

COMMENT

INTER ARMA SILENT DEFINITIONES

Under the title "*Inter Arma silent leges*" this writer had, some years ago, the pleasure of reviewing an earlier book by Professor Julius Stone.¹ In his latest book Professor Stone has himself used the variation of this maxim which stands as the title of the present article.² It is not an inappropriate title, for by implication it suggests in four words the whole complex of reasons that have so far frustrated, and will probably continue to frustrate, the attempts to reach an agreed international definition of aggression — reasons which it is one of the main objects of Professor Stone's book to bring out and make explicit. These reasons are perfectly well-known to that group amongst the would-be definers whose purpose is an ulterior one, and who pursue the matter mainly as a propaganda exercise. They are probably impervious to argument, but Professor Stone's book will render real service if it can persuade that other group, of idealists and technicians — whose efforts, if misguided, are at least sincere — that the attempt is futile. And this is so, not only because under present conditions the ambition is virtually unrealisable and because, even if a definition were produced that commanded general international acceptance, it would not (certainly not by itself) achieve the underlying purpose of its sponsors, namely to prevent, or at any rate appreciably decrease recourse to "aggression". It is also so because, as Professor Stone shows, there are other and more promising ways of promoting that purpose, some of which have begun to be made use of by the United Nations.

Inter arma silent definitiones. The paradox about the attempt to define aggression is very similar to that which has always dogged the parallel attempt to agree on international measures of disarmament — and both sets of attempts go back to before the second world war, or even earlier. The conditions which would enable the attempt to succeed would equally render it largely unnecessary. Given general world security, to agree on measures of disarmament would doubtless be easy, but rather meaningless: disarmament would come about naturally and unilaterally. In an insecure world, general disarmament may be essential, but becomes by the same token, if not actually impossible, very difficult of achievement, as the events of many years have shown.³ Similarly in a world in which "aggression" was intrinsically unlikely to occur, the need to define it would not be felt; but in a world in which its occurrence is an obvious possibility, any attempt at definition is bound to encounter great obstacles.

¹ *Legal Controls of International Conflict* (1954). See under that title (1955) 1 *Sydney L.R.* 332-343.

² *Aggression and World Order* (1958). London, Stevens & Sons, Ltd., Berkeley, University of California Press, Sydney, Maitland Publications Pty. Ltd. xiv and 226 pp., with Name and Subject Indexes. 40/-. See p. 46.

³ This is naturally not a reason for giving up the attempt to reach agreement on disarmament.

Professor Stone brings out very clearly the nature of these obstacles. They are not merely verbal and logical. Indeed merely as a matter of propounding a formula, many paper definitions exist. The difficulty is to find any one formula that can command some measure of general acceptance; and the reasons for that difficulty lie outside the technique of definition altogether. It would nevertheless be an error to underestimate the verbal and logical objections that can be made to all the types of definition that have so far been put forward. To the "enumerative" type, which relies on a statement of the specific acts said to constitute aggression, it can be objected that a mere catalogue of acts, divorced from the particular circumstances in which they occur, and above all, as Professor Stone shows, divorced from an *evaluation* of them in the light of the political, legal and moral factors that have preceded them, is virtually useless. It must lead, on the one hand, to the inculcation of States which, whatever their precise deeds, have not, on a balanced view of the situation as a whole, been substantively guilty of aggression; and on the other, to the exculpation of States which have been guilty of it, although their actions may not fall literally within the terms of any of those listed.⁴

The "abstract" type of definition, which makes no attempt to specify particular acts, but relies on a general formula, is open to the objection that it must of necessity make use of terms which themselves require definition — such phrases for instance as "except in the legitimate exercise of the right of individual or collective self-defence", or "except as may be authorised under the Charter of the United Nations". Such definitions are often circular, and inevitably indeterminate. Self-defence is frequently the very plea put forward by the aggressor, and to define aggression as "non self-defence" is valueless unless self-defence itself is defined, which merely brings the matter back to what constitutes aggression. As regards definitions that refer to the United Nations Charter, Professor Stone advances strong arguments in support of the view that, correctly interpreted, the Charter does not in fact exclude the use of force, as being illegitimate in *all* cases except those of individual or collective self-defence against armed attack (Article 51), or in the execution of authorised collective measures of enforcement decided upon by the Security Council or recommended by the Assembly. As Professor Stone says, the relevant provision (Article 2, paragraph 4) does not "forbid 'the threat or use of force' *simpliciter*", but only when directed "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". As regards the latter phrase, which is often cited as effecting a total prohibition on the use or threat of force other than in self-defence or collective Charter action, Professor Stone shows that, on an examination of the relevant provisions regarding the purposes of the United Nations, the correctness of this view is far from self-evident and that it indeed to a large extent begs the question.⁵

The "mixed" type of definition, which makes use of an abstract formula and then goes on to list a number of particular acts by way of example, is open to the objections applicable to each of the other types. A variation of it, which leaves the determination to some organ such as the Security Council, while specifying a number of tests or criteria for the guidance of this organ (most of which would in any case be obvious factors to be taken into consideration) adds little; for in effect it continues to leave the matter

⁴ In the famous phrase first used by Sir Austen Chamberlain in the House of Commons on November 24, 1927, and cited by Professor Stone (p. 36), definitions of this type act as a "trap for the innocent and signpost for the guilty".

⁵ From a drafting point of view it is clear that a direct and definite intention to ban all force other than in actual self-defence or collective Charter action would have been expressed in language quite different from that in fact contained in Art. 2, para. 4, which involves a number of difficult points of interpretation.

to the determination of the organ concerned. This last type, while certainly preferable to the others, has no point as a definition.

However, in addition to these technical difficulties (which, in a different climate of international feeling, might not be absolutely insuperable) there are others of a more substantive kind, to the discussion of which a considerable part of Professor Stone's book is devoted. These relate not so much to the possibility on paper of producing a definition, but to the willingness of the members of the United Nations, acting by the necessary two-thirds majority,⁶ to agree to one.

There is first of all the obvious fact that for many of the protagonists of a definition, the whole subject is simply, or mainly, a propaganda exercise in the cold war, or on behalf of the under-developed countries ("economic aggression"). In the case of some of the enumerative definitions particularly, it is manifest that the object is less to restrain or even detect aggression as such, than to get it on record that certain particular types of international actions are always, and irrespective of circumstances, illegal. So long as this appears to be the real or main object, it is clear that the chances of agreement are nil. It has indeed led to counter-proposals for including in any definition the concept of "indirect aggression" (subversive activities, etc.) — a perfectly well justified idea under present-day conditions, but not one that enhances the probability of reaching general agreement.

Secondly, some of the enumerative definitions have not only listed certain specific acts as being *ipso facto* aggressive; they have also contained a list of acts on the part of the notional victim of the aggression which, whatever their demerits, legal or moral, are in no circumstances to be held to justify the use of force as a means of redress. Not only does this involve prejudging an issue that may depend very much on the facts of the particular case; not only would it enable States to commit certain illegalities (ill-treatment of foreigners, expropriation without compensation, etc.) in the knowledge that any forcible reaction would automatically be deemed to be aggression; but also the relevant passages read almost as a license, or even an invitation, to States to behave in these ways. It is small wonder that confidence has been further shaken in the whole idea of attempting to *define* aggression — which is in no way to deny that certain acts do constitute or involve aggression, nor to assert that the use of force is necessarily justified merely because it has been provoked.

This leads to a third point on which Professor Stone rightly insists. In his view, it is unrealistic to expect that States will be willing *a priori* and before the fact so to speak, to renounce the use of force as a means of redress, or agree to such action being defined in advance as *ipso facto* constituting aggression, in an international society in which there are no institutions for changing or enforcing the law, or even (in the last resort) for obtaining an adjudication of a State's legal rights except with the consent of the other party to the dispute. It is not so much that in such circumstances the use of force would necessarily be justified, although it may be (and in the *Corfu Channel Case* the International Court gave a clear indication of at least one type of case where it would be).⁷ It is rather that in a situation of this kind, countries will not be willing to give up the indirect sanction involved by the latent possibility that there may be a recourse to force as a means of redress, or to agree to definitions the practical effect of which will not be to restrain real aggression, but to facilitate processes by which countries can, with complete impunity, commit every illegality or repudiate every obligation, so long only as they do not actually attack or invade the territory of another country. In illustration Professor Stone says graphically (p. 120):

⁶ Under Art. 18 of the Charter, the matter would automatically rank as an "important" one, as involving a question of peace and security.

⁷ I. C. J. Reports, 1949, p. 4.

A municipal system is scarcely conceivable in which there would be no legislature, and no legal means of enforcement of existing legal rights, and of which only one rule of the criminal law was enforceable, namely a rule visiting capital punishment on any citizen who committed a physical assault on another or forcibly entered upon the realty of another. Such a system would place under intolerable handicaps all law-abiding citizens not prone to secret theft, seduction, fraud, defamation, misappropriation and all the other wrongs which can be committed without trespass to person or realty.

Natural horror of war has led to an almost exclusive concentration on the techniques of peace preservation, to the neglect of what is in the long run the equally important task of maintaining and enforcing the law and the requirements of justice. Here again Professor Stone is eloquent (p. 182):

Mere arrest of hostilities without the growth of a pattern of grievance-handling will not succeed even in the shorter long run. States will break out of such situations as soon as it becomes clear that the General Assembly cannot or will not use its authority also to protect their rights and legitimate interests, which suppression of forcible self-redress must otherwise leave naked and exposed to the rapacity, malice or irresponsibility of other States. They will assuredly break out once it is clear that this moral suasion is so appropriated to the selfish interests of any coalition of votes as to override steadily the minimal demands of elementary justice.

And it is because a definition of aggression which systematically ignores demands sincerely made in the name of justice is thus not operationally viable, while an agreed definition that is precise enough to guide us and yet flexible enough to take these demands into account is beyond our reach, that the hope of basing peace enforcement on a definition of aggression has gradually faded. The argument that it is ethically imperative to define aggression on the ground that such definition is vital to human survival, loses most of its forces once it is shown, as we believe has been shown in these pages, that such a definition even if found and if accepted by most States would not fulfil its assumed purpose.

Such is Professor Stone's main theme, but the above discussion does less than justice to the wealth of argument and erudition with which it is presented. This is not only one of the latest but must be about the most complete work on the subject to have appeared. In it Professor Stone traces the whole history of the matter from its origins in the period of the League of Nations and throughout the eight or nine years during which it has occupied the attention of the United Nations. There is a valuable account of all the various proposals and main arguments which have been presented in the United Nations, both in the Sixth Committee and in the various special committees on defining aggression which have been set up. He draws attention to the fact that following upon the end of the war, there was a sort of close period extending up to 1950 when the subject was not debated or mentioned in the United Nations at all, and thinks it was "no mere chance that the war of definitions did not resume till the full paralysis of the Security Council after August 1950, and the move in the Uniting For Peace Resolutions to assert compensatory powers in the General Assembly." On this basis he develops the view that a main source of the urge to define aggression on the part of many members of the United Nations arose largely from awareness that the Assembly's decisions, even under the Uniting for Peace procedure, could not bind Member States, and the consequent desire to stimulate the willingness of members to act on a voluntary basis by providing them with ready-made techniques on a subject having a strong emotive aspect.

There is certainly truth in this, though the author shows awareness at many points that the motivations behind the campaign for definition are

complex and confused rather than simple and clear. In particular, the present reviewer's own recollection is that the matter came up in 1950 in a rather different way and for rather different reasons, the details of which cannot be gone into here. Professor Stone himself draws attention to the fact that it was the Soviet Union at the 1950 Assembly which, in connexion with an item entitled "Duties of States in the Event of the Outbreak of Hostilities", put forward a draft definition of aggression which was substantially the same as that put forward by Russia in 1933 in the League of Nations. And, of course, the Soviet Union was not then wishing in any way to render the Assembly "Uniting For Peace" procedure more effective; rather the exact reverse was the case. Moreover, so little was the Assembly anxious at that time to deal with the matter itself, that it immediately referred it to the International Law Commission. The Report of the Commission was inconclusive, and every debate held on the subject in the Sixth Committee from 1951 up to date has, as Professor Stone shows in detail, been equally inconclusive.

It is indeed remarkable how Professor Stone has been able to take this somewhat forbidding — one is almost tempted to say tattered — subject, and to construct out of it, as he has, a fascinating essay in political and legal theory.

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