BOOK REVIEWS

LEGAL CONTROLS OF INTERNATIONAL CONFLICT. By Julius Stone. New York: Rinehart & Company, Inc., 1954. Pp. lv, 851. $12.00.

The appearance of a new work by the distinguished author of *The Province and Function of Law* is a noteworthy event for legal literature and particularly for international law. In his earlier monumental treatise on legal philosophy, Professor Stone set such a lofty standard of thoroughness, both in research and analysis, that to approximate it again within a few short years would seem to be almost beyond the capacity of even such industry as his. For this reason it is a pleasure to report that the scholarship of the present volume is of a high order, which in no way impairs the author's stature. It is a work which evidences considerable erudition and a degree of coverage which should prove useful to students of the many topics treated. This does not imply that the volume is altogether free from flaws; but in any treatise of such scope criticism as to range and depth of content must be evaluated with due allowance for inevitable differences of opinion on the treatment of subjects particularly absorbing to the critic.

Stone's work is probably the most serious attempt in English since the second world war to re-survey the principles and practices applicable in the vast domain of international legal relations known as the law of war. For, under a somewhat unorthodox title the author has, in truth, prepared a major volume on the two familiar companion headings of (a) the settlement of international disputes, and (b) the law of war and neutrality. However, *Legal Controls of International Conflict* is not just another textbook. A thorough-going text it is; but it is much more than that. Its stated purpose is a re-examination of the unstable dynamics of international law in a fermenting world, in contrast with the traditional pattern of that law which is portrayed by its accustomed literary systematization in the textbooks. Put somewhat differently, a principal preoccupation of the author has been to narrow the gulf which all too often exists between the principles of international law expounded by leading publicists, and the actual practice and actions of States. That others before him have suffered from a similar concern only attests to the increasing dissatisfaction which legal scholars have come to experience over the unreality of principles traditionally laid down as "the law."

Nowhere is the gap greater than in the classical division of the subject known as the law of war; for it is here that lawyers and lay scholars alike

have been so beguiled with the image of war outlawed that they have allowed the law of war to drift far enough from reality as to become almost archaic. On the other hand, the fact that this gulf can never be closed entirely because of that very dynamism which traditional expositions have neglected, in no way deprecates the very solid attack which Stone has made upon the entire elusive problem. If the gap is not bridged, at least there is little doubt that it has become more vulnerable to future attacks by writers of comparable determination.

The work consists of twenty-six chapters of standard text expositions of what may be regarded as settled (the "static") principles, accompanied by thirty-four critical "discourses" which seek to examine the elements operating to produce modifications and deteriorations within the systematic framework we have come to know. In this form of presentation lies one of the intriguing departures of the work from the conventional handling. Chapters and discourses stand sufficiently alone to permit each to be used separately, or to be used in conjunction with each other. This approach could be a veritable bonanza to the teacher who is hard-pressed to discover new and stimulating techniques for students working with international law at any level. For, within the compass of a single volume we are furnished a most respectable text (chapters) and an advanced pedagogic instrument in the form of critiques and problems (discourses) which challenge the static system we are prone to take for granted (the text).

Despite these mechanical innovations, the work is predominantly a treatise, and a remarkably good one. As a tool of research for lawyers and government legal departments, it should prove most valuable. Elaborately documented, with impressive citations to leading commentators in the principal languages, it should lighten the burden of those who wish to explore special topics in greater detail.

In an introductory chapter, the author deplores the failure of 20th century legal technicians to adjust the life-preserving rules of war-law to contemporary conditions, which has had the consequence of leaving human life increasingly exposed to belligerent violence. Excessive infatuation with the "outlawry of war" will-o'-the-wisp has dimmed man's proper understanding of the extent of the role played by war in peace time and of the process we call the "cold" war. This leads Professor Stone to a thoughtful discussion of the necessity for continued human communication to survival of the group, and the compulsion which moves nearly all governments to block the penetrative power of hostile propaganda. He contends most forcefully that it has been a function of international law to provide lines of human communication across the otherwise "insulated chambers" of the State. To deny the existence of international law, or to write it off as beyond salvaging could only contribute further to the breakdown in human communication.

The reconstruction of international law, or rather the attainment of a more extensive recognition of that law, impels the author to re-examine

its basic assumptions as well as some of its specific technical concepts in terms of their relation to political and psychological factors. This, of course, conduces to a review of the positive-natural law conflict, in ascertaining whether either of these approaches furnishes an adequate framework within which the questions plaguing our generation may be answered. The leading philosophical theories on the nature of interstate relations are quickly dissected, followed (in Book I) by a treatment of the historical growth of international law, its standing as "law" and an incisive "discourse" on Soviet and Western approaches to international law. This reviewer frankly sees insufficient justification for including Book I (only 64 pages) in the volume at all. Much of the philosophical material was more deftly handled in Stone's earlier work. The rest consists of an assemblage of essays appropriate for law journal studies, but adding little of relevance to the principal subject examined.

In Books II and III ("International Disputes and Peace Enforcement," and "War and Neutrality") the author comes to grips with his subject. Chapters III-VI contain scholarly expositions of the classical modes of settling international disputes, with particular emphasis on arbitration and judicial settlement both prior and subsequent to the establishment of the United Nations Charter. The subjects of collective conciliation and peace enforcement under the Charter, the problem of the veto, legal aspects of the Korean action, Chinese representation, the Western defense system and the "Uniting for Peace" dilemma are brilliantly developed with concise, yet adequate commentary on the issues which these have raised. This portion of the work will surprise the reader with its crisp, thorough grasp of the transformation of the Charter from 1945 to 1953.

As might be expected, by far the greater part of the work (435 pages) is devoted to the subject of War and Neutrality. An opening general chapter (XI) on the legal nature and commencement of war is accompanied by stimulating discourses on the legality of spreading hostile propaganda (ideological warfare), the future of the international crime of so-called aggressive war-making (which the author does not regard as very bright) and atomic weapons under international law. Professor Stone has probably added fuel to the controversy which was kindled by the aggressive-war doctrine of the Nuremberg-Tokyo trials, with his honest recognition that, although the Charter of the Nuremberg tribunal was a legislative venture not founded upon existing international law, the time had arrived in 1945 when aggressive war should be made internationally criminal and punished. If one is constrained to accommodate oneself to such extra-legal procedures, probably this is as convenient a device as any other. In that connection, there is a still untold story behind the espousal by the United States government, over the considered judgment of some of its international lawyers, of the aggressive war theory as a basis of prosecution. This reviewer, a futile voice in opposition, was convinced then as he is today that acceptance of

the theory was a legal and political blunder which we would some day live to regret.[1]

The effects of the outbreak of war on the status and capacity of individuals and on legal transactions (Chapter XIV) provide an opportunity for summarizing developments on trading with the enemy, internment and sequestration of enemy property principally from the Anglo-American standpoint. A transitional discourse on enemy character introduces a departure from standard treatment in the form of four solid chapters (XV-XVIII) on economic warfare, including the matter of contraband, blockade and unneutral service. Chapters XX-XXII deal with the law of land, sea and air warfare, including the modern problems of unprivileged belligerency, guerilla and Home Guard formations, spies and saboteurs. Chapter XXIII relating to the termination of hostilities is followed by a major division (Chapters XXIV-XXVI) dealing with the protection of individuals who have fallen into the power of the enemy: prisoners of war, sick and wounded, civilian personnel and the inhabitants of a territory under belligerent occupation. A final discourse appropriately catalogues the inadequacies of existing rules of law concerning the authority of an occupying power, and postulates the inevitability of infractions of the Hague Regulations until these are recast in an adjustment, both of attitude and of principle, to modern conditions. An appendix analyzes the International Law Commission's Draft Convention of 1953 on Arbitral Procedure, which appeared too late to be included in the body of the text material.

Within the scope drawn for it by its author, Stone's work will probably rank for some time as outstanding in its field, combining a profundity of creative analysis with leading doctrinal, case and treaty materials in an evolving area of international law. If there is a major weakness in the volume it is that Professor Stone has purported to cover so wide a range of topics within such restricted space that inevitable deficiencies must appear in the minutiae of those applications of legal principle which confront lawyers in practice. It is regrettable, given the occasion which the subject presented, that hardly any attempt is made to sift the accumulating stock of European cases which emerged from the second world war. Nowhere is this more evident than in the author's treatment of the law of belligerent occupation which contributes little to what had been developed by earlier scholars examining World War I practice under the Hague Regulations.

Without in any way disparaging Professor Stone's fine labor, the legal profession nevertheless must wistfully await the appearance of a second Garner to compile the definitive treatise on the law of war as applied during our world's second great military cataclysm.

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1. See BATY, INTERNATIONAL LAW IN TWILIGHT 187 (1954), condemning the aggressive war theory of Nuremberg as identical with the Hitlerian doctrine of "punishment by analogy."

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THE RIGHT TO COUNSEL IN AMERICAN COURTS. By William N. Beaney. Ann Arbor: University of Michigan Press, 1955. Pp. 270. $4.50.

Today, lawyers need hardly be reminded that the enjoyment of all constitutional rights guaranteed to an accused depends, in the final analysis, on the crucial right to counsel. A layman charged with the commission of a criminal offense is only vaguely aware of the right to demand the nature of the accusation against him; if apprised of it, he cannot comprehend its full meaning. He does not know that he has a constitutional right to confront his accuser, and, if he is aware of his right, he lacks the expert skill to cross-examine properly. The right to compulsory process, to a speedy public trial and against self-incrimination is of little practical value to a defendant who is denied the effective assistance of counsel.

From what precedents and in what manner has this right to counsel developed? Is the right enjoyed to the extent that current concepts of justice require? What needs to be done to guarantee its wider enjoyment in the future?

These questions, currently in the minds of judges, lawyers and others concerned with the improvement of criminal justice, are thoroughly explored in *The Right To Counsel In American Courts.* In lucid style Professor Beaney traces the historical background of the right to counsel in English and early American law. He examines the process by which the Sixth Amendment counsel provision has been applied in federal courts. He surveys the state constitutional and statutory provisions and the cases in which they have been applied. He analyzes critically the interpretation by the United States Supreme Court of the due process clause of the Fourteenth Amendment as a limitation on state procedure in respect to counsel. And finally, as an experienced observer, he reviews the practical problems to be faced and resolved if the need for legal representation is to be adequately filled for those defendants who are financially unable to engage private counsel.

Leading United States Supreme Court cases defining the scope of the right to counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States are critically considered and fully discussed. Attention is focused on *Johnson v. Zerbst*,[1] *Walker v. Johnston*,[2] *Powell v. Alabama*[3] and *Betts v. Brady*.[4] In *Johnson v. Zerbst* the United States Supreme Court laid down the rule that in a federal case a defendant can be tried legally without counsel only when it is disclosed that he is of normal ability and has intelligently waived his right to be represented by a lawyer. In *Walker v. Johnston* the Supreme Court held that in a federal case a plea of guilty entered by a defendant who has not been informed of his right to counsel cannot be treated as a waiver of counsel. In *Powell v. Alabama* the

1. 304 U.S. 458 (1938).
2. 312 U.S. 275 (1941).
3. 287 U.S. 45 (1932).
4. 316 U.S. 455 (1942).

Supreme Court declared that the due process clause requires a state to furnish "effective" counsel to a defendant charged with a capital offense. *Betts v. Brady* decided that failure of a state to appoint counsel to represent an indigent defendant in a noncapital case is not a denial of due process where the record shows that the defendant's case was fairly tried. The determinative question as to whether the defendant has been accorded a fair trial can be answered only after an "appraisal of the totality of facts. . . ."[5] Where an examination of the trial record reveals "a denial of fundamental fairness, shocking to the universal sense of justice . . ."[6] the conviction will be reversed. Some members of the Court in this and subsequent cases have taken the position that failure of a state to provide counsel to a man charged with the commission of a serious offense is in itself a denial of due process.

The author's study clearly points up the decisional trend broadening the right to counsel. If this trend continues, it would seem likely that the time is not far off when the trial of an accused without counsel, in the absence of an intelligent waiver, will be deemed, ipso facto, void because of the trial court's lack of jurisdiction to proceed.

Professor Beaney firmly believes that the traditional haphazard method of providing counsel on any basis which seems appropriate to the trial judge will not be adequate to meet the increased demand for legal representation once it is made clear that, at least in the more serious cases, counsel must be furnished to an indigent defendant. Having arrived at this conviction the author turns his attention to the recently developed systems of furnishing counsel to indigent defendants—public defenders, voluntary defenders and rotation of attorneys from the entire Bar. From an evaluation of these alternative methods, the author concludes that, particularly in highly populated areas, there is an urgent need for the active promotion and wider use of these new departures from the traditional method of assigning to the defense some lawyer who happens to be in the courtroom at the time a case is called for trial.

The author discusses some constantly recurring questions including the time at which the accused can first obtain the aid of a lawyer, the defendant's inability to gain postponement if the attorney is not immediately available, the right to change lawyers if the defendant becomes dissatisfied, the amount of time a lawyer is allowed for preparation, the right of a defendant to consult his attorney before trial and during trial, the effect of counsel's absence during trial, and the limits, if any, that the court can place on counsel's efforts in court on behalf of his client. These and related situations form the basic material which the author utilizes to create a lively and exciting picture of the existing right to counsel in our courts.

The Right To Counsel In American Courts will strongly appeal to the student of constitutional history because it is the first scholarly and

5. *Id.* at 462.
6. *Ibid.*

comprehensive treatment of a constitutional right, the interpretation of which is currently undergoing rapid development. Professor Beaney's treatise will prove a helpful guide to the judge presiding in the trial of criminal cases and particularly to that judge who is being confronted with a flood of petitions which attack judgments of conviction on the claimed denial of some phase of the right to counsel. By clarifying counsel problems which arise in everyday practice, this book will also prove valuable to the lawyer whose practice takes him into the criminal courts.

If it is intended that a reviewer take issue with an author's philosophy, findings and conclusions, this reviewer will fail in his assignment. This book is well written; the orderly arrangement of subjects, the precision and clarity of language, the careful documentation of authorities, and the succinct summaries and conclusions following each chapter leave nothing to be desired. The reviewer heartily agrees with the author's assumption that this nation can afford decent treatment for its indigent members who face a danger of losing life or liberty in criminal procedure. He also agrees with the author's critical interpretation of the meaning and scope of leading federal and state cases and with his forecast for the future of the basic right to counsel.

If there is any area of disagreement, it is with a single comment that the opinions of the United States Supreme Court "have exhibited a rather perfectionist attitude toward procedure which is quite remote from what busy lower courts believe they can adhere to in practice" . . . and that "while the law must have the leavening quality of mercy, it seems a destructive and costly method of asserting that quality to overturn constantly the informed judgments of those who attempt to apply the law in the lower courts" (pp. 78-79). It seems only fair to say that this "perfectionist" attitude has been responsible for bringing about a solution of the most difficult phase of the counsel problem in the federal court by compelling the adoption of a rule of federal criminal procedure requiring that a defendant be advised of his right to counsel and that an attorney be furnished for him if he is financially unable to engage his own.[7] Moreover, *Powell v. Alabama, Johnson v. Zerbst,* and the host of counsel cases in the United States Supreme Court which followed have not only had a salutary effect on federal practice but have also played a major role in bringing about needed liberalization of state policy and procedure with regard to the right to counsel. As Professor Beaney himself points out, "if the states undertake widespread reform of their existing practices respecting counsel, there will be little need for the Supreme Court to interfere in their proceedings" (p. 234).

The Right To Counsel In American Courts was printed soon after the publication of two cognate works, *Legal Aid in the United States*[8]

7. FED. R. CRIM. P. 44.

8. BROWNELL, LEGAL AID IN THE UNITED STATES (1951) is a study of the availability of lawyers' services for persons unable to pay fees.

and *The American Lawyer*.[9] Each of these three books is complete in itself, yet all have a close mutual relation. Together they comprise a monumental contribution to a better understanding of the function of lawyers in a free society.

Herman I. Pollock †

STUDIES IN FEDERALISM. Directed and edited by Robert R. Bowie and Carl J. Friedrich. Boston and Toronto: Little, Brown and Company, 1954. Pp. xlii, 887. $15.00.

This volume gathers studies written to serve a practical purpose. It may be compared with some of the classical books of the French literature intended for the education of princes. It reproduces studies which were furnished during the year 1952 to the movement for European federation. If some of the princes to whose education so much care and attention had been devoted turned out to be disappointing monarchs, the results of the efforts made toward a political organization of Europe have been hardly less disappointing. There is no need to consider here the reasons for this relative failure. The books intended for the princes made useful and enjoyable reading for many generations to follow them. Similarly, the *Studies in Federalism* have a permanent value. The wealth of documentation, of suggestions based on experience, and of reflection, which they contain will be studied by all scholars or political persons anxious to strive toward a better organization of Europe. They will even be of interest to any person desirous of broadening his views by a comparative study of some of the most important federations of the world—Australia, Canada, Germany, Switzerland, the United States—and, also, by a study of federalism in itself.

The value of the book may stem directly from its purpose. Too modestly, Professor Carl J. Friedrich presents it as a documentation, but it is more than that. It is an answer. It is the answer given by some competent scholars, on the basis and with the evidence of documentation, to the questions: What is a Federation? How does it work? What are the problems it creates? How are they solved? These are difficult questions for many European people accustomed to a unitarian form of government. These are the questions to which answers are given in the *Studies* by such scholars as Robert R. Bowie and Carl J. Friedrich, both directors of the research, Arthur E. Sutherland, who was closely associated with them, Ayers Brinser, H. van Buren Cleveland, Paul A. Freund, Robert G. McCloskey, Edward McWhinney, and Louis S. Sohn. The contributors received the help of twenty-eight research assistants born either in the United States or in the various countries studied, some of them well known by previous publications.

9. BLAUSTEIN & PORTER, THE AMERICAN LAWYER (1954) is a summary of The Survey of the Legal Profession.

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In order to answer these questions, after an introduction in which Professor Friedrich explains the background of the *Studies* and the development of the Draft Constitution, and in order to discuss the latter, sixteen chapters are devoted to: the federal legislature; the federal executive; the federal judiciary; defense; foreign affairs; commerce, transportation, and customs; public finances; federal powers over currency, banking, credit, and foreign exchange; agriculture; labor and social security; personal rights; citizenship and immigration; defense of the constitutional order; overseas territories; admission of new states, territorial adjustments, and secession; and amendment of the constitution.

Each chapter complies with a standard pattern. An introduction sets forth the problems, then they are studied. For example, the chapter devoted to the federal judiciary deals with the judicial function in maintaining the supremacy of the constitution, the judicial function in promoting the uniformity of law, the judicial function in determining controversies between certain classes or parties (controversies between states, and between the federation and member states, controversies to which the federation or an officer thereof acting in his official capacity is a party, controversies between citizens of different states, controversies affecting ambassadors, other public ministers, and consuls accredited to the federation), the allocation of federal judicial power within the federal judiciary, the relation of the supreme court to the state courts, and the appointment and tenure of judges. On the basis of this study of the problems, conclusions and suggestions are presented. Finally, appendices, usually five in number, state the solutions given to the problem in Australia, Canada, Germany, Switzerland, and the United States. The appendices may consist of the mere reproduction of constitutional or statutory provisions, if such provisions sufficiently answer the problems previously studied. Usually, however, a text written by one of the contributors gives a much more concrete, comprehensive, and up-to-date view than the one which could have been derived from the constitutional or statutory provisions. The respective functions of the texts of the various chapters and of the appendices are clear, even though the same information may sometimes be found in both sets of writing. While the appendices state separately the systems of the various countries considered on a certain topic, the chapters, based on the information in the appendices, present a synthetic view, logically divided, of the possible solutions of the problems which arise under the topic.

This mere description of the content of the *Studies* should be sufficient to give a fair view of their interest and of their value, as long as no criticism can be directed to the information they contain. The book will be of little value to the person who already knows the federal system of one of the countries considered and is seeking to deepen his knowledge. A book which encompasses the federal system of five countries such as Australia, Canada, Germany, Switzerland, and the United States in hardly more than 800 pages, cannot avoid giving a relative impression of oversimplification. The numbers of pages devoted to the United States in the appendices, for

instance, are only eight for the legislative, four for the executive, and seven for the judiciary. This is certainly little, even though the United States is dealt with in thirteen other appendices, such as commerce (eight pages), agriculture (twelve pages), labor and social security (fourteen pages), and even though it would be unfair to measure the amount of space devoted to a country only by the number of pages devoted to it in the appendices. The book, however, has never been intended for this kind of reader. It will remain as a guide, clearly organized and deeply thought through, for the creation of a federation if and when the people of Europe have a real will to unite their destinies. That was its purpose. From a broader point of view, it will be an excellent *exposé* for scholars, political persons, or cultivated readers accustomed to life under a unitarian system of government who wish to understand the practical working of a federation. It will have the same value for the person living in a federation, but seeking information on other federations. As a matter of fact, the book constitutes a very clear and penetrating introduction to the government of the five countries considered. Finally, it will be equally precious for the reader accustomed to a federation and anxious to reconsider it with the help of competent scholars proceeding on the basis of comparative experience.

The book is not just a documentation, or merely a description, even if it is very valuable from this point of view. It was intended to be constructive and it will be so in many respects, even if its immediate purpose has been temporarily defeated.

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