Jurisprudence and one in International Law, the latter located in the Department of Law.<sup>10</sup> Most would now think the combination of international law and jurisprudence no more (and no less) appropriate than the combination of jurisprudence with constitutional law or contract. On the other hand, international law does raise acute problems of legal theory, not limited to the hoary question whether it is "law properly so-called" (indeed that is perhaps the least interesting of the theoretical questions it raises). Nor has the growth in the materials, and in the "positive" character of international law since 1900, and especially since 1945, solved the

<sup>6</sup> A Faculty resolution to relocate to campus was rescinded, over his strong opposition, in 1967. In 1989 the Faculty again decided that a new Law School should be built on the campus. For an account of the internal controversies of the time, written by Stone's most vigorous opponent, see WL Morison, "Law School People 1941-1973", in *A Century Down Town* (1991) 105.

<sup>7</sup> In Anglophone universities there seem to have been three earlier chairs under this title: the Regius Chair of Public Law and the Law of Nature and Nations at Edinburgh (1707; first holder, Areskine; lapsed in 1831 but revived in 1862 with the appointment of Lorimer); the Chair of Jurisprudence and the Law of Nations at University College, London (1827, first holder, Austin); and the short-lived Chair of Jurisprudence and International Law at Trinity College, Dublin (1877, first holder, Leech). For a good review of the development of international law in English Universities during the 19th and early 20th centuries see DHN Johnson, "The English Tradition in International Law" (1962) 11 *ICLQ* 416.

<sup>8</sup> e.g. Pufendorf's *De Jure Naturae et Gentium Libri Octo* (1672).

<sup>9</sup> Myers McDougal and Georg Schwarzenberger are other examples. It should be noted that Stone's work was not even limited to these two fields. In his earlier years he wrote extensively on the law of evidence, and in 1991 the revision of a lengthy manuscript of his written at Harvard 40 years earlier was published: J Stone & WAN Wells, *Evidence. Its History and Policies* (Butterworths, Sydney, 1991).

<sup>10</sup> Because Stone's successor, DHN Johnson (1975-85) regarded international law as "law properly so-called", and therefore to be located in a Department of Law rather than of Jurisprudence.

theoretical problems. The old questions are still real questions, as Stone repeatedly emphasised,<sup>11</sup> although they may have to be answered now in a greatly altered context.

Stone's preoccupation with legal theory thus gave his international law writing an intrinsic interest going beyond the particular controversies to which much of that writing was devoted. For his work in international law was a *particular* kind of work—particular in that he concentrated on specific topics to the complete exclusion of others, particular in that his work was usually written, or at least inspired, by way of a critical commentary on ideas or actions with which he disagreed. He saw his own career, in the international law field, as that of “an articulate dissenter from positions taken by many colleagues”.<sup>12</sup> It is perhaps for that reason that some tended to regard him as primarily a legal theorist and only secondarily an international lawyer.<sup>13</sup>

But this is unfair. He wrote extensively on central topics of international law throughout his life, and his work reveals a consistent and distinctive trend or approach to the subject. That approach is in sharp contrast to what are presented as “progressive” or optimistic accounts of the world order problem and international law's role in it—accounts which have gained salience with the end of the Cold War, the reunification of Germany and the resurrection of the Security Council's effective authority over matters of international peace and security in at least one area of the Middle East. For this reason also it is instructive to review Stone's work, to see if his resigned self-congratulation “that my judgments as a scholar have so soon proved to be so right”<sup>14</sup> was not, after all, premature, an epiphenomenon of a Cold War now lost and won.

Having regard to the volume of his work, and in the space available here, it is not possible to give anything like a complete account of his contribution to international law. Instead I want to focus on three basic and to some extent related questions repeatedly addressed in his international law writings, and on which he held characteristically strong (and to some extent heterodox) views. These issues are, first, his approach to the regulation of the use of force by international law, in particular through his work on the definition of aggression and his approach to the problem of the validity of coerced treaties; secondly, his advocacy of a “sociological approach” to international law, and the purposes he saw the sociological approach as filling, and thirdly, his attitude (given his “realism” and apparent pessimism) to the future of the subject. Setting

<sup>11</sup> *Legal Controls of International Conflict* (1959) lv, referring to “the magic circle of the unsolved classical problems”.

<sup>12</sup> “Author's Preface” in *Of Law and Nations*, xi.

<sup>13</sup> Cf E McWhinney, “Sociological Jurisprudence and Julius Stone's International Law Thinking” (1986) 10 *Bull ASLP* 150, 151. The disjunction others perceived may have been behind Stone's wry comment about donning, in the alternative, “my jurisprudential hat or my publicist hat”: J Stone, *Visions of World Order. Between State Power and Human Justice* (John Hopkins, Baltimore, 1984) 13 (hereafter *Visions of World Order*).

<sup>14</sup> “Author's Preface” in *Of Law and Nations*, vii, viii.

himself resolutely against the more optimistic accounts of international law as effectively a "common law of mankind" (in Jenks' phrase), rejecting influential alternative approaches (such as Myers McDougal's), accepting Falk's critical diagnosis of the foundations of the subject but rejecting Falk's alternative prognosis, what was left?<sup>15</sup> How "realistic" or pessimistic could one be and yet stay in the game?

### STONE'S APPROACH TO INTERNATIONAL LAW AND THE REGULATION OF FORCE

Stone's first major post-war work in international law was his magnum opus, *Legal Controls of International Conflict*.<sup>16</sup> In some ways a textbook *manqué*, *Legal Controls* is a massive review of the history and present status of international law rules and institutions relevant to the settlement of conflict, especially armed conflict. Its characteristic themes include the following:<sup>17</sup>

- (1) Grave scepticism as to whether apparent changes in the international law of armed conflict, especially those introduced by the Charter, have brought about any real or effective change in international law.
- (2) An enlarged view of the right of self-defence, extending well beyond self-defence against armed attack, and a willingness to analogise from self-defence to other "inherent" rights of States to use force to defend their essential interests.
- (3) Emphasis on the doubts and uncertainties surrounding the Charter provisions, so that the "penumbra" of uncertainty tends to overwhelm any fixed core of meaning. One consequence is that the pre-existing law, which (in his view) reserved to States some ultimate right to judge the occasions for the use of force in international relations, survives.
- (4) Rejection of municipal law analogies, and in particular of municipal law analogies in the field of the use of force. The problem with such analogies is that they fail to take into account the lack of authoritative decision-making bodies (especially judicial agencies) at the international level, and are therefore a recipe for the absolute priority of a certain form of "order" (the absence of transboundary aggressive force) over international justice or the rights of States. A proper theory of self-defence could not stand alone, a solitary police officer maintaining an uneasy peace. It would require a full theory of the rights of States, rights which may sometimes need to be vindicated

<sup>15</sup> See esp *Visions of World Order*, chs 3-5.

<sup>16</sup> *Legal Controls of International Conflict. A Treatise on the Dynamics of Disputes- and War-Law* (London, Stevens, 1954, hereafter *Legal Controls*); a "second impression", revised with supplement, appeared in 1959. For a sympathetic contemporary appraisal see G Fitzmaurice, "Inter Arma Silent Leges" (1955) 1 *Sydney LR* 332.

<sup>17</sup> Röling, in a perceptive and sympathetic critique of Stone's work in this field, saw some softening, if not modification in his later position: BVA Röling, "On the Prohibition of the Use of Force", in AR Blackshield (ed), *Legal Change. Essays in Honour of Julius Stone* (Butterworths, Sydney, 1983) 274, 278-83. If there was any softening, it was, I think, merely verbal.

by force if all other means have been exhausted. If analogies are to be sought, they are to be found more in the United States Supreme Court's approach to due process. The rules dealing with the use of force at the international level are in a sense procedures for approximating to substantive justice rather than barriers in the way of certain kinds of action whatever the consequences:

As with the lack of "due process" so with aggression, there is no . . . easy escape from the duty of seeking just solutions; and the search for such solutions necessarily requires us to consider the full complexity of the situation which is to be judged.<sup>18</sup>

- (5) A radical uncertainty, and corresponding subjectivity, about the rules relating to the use of force. International law cannot determine these matters completely and automatically. In default there is no alternative but to resign them to the workings of power politics and the decisions of affected States.
- (6) Preference for "the law in action" over the "law in the books", for "operative norms as distinct from mere verbal formulations".<sup>19</sup> This was also a characteristic Stone theme in his legal theory, with obvious resonance to the work of the American realists. But in this field the "law in action" was represented by the lack of agreement on common rules, the reality of conflict and the threat or assertion of the right to use force in defence of rights or vital interests.<sup>20</sup>
- (7) At a basic level, the assertion that peace and justice are interdependent, and an accompanying refusal to accept that the international community can have agreed, in Article 2 of the Charter or in any other way, to postpone one value to the other.

Again it is not possible to canvass all the issues raised by *Legal Controls* or by his later work in the same vein: these have in any event been discussed in detail elsewhere.<sup>21</sup> Instead I will take two issues, both given extensive and repeated treatment by Stone, as representative of his broader position. These are the question of the definition of aggression, and the issue of the validity of coerced treaties.

The definition of aggression as an international wrong and as a basis for international action by bodies such as the Security Council had long been pursued. It had been an issue in the inter-war period, and remained so under the Charter. Stone himself pursued it, in a "Discourse" in *Legal Controls*<sup>22</sup> and in much later work. His essential theme was that the search for definitions was futile, even counter-productive:

<sup>18</sup> J Stone, *Aggression and World Order. A Critique of United Nations Theories of Aggression* (Sydney, Maitland Publications, 1958), 132 (hereafter *Aggression and World Order*).

<sup>19</sup> *Visions of World Order*, 4.

<sup>20</sup> *Legal Controls*, 64, cited by McWhinney (1955) 64 *Yale LJ* 959, 963.

<sup>21</sup> See e.g. I Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963). For Stone's caustic review of Brownlie see (1965) 59 *AJIL* 396; and see also Stone, *Of Law and Nations* 20-2.

<sup>22</sup> *Legal Controls*, Discourse 17.

While "aggression", in the literal psychological sense, would ordinarily be unjust by any criterion, it is not equally the case that what is not aggression in the literal sense is necessarily just. There is concealed, therefore, in this metaphorical use of the term, all the doubts and disputations surrounding the ideal of justice. And an attempt to confine its application to international law within the confines of any short verbal formula is bound to fail . . . [But] even if . . . adequate concrete precepts could in theory be devised stereotyping exhaustively the aggressive situations, the wisdom of doing so would be questionable . . . [T]o seek to define with authority, and once for all, the concrete aggression situations would be but to invite future aggressors to devise new means of imposing their will on others by force or fraud.<sup>23</sup>

But there were problems with the view that definitions, while logically possible, were diplomatically and politically unnecessary. That implied, as Leo Gross pointed out, an "intuitive" concept of aggression, one which was inclined to falter if personal affiliations or allegiances were present to cloud the issue.<sup>24</sup> Indeed in Stone's case the influence of the Suez crisis loomed over his subsequent discussions, especially in *Aggression and World Order*, as some critics noted.<sup>25</sup>

It was also doubtful whether the search for a comprehensive definition of aggression was central to the international effort to restrain conflict, however much it may have occupied particular United Nations committees.<sup>26</sup> It is true that the United Nations did eventually produce a definition of aggression, in General Assembly Resolution 3314(XXIX) of 14 December 1974. That resolution was produced at the height of the "North-South" confrontation, and with no end yet in sight to the Cold War. Predictably enough it resolved few of the unanswered questions, although it seemed to support Stone's general approach to some limited extent by contemplating that anticipatory self-defence might be lawful in some circumstances.<sup>27</sup> Stone made a microscopic and highly critical examination of the Definition.<sup>28</sup> Referring for example to the provisions

<sup>23</sup> *Legal Controls*, 330-1.

<sup>24</sup> L Gross, Book Review (1958) 34 *BYIL* 421, 424.

<sup>25</sup> e.g. CT Oliver, (1959) 108 *U Pa LR* 279; JR Pennock, (1958) 68 *Yale LJ* 387, 392.

<sup>26</sup> Oliver, 280 ("the exercise of drafting definitions of aggression is considerably outside the main stream of the interests and the preoccupations of states when dealing with each other through international organizations"). GG Fitzmaurice described the definitional exercise as "tattered": "*Inter Arma Silent Definitiones*" (1959) 3 *Sydney LR* 71, 75.

<sup>27</sup> On anticipatory self-defence, Article 2 of the Definition stated that:

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

At one level this left open the question entirely, since it did not determine when (if ever) the first use of armed force would contravene the Charter. At another level it suggested that a first use of force could sometimes be acceptable, but the only instance suggested was that of minor border violations, which again is beside the present point.

<sup>28</sup> J Stone, *Conflict through Consensus. United Nations Approaches to Aggression* (Sydney, Maitland Publications, 1977) (hereafter *Conflict through Consensus*).

of the Definition which deal with the relationship between self-determination and the use of force, he commented that:

The tangled interrelations between the provisions [of the Definition], the ambiguities, indeterminacies, and conflicts among their terms, and the doubts as to what legal force some of [those provisions] had, present an exquisite example of how conflict can be consummated in consensus. Nor, in view of the central place of abusive exploitation of the right of self-determination by third States as part of the techniques of indirect aggression since World War II, should this occasion any surprise.<sup>29</sup>

Many of his particular comments on the Definition were well taken; some were unanswerable. But there was in the whole enterprise an element of over-reaction. The Definition could not, and did not purport to, affect the Charter rules about the use of force. It was both a vehicle for and a source of argument, but one with only as much salience or legitimacy as it would be accorded in subsequent practice. The general Western approach to such exercises was to seek to limit the damage they could do, to insert necessary qualifications and to walk away in the belief (not, of course, necessarily justified) that no lasting harm had been done. The high level of attention, and dissent, Stone had levelled at the Declaration might have been thought to undercut that approach, and to invest the Declaration with more significance than it might otherwise have. It might also have been said that the tendency of the Definition to incorporate elements of substantive justice (especially in the context of the right to self-determination) was simply an application—no doubt unwelcome—of Stone's own approach that substantive rights and international order are intrinsically connected. The game of giving priority to (specified or unspecified) substantive rights can be played by others!<sup>30</sup>

But the most fundamental problem was the role intended to be played by the concept of "aggression", however defined. The Security Council's powers under Chapter VII of the Charter are not limited to acts of aggression: they extend also to threats to or breaches of the peace (Article 39). Nor are the prohibitions in the Charter on the use of force by States expressed in terms of "aggression". States are prohibited from using armed force against other States in most circumstances, subject to their inherent right of individual or collective self-defence against an armed attack (Articles 2(4), 51). It is true that one of the Nuremberg charges (not the happiest one) related to the waging of aggressive war,<sup>31</sup> and proposals continue to be made for a crime of "aggression" to be included in an international code of war crimes. But the general international law rules relating to the use of force nowhere rely on aggression as a determining

<sup>29</sup> *Conflict through Consensus*, 71.

<sup>30</sup> And of the controversial "reservation" in relation to intervention in aid of self-determination in the International Court's judgment in the *Nicaragua Case (Merits)* ICJ Rep 1986 p.14, 108; cf *id.*, 350-2 (Judge Schwebel, dissenting).

<sup>31</sup> Cf *Legal Controls*, Discourse 16, 324-9.

concept. No doubt some of Stone's objections to a United Nations definition (inevitably a consensus definition) of aggression would apply equally to attempts to define the terms used in Articles 2(4) and 51. But such attempts would at least have the advantage of being directed at provisions directly applicable to the relations between States under the Charter, independently of Security Council decision or intervention.

The point is obvious enough, and has been often enough made.<sup>32</sup> It is interesting to speculate why Stone nonetheless devoted so much of his attention to the definition of aggression. No doubt it gave an opportunity to criticise that vulnerable body, the General Assembly, for being "reckless of legalities" and for "intellectual regression".<sup>33</sup> More fundamental perhaps was an awareness that the Assembly, by moving (or appearing to move) away from the Charter text, was in one sense endorsing Stone's own direction. For him the problem was not the move but the form it took. If this was so, it was precisely the reason why most international lawyers saw the definition of aggression as a side-road that attracted Stone to it. To him the central issue was one of justice, which orthodox exegesis of Charter prohibitions tended to by-pass.

A second illustration of Stone's individualistic approach to issues relating to the use of force was the question of the validity of coerced treaties. Again that might not be thought to be a vital issue, given the relative infrequency with which it has arisen and the general consensus of the issue, at least since Article 52 of the Vienna Convention on the Law of Treaties declared that treaties procured by a threat or use of force contrary to the United Nations Charter were indeed void.<sup>34</sup> But like the issue of the definition of aggression, this raised for Stone fundamental theoretical questions about the status and structure of international law.<sup>35</sup>

As so often, Stone began from the "classical", that is to say the 19th century, position. This was stated in the following memorable passage:

Customary international law differs from municipal law at least in this. It provides for its own destruction by the mere force of its own subjects. By dint of its tolerance of war, the blank left for war-like solutions, the title attributed to conquest, and to the validity of treaties imposed on the vanquished, a single state could conceivably impose its legal authority upon all other states,

<sup>32</sup> e.g. LB Sohn, "The Definition of Aggression" (1959) 45 *Virginia LR* 697, 701.

<sup>33</sup> *Conflict through Consensus*, 37-8, 43.

<sup>34</sup> A proposition the International Court had no difficulty in accepting in the *Icelandic Fisheries Case* ICJ Rep 1973 p.1, 15.

<sup>35</sup> The issue was only briefly addressed in *Legal Controls*, 640-1, but it was taken up at some length in 1956, where the validity of international treaties imposed under duress was stated to be a matter of "crucial importance": J Stone, "Problems Confronting Sociological Enquiries Concerning International Law" (1956) 89 *Receuil des cours* 132-3 (hereafter "Sociological Enquiries"). Subsequent treatments (with minor variations in expression and emphasis) were "Approaches to the Notion of International Justice" in RA Falk & CE Black, *The Future of the International Legal Order: Retrospect and Prospect* (Princeton, Princeton UP, 1969) vol 1, 372, 382-401; and "De Victoribus Victis: or How to Defeat Victors" in *Of Law and Nations*, 231-51.



substituting subordination to its own global authority for the existing relations of co-ordination. And what goes conceivably for the subversion of the whole legal order, goes in constant practice for the subversion of particular norms and the creation of particular norms. All the customary legal attributes of Statehood can be successfully overridden by imposed treaty after a *successful* resort to war. The crucial importance of the validity of international treaties imposed under duress is insufficiently observed . . . [P]recisely through its recognition of title by conquest and of the validity of imposed treaties, international law *legalises* that transformation and destruction which in municipal systems can normally arise only from legal revolution.<sup>36</sup>

This was the established 19th century position and the question was: what were the implications of the adoption of Charter rules prohibiting the use of force except in limited circumstances? It was logically possible that international law might deplore the offence but allow the offender to escape with the fruits of victory. But that was always a rather unlikely outcome, given that the struggle to limit aggression during the 1930s had been aimed precisely at preventing aggressors from consolidating their title (e.g. in Manchuria and Abyssinia), and the temporary failure of that attempt was in the circumstances no deterrent to the fresh start most thought had been made with the United Nations Charter and the post-1945 settlement. Thus the inference that treaties coerced by an unlawful use of force were void was drawn by the International Law Commission, after lengthy discussion and some changes of course, in its work for Draft Articles on the Law of Treaties.<sup>37</sup>

By contrast, Stone approached the issue in almost apocalyptic terms:

In substance, even if a legal rule squarely denied [the victor's] rights under the peace treaty, he would still continue to enjoy the fruits. But the story would not end there. For, while such a last-ditch legal rule would not do much for the victor or relieve the victim, it might produce dramatic and perhaps disastrous affects for the whole international legal order . . . Since, during the last two generations, many States and areas of the world have become involved in such forcible changes, international law might find itself in the position of abdicating its reign at a particular time over a substantial number of the States and peoples of the world—all this without achieving the objective of really depriving the "aggressors" of the fruits of their victories . . . For international law . . . there is really no alternative to accommodation with the victor in his terms for the vanquished. Since the victor can have whatever his power (tempered by his conscience) gives him, the effect of international law's refusing

<sup>36</sup> "Sociological Enquiries", 132-3 (emphasis in original).

<sup>37</sup> For Stone's account of the stages of the ILC's work see *Of Law and Nations*, 235-47.

limited accommodation will be but to the destroy in whole or in part the international legal order generally.<sup>38</sup>

But it is a curious "reign" which concedes to a wrong-doing State the capacity to change the law by a coerced treaty, especially in the bilateral situation: The weapon of non-recognition of the consequences of illegal action (including treaties) may not mean a great deal in the struggle for some version of the rule of law in a decentralised system, but it is something.

Moreover if the system is ever going to begin to generate worthwhile results in terms of limiting state power, it is the *first* thing. If a treaty produced by an illegal use of force is valid, then it is valid not merely as against the defeated state but, in the sense of producing an opposable situation, as against the world.<sup>39</sup> Taking only the situation of the defeated State, there would be no basis in the law of treaties for that State denouncing the treaty once the power relations of the parties (or the capacity or will of the victor) had changed. It is true that Stone suggested that an imposed treaty would be valid "until there is sufficient change in the relevant power relations to bring about a denunciation or renegotiation".<sup>40</sup> But apart from voluntary renegotiation (which may or may not be achievable without further conflict) it is not a basis for the denunciation or subsequent termination of a treaty that the power relations between the parties, on the basis of which the treaty was in fact entered into, have changed. The rule relating to fundamental change of circumstances, especially as contained in the Vienna Convention, is much more limited than that.<sup>41</sup>

Thus although Stone criticised the invalidity rule in Article 52 for producing radical instability in treaties, his own doctrine, given the pressure it would create for a much broader *rebus sic stantibus* doctrine,<sup>42</sup> would tend to produce its own instability—an instability not necessarily limited to situations involving unlawful use of force.

Moreover Stone's whole discussion overlooked the reality that in major situations of conflict, two parties are rarely left alone to resolve their differences under the circumstances of modern international relations. Invariably third parties (the Security Council, regional organisations or individual States) get involved, and their involvement is itself, in many cases, likely to displace the operation of Article 52. Stone was concerned that Article 52 would tend to prevent the satisfactory resolution of conflict on a bilateral basis, but it is most unlikely that bilateral conflict involving

<sup>38</sup> *Of Law and Nations*, 233-5.

<sup>39</sup> It is true that a treaty as such does not bind third States: Vienna Convention on the Law of Treaties, Arts 34-5. But third States are required to respect the consequences of treaties lawfully entered into by the parties on a bilateral basis and operating within the sphere of their own rights. Moreover the effect of coerced peace treaties is normally to create territorial changes which, if they affect only the territory of the parties, are opposable to third States.

<sup>40</sup> *Of Law and Nations*, 250.

<sup>41</sup> See Vienna Convention on the Law of Treaties, Art 62.

<sup>42</sup> Traces of which did indeed exist in 19th century international law, but which is significantly narrower in modern practice.

the use of major force can be satisfactorily resolved bilaterally, other than on the basis of a return to the *status quo ante* (in which case no question of coercion would arise). Stone commented that, in the case of . . .

treaties emerging after armed struggles in which it is the vanquished rather than the victor state which unlawfully resorted to force, Article 52 would be likely to create additional psychological obstacles to the achievement of a just and stable settlement. Since its applicability to a given situation is left to each state's unilateral appreciation, the delinquent and now vanquished state would undoubtedly seek to use it to justify renewed designs for another round of unlawful resort to force, instead of sincerely searching for a basis of settlement by negotiation.<sup>43</sup>

Like other passages in Stone's work, the passage has undertones of the Middle East conflict, but it is inconceivable that that conflict—whether or not it can be settled bilaterally—could be settled by bilateral “peace treaties” coerced by an unlawful use of force.<sup>44</sup> As with the definition of aggression (if for different reasons), one wonders whether the game was worth the candle.

#### “SOCIOLOGICAL ENQUIRIES” AND INTERNATIONAL LAW

A persistent theme of Stone's, developed for example in his 1956 Hague lectures,<sup>45</sup> was of the need for a “sociological” perspective on, and for sociological enquiries concerning, international law. Obviously this related closely to his assimilation of American realism, and especially the work of Roscoe Pound. But as in relation to the regulation of the use of force by States, his thought here involved an apparent impasse. On the one hand, sociological enquiry was vital and necessary; on the other it was, at least in relation to those fundamental issues which stood in the way of progress towards a new order or vision, impossible.

It was vital and necessary for several reasons. Sociological enquiry was a crucial validating tool, a basis for “checking” the claims of international law as an operative order (or else as a set of operative fragments operating within the same general field) against the reality of the values and demands both of States and of the people who constitute States. It was particularly important in counteracting the pervasive tendency to rely on analogies from municipal law in determining the content or direction of international law: such municipal analogies were presumptively invalid, in the absence of confirmatory “sociological inquiries”.<sup>46</sup>

<sup>43</sup> *Of Law and Nations*, 251.

<sup>44</sup> Another curiosity in Stone's treatment is his failure to allow that the consequences of unlawful conduct can, over time, be resolved by other means, including acquiescence or estoppel, and that in the meantime certain forms of dealing with any legal occupant are permitted, especially those with a humanitarian justification: see e.g. *Namibia Opinion* ICJ Rep 1971 p.6.

<sup>45</sup> “Sociological Enquiries”, 61.

<sup>46</sup> “Sociological Enquiries”, 183.

But there were as many difficulties in the path of sociological enquiry in relation to fundamental aspects of international law as a system as there were compelling reasons to engage in it:

Insofar . . . as international law proceeds finally on a long-term consensus (and therefore compromise) between the policies of many states (not to mention other actors), its content at any particular moment would not correspond to the claims, aspirations, and expectations of the respective bodies of citizens even if the policies of each state had initially corresponded perfectly with the claims, aspirations, and expectations of its citizens. Unless it were to renounce the effort to understand the relations of this law to the lives of individual human beings, a sociology of international law would have to inquire into the component elements of this double compromise: between the state apparatus and its human constituents internally and between states *inter se* internationally. Such an enquiry, even without the blocking, distorting and stereotyping activities of state entities, would be rather intractable. In the presence of those activities such an enquiry is virtually senseless.<sup>47</sup>

It followed, apparently, that a sociology of international law . . .

must, for the time being, renounce any tasks involving the explanation of the contents, or of the phases of stability, change and breakdown, of international law in terms of the claims, aspirations, and expectations of the human beings generally who make up the various state communities.<sup>48</sup>

It may have been this curious paradox, the paradox of a crucial and impossible test, that gave Stone's account such a preliminary, even frustrating, quality—an enquiry into the possibility of enquiry,<sup>49</sup> but without any demonstration of that possibility by actually carrying out a sociological investigation into world order issues.<sup>50</sup>

Another oddity here is the idea that a sociological enquiry into any field of human activity—including international law—could be impossible. A sociological enquiry is, presumably, an enquiry into certain states of human affairs as a matter of fact, contrasted or perhaps illuminated by an account of the attitude of the people concerned to their own words and actions. No doubt with such a diffuse and widespread activity as

<sup>47</sup> *Visions of World Order*, 42. Cf. "Sociological Enquiries" 140.

<sup>48</sup> *Visions of World Order*, 42. Cf. "Sociological Enquiries" 140-1.

<sup>49</sup> "Sociological Enquiries" 73-4.

<sup>50</sup> In a similar way Stone thought that international relations could only be understood by examining the . . .

various degrees of reciprocating determination between State policy and human claims and attitudes; that degree will vary from State to State, and will often present extraordinary complexities within a single State. The ascertainment of that degree *in every case and at each relevant moment* is an indispensable preliminary to any fundamental study of international politics.

"Sociological Enquiries", 140 (emphasis added). He added that "it is probably the impossibility of the task that underlies many doubts as to the standing of that discipline" (*ibid*) (a footnote not repeated in *Visions of World Order*, 42).

international law an enquiry of this kind might be difficult to conduct. Many of the decision-makers are likely to be inaccessible, or uncommunicative. Their professions of allegiance to international law might be false, or partial—or, even if sincere, the product of a false consciousness. But this is true, to a greater or lesser extent, of many other areas of sociological enquiry—of the sociology of the family, for example. Why should international relations be peculiarly open to the possibility that a sociological enquiry is “impossible”?

One reason, much reflected on, was the idea that the defects and obstacles to human communication in the modern world are such that a true system of international law is as impossible as “a full scale sociological approach to international law in its general range”.<sup>51</sup> His works are replete with references to “the blockage and distortion of relations and communications between human beings across frontiers which... is the threshold barrier to a full sociology of international law”,<sup>52</sup> to “the parlous state of communications across state frontiers and the related operations of the state entity in inhibiting, molding, and distorting the formation and articulation of human claims, aspirations, and expectations, as well as the transmission and reception of communications”.<sup>53</sup> True, new technologies have improved the quantity of transboundary communications, and expanded the possibility of people escaping from state control of media and communications. But, he thought, these possibilities were overshadowed by the increased technological capacity of the State to control and prevent free contact and communication, especially at the international level.

The result was peculiarly fatal to any fundamental sociological enquiry:

No doubt, we cleave desperately to the hope that the state entity as an insulating and distorting agent in the channels of human communication will stop short of bringing total collapse of communication across frontiers and total inaccessibility of human minds to objective inquiries. Yet, paradoxically, we also assume that state entities will continue, to a degree, their separate ways. There is also a consequential paradox. So far as the factor of communication is concerned, the best condition for the growth of a body of sociological knowledge concerning international law would be either global political anarchy, where there is no *étatisme* of any sort, or a world state. Yet, of course, in either of these two cases, international law as we know it would disappear, and together with it the need for the instant kind of sociological inquiries.<sup>54</sup>

<sup>51</sup> “Sociological Enquiries” 74.

<sup>52</sup> *Visions of World Order*, 12.

<sup>53</sup> *Visions of World Order*, 41.

<sup>54</sup> *Visions of World Order*, 42.

These views about the effect on human communication of developments in technology and administration were by no means new, as some reviewers noted.<sup>55</sup> During the 1930s George Orwell, for one, had made the point that improved technologies of communication increased the State's power to control and limit communication. But in the end the point now seems overdone, restated to the point of dogma. It is true that many States have sought to achieve what Stone often described as "the nationalization of truth".<sup>56</sup> But ultimately these attempts have only been partially successful. There is a greater degree of communication of people, in whatever capacity, between countries, and there is—however uneven and imperfect—a common interest and shared concern in the continuation of those communications, and of such common resources as the environment. Admittedly there are "few signs of any tendency for sovereign states and their apparatus of coercion to disappear".<sup>57</sup> But international law—which has the function at least of registering and facilitating changes in the international system, if it does not create or cause them—can contribute to the breaking down of barriers, does not have to be static pending revolutionary change from outside. It is, or can be, *temperamenta pacis* as well as *temperamenta belli*.<sup>58</sup> And it need not have as part of its ground-plan the movement to a world State.

For Stone, however, it was not possible to answer certain ultimate questions, in the present state of affairs. These were, in particular, the questions about human needs and values which he thought had to be answered before one could validate or sustain alternative "homocentric" visions of world order, and corresponding visions of the role of international law as a facilitator of a new order. "To allow [any] Great Vision to control present thought or determine present objectives would be to divert attention from the less exciting but more promising tasks that lie to hand."<sup>59</sup>

In the absence of good answers to these questions (producing answers being for the time being a functional impossibility), the sociologist of international law was left to perform more humble, though still important tasks. In particular, because the essential basis for international law in its "pre-visionary", realist condition was the principle of effectiveness, sociologists of international law should check whether particular rules did reflect the reality of the perceptions and values of state officials, the primary actors.<sup>60</sup> Reflecting a dynamic sociology, the focus in particular should be on rules affected by impending or actual change or breakdown,<sup>61</sup> on the impact on State actors of the operation of specialized international

<sup>55</sup> NH Alford (1955) 41 *Virginia LR* 283, 285.

<sup>56</sup> e.g. *Visions of World Order*, 24, 36.

<sup>57</sup> *Visions of World Order*, 13.

<sup>58</sup> An area where international law has played a role, along with other factors and forces, is that of human rights. The only textual reference to international human rights, in *Visions of World Order*, is a rather disparaging reference to Jenks' reliance on it as one of the factors of change: id., 17.

<sup>59</sup> "Sociological Enquiries", 138-9.

<sup>60</sup> See his formidable list of questions to be asked at the "operational level of international law rules": "Sociological Enquiries", 141-3.

<sup>61</sup> "Sociological Enquiries", 145-9.

agencies,<sup>62</sup> and on intensive studies of the social, political and economic context of particular international law rules of the 19th century.<sup>63</sup> (Although he did not say this, the latter would, presumably, show not how much but how little the international system has really changed.) And although these were more modest aims, they still required formidable qualifications and energy,<sup>64</sup> so formidable that Stone doubted "whether even the most ingenious division of the most competent scholarly talents is equal to the tasks involved".<sup>65</sup> So there was enough to be getting on with!

It is not necessary to accept Stone's rejection of "visionary" versions of modern international law to see how useful a sociological approach would be. It is still a standard fault in legal scholarship to gloss over the real effects of the "law in the books", to leave fact finding to others, to assume that the task is done once the latest case or text has been analysed. This is true of international no less than national scholarship, although given the difficulty of the task and of access to the relevant materials, perhaps with greater excuse. In pointing the way, Stone was performing an important service—although he made the task sound so difficult that it is perhaps not surprising that so few have followed. One may doubt that these inquiries would make international law a more "scientific" discipline—that being a matter of epistemology rather than sociology—but it would certainly make it a more informed one.

#### THE FUTURE OF INTERNATIONAL LAW: BRIDLED PESSIMISM?

As even this brief account reflects, Stone's work was distinctive, addressing real and difficult issues with a characteristic blend of scepticism and fervour, with erudition and an occasional brilliant phrase—his "enclaves of justice", for example.<sup>66</sup> It is true that the impression he sometimes gave, the impression others certainly had of him, was of a secondary student of the subject, someone who dealt rather in generalities, who failed to convey what it feels like to be involved in particular issues of international law—rather like a botanist surveying the foliage from a helicopter, urging his colleagues on to greater efforts, while taking minute care to criticise the advances they thought they had already made!

Moreover the impression sometimes left by his work was of a sort of "*blocage défonctionnel*", since the conditions he required for progress in the subject were so stringent as virtually to assure that progress could

<sup>62</sup> "Sociological Enquiries", 149-51.

<sup>63</sup> "Sociological Enquiries", 151-4.

<sup>64</sup> "Sociological Enquiries", 158-74.

<sup>65</sup> "Sociological Enquiries", 173.

<sup>66</sup> I cannot resist mentioning also his occasional obscurity. "Sociological Enquiries", 116 contains both the commandment "to make the results of each scholar's inquiries communicable to others" and the following (unrelated) footnote:

This "positivity" may also be expressed as a complex unity of the foregoing ontic and eidetic aspects, as the *concretum* emerging from their unity.

never be made.<sup>67</sup> Examples include his insistence on the validity of coerced treaties (and of the effects such treaties would produce), or his agenda and qualifications for the conduct of sociological enquiries into international law. On the other hand he did articulate clearly, and face directly, a "deep sense of dissatisfaction . . . with the ever-widening incongruity between international law . . . and the actual conduct of interstate relations".<sup>68</sup> That sense of dissatisfaction is widely felt even amongst those who understand and accept that international law rarely operates in the manner of an effectively centralized national legal system. It is a dissatisfaction that cannot simply be wished away—as Stone thought Jenks and Lauterpacht sought to do—or hypothesised away, as he thought McDougal and Falk sought to do.

In reading Stone one is left—characteristically—with a paradox.<sup>69</sup> On the one hand, reductivism can be pushed too far. It is all very well to say that Stone's "special achievement... was all along to see through this smoke-screen of treaties and legal language, and yet not to become a mere advocate of cynical power-wielding".<sup>70</sup> But if "treaties and legal language" are merely a smoke-screen, then the reality that is observed is not a legal one, and the vocation or profession of international law is negated.<sup>71</sup> If this is the reality, then the sooner it is faced the better. It is true that there may be other alternatives than to become an "advocate of cynical power-wielding": one can, for example, aspire to sainthood, to denial of the world, or to direct political action. But Stone's authority was not that of the saint, the ascetic, or the politician. It was that of the legal theorist, no doubt, but also of the professional international lawyer, one not concerned to avoid treading on others' toes but genuinely concerned to avoid cutting the ground from under his own feet.

His fundamental problem was in perceiving how international law could be other than a reflection of power relations between sovereign states retaining inherent powers of action *contra legem*, unless it could really reflect and harness the values and wishes of human beings by a form of direct connection, by-passing the State to that extent. Hence his attraction for Richard Falk's work (despite the many other disagreements there must have been between them). But his problem with Falk's vision was in seeing how, in the real world of international relations, human

<sup>67</sup> cf FA Mann's query, in relation to *Legal Controls*: "what permanent and constructive benefit international law can derive from a book which, while it is written with an obvious sense of responsibility, discloses a measure of impatience that is not really merited and in any event constitutes a source of danger... Even assuming that [his] strictures are well founded, is it not the lawyer's task to develop rather than destroy?" (1954) 17 *Modern LR* 882, 583.

<sup>68</sup> *Legal Controls*, viii.

<sup>69</sup> Cf Ferencz (1985) 79 *AJIL* 1084, 1086.

<sup>70</sup> R Falk, "On the Recent Further Decline in International Law", in AR Blackshield (ed), *Legal Change. Essays in Honour of Julius Stone* (Butterworths, Sydney, 1983) 264, 265.

<sup>71</sup> This nihilistic implication was accepted by some at least of his readers: e.g. EE Harris, (1955) 72 *S Af LJ* 105, 109, who concludes that the value of studying the legal controls of international conflict, as emphasized by Stone, lies "more in the emphasis it puts upon the impossibility of maintaining peace, or mitigating the efforts of war by means of international law, than in any hope that these results will be effected by it".



values could be incorporated, or how scholars could know, by sociological checking, that this had truly occurred. He was prepared to accept that some movement of this sort might be occurring, but was not prepared to accept facile assumptions as a foundation for an expanded rule of law. As he said:

This ambivalence between the "state entity" and "human" frameworks in conceptualising *international justice* has its technical legal parallel in our chronic arguments as to whether, and if so in what respects and to what extent, individuals as well as states are bearers of rights and duties under international law. Even if, conservatively, we exclude any direct legal personality of individuals under this law, the vigorous growth of the opposed standpoint cannot be ignored. For it imports at least the thesis . . . that justice in the international sphere requires that international law should be changed so as to assure that just benefits and burdens lie directly on human beings—and perhaps, indeed, that the legal personality of the state entity be seen as merely instrumental to this assurance. What is most troublesome concerning this ambivalence is not the duality of focus, but the absence of sustained efforts to draw some objective line between the occasions when one or the other is to be appealed to. For the main point, that neither can serve as an *exclusive* basis of present thinking about international justice, does not exclude the possibility that each of them may, within some ascertainable limits, provide at least some practical bases of judgement. It is probable . . . that some coordinate operation of both, each in a delimited sphere, is the best we can hope for for the foreseeable future.<sup>72</sup>

The positive was precarious, then, but it was present. His teaching was not confined to "elegiac regret that the historic and pragmatic lessons of the League experience had not, after all, been learned".<sup>73</sup> Whatever my disagreements with him (and I have not tried to hide them), he was a scholar of high purpose, asking fundamental and uncomfortable questions. Far from taking refuge in doctrine, he sought "to integrate with the literary systematics and social statics of international law, a coherent examination of the unstable dynamics of its operation in a world of travail".<sup>74</sup> Without an act of faith, one cannot claim that the world travails to perfection. But it needs little faith to grasp the present need for better cooperation in communication between peoples and in the management of human affairs. Barriers to such communication and such management have to be faced, and they are, as he saw, primarily sociological and political rather than legal. The effort to overcome those barriers requires first that we understand them, and this was both his major emphasis and his major contribution. Always a teacher, he asked real questions, questions to be ignored, even now, at our peril.

<sup>72</sup> "Approaches to the Notion of International Justice", 436-7 (emphasis in original).

<sup>73</sup> Röling (1983) 278.

<sup>74</sup> *Legal Controls*, ix.