EDITORIAL COMMENT

"THE OLD ORDER CHANGETH, YIELDING PLACE TO NEW"

When the original *Oppenheim's International Law* appeared in 1905–1906 it took its place immediately among the leading treatises on the subject. The author was Whewell Professor of International Law at Cambridge and a scholar of first rank, whose outlook was Continental rather than Anglo-Saxon, and whose references to Continental literature gave to the volumes an authoritative character outside of the more limited British circle dominated by Hall and Westlake. It is true that Oppenheim was conditioned by the traditions of his time, particularly in his treatment of war and neutrality. In the second edition of Volume II, published in 1912, there is nothing to suggest that Oppenheim saw the irony of the Hague Peace Conference of 1907 which devoted the greater part of its time to formulating laws of war. But for all that there was an element of constructive criticism in what he wrote, a sense of law as the only alternative to force, a belief in the "eternal moral and economic factors" working in favor of the development of international law.

Perhaps it would have been just as well to have left the second edition as a memorial to the naiveté of the statesmen of 1907 who thought in terms of sovereignty and not of co-operation, who believed that peace could be kept by a balance of power, or at any rate that if peace could not be kept, war could be fought according to the rules and peace restored by treaties that would last until a new shift might take place in the balance of power. But Oppenheim had already made notes for a new edition that would incorporate the results of the World War, so that it was to be expected that upon his untimely death in 1919 the publishers should choose an editor to complete the work. Thereafter followed a third edition by Roxburgh and a fourth edition by McNair, then fifth, sixth and seventh editions by Lauterpacht, the last appearing, Volume I in 1948 [1] and Volume II in 1952. Unfortunately Mr. Roxburgh decided that the condition of Oppenheim's manuscript made it necessary for him to work in the new matter, including his own contributions, without giving warning of its presence, that being in his judgment the method most conducive to maintaining the book as a living exposition of the law; and subsequent editions were continued along the same lines. The result by this time is that the original Oppenheim has been completely lost in the process, and what we now have is a compendium of accurate and reliable information, extremely useful as a work of reference, but a treatise which is neither Oppenheim nor Lauterpacht.

The writer well remembers how, in a review in this JOURNAL, he described

[1] Reviewed in this JOURNAL, Vol. 44 (1950), p. 784.

the fourth edition, published in 1926–1928, as being "an event" among scholars, its chief merit lying in its lucid presentation both of the general principles of the law and of the facts of international practice from which concrete rules of conduct might be drawn. But much water has gone under the bridge since then, and the developments in international law have been so fundamental and far-reaching that one is led to ask, Is it not time to abandon the effort to bring Oppenheim up to date, to attempt to reconcile Oppenheim's views of forty years ago with all that has happened since and indeed with what he himself would doubtless hold if he were living today?

The contradictions and the inconsistencies between the Oppenheim of 1912 and Lauterpacht's Oppenheim are, as might be expected, more difficult to reconcile in Volume II, dealing with "Disputes, War and Neutrality" which has just come to hand. The changes that have taken place in the procedures for the settlement of disputes were not difficult to record, for in most cases the newer procedures were fairly clearly dated. But the changes in the law of war and neutrality have been so far-reaching that in one case after another the generalizations of Oppenheim are contradicted by the facts which follow them in the succeeding pages. In some instances even the opinions expressed by Oppenheim are changed without notice. Oppenheim stated (§53) in his edition of 1912 that "impatient pacifists, as well as those who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent"; and this was repeated in McNair's edition of 1926. But taking into account the adoption of the Pact of Paris, the seventh edition restricts the statement to "many persons frequently consider war and law inconsistent," which is not what Oppenheim thought nor yet how Lauterpacht would say it, who would surely limit "war" to a war of self-defense under Article 51 of the Charter of the United Nations, which is really not "war" at all in the old sense.

In the case of such problems as the status of noncombatants in time of war, the restrictions upon bombardment of towns, the legality of the instruments of warfare both on land and on sea, either the original Oppenheim text has been altered or the new material has been introduced in lettered sections which leave it to the reader to reconcile Oppenheim and the later event. Perhaps the hardest task of the editor was to adapt Oppenheim's original text to the changes in the law of neutrality introduced by the obligations of Article X of the Covenant of the League of Nations and by the provisions of Chapter VII of the Charter of the United Nations. Section 293, for example, setting forth Oppenheim's "Concept of Neutrality" is repeated in modified form in the seventh edition, but upon examination even the modified text appears to conflict with the sections preceding it which describe neutrality in relation to the Charter of the United Nations. By contrast it must be said that where completely new material is introduced, as in Section 116a on the "Legality of the Atomic Weapon," the text is what might be expected of so wise and humane a scholar as the editor; and

we are led to inquire, with all due respect, whether he could not have put his time and scholarship to better advantage by giving us a volume of his own on the subject rather than the new edition of Oppenheim that is before us.

No one knows better than Professor Lauterpacht the fundamental change that has been brought about by the acceptance of the principle that all nations are collectively responsible for the maintenance of peace. It may be that a great Power, supported by satellites, is holding out against the application of the principle of collective security set forth in the Charter of the United Nations; but the principle is there, and it is not to be believed that the great body of the members of the international community will reject it even if the organization they have created to give effect to it should prove unequal to its task. In the light of that principle, the old law of war and of neutrality must now be written in the past tense. The use of force may unhappily have to be resorted to from time to time against those found guilty by the United Nations of acts of aggression, as today in Korea, whether by decision of the Security Council or as a measure of collective self-defense under Article 51 of the Charter. But no one could hold that such use of force is "war" in the sense understood when the Hague Conventions were signed in 1907 or subsequently amended. The conclusion would seem to be that where the United Nations is acting in resistance to aggression it will be in a position to formulate its own rules of conduct—rules dictated by the fundamental moral standards of the states engaged in upholding the law.

No doubt the United Nations will be guided in the adoption of its rules of conduct under such circumstances by the humanitarian traditions of the old law, as in the treatment of prisoners of war and of noncombatants; but the rules will be binding not because of old conventions drawn up under other conditions but because of the decision of the United Nations. As for the aggressor, it can only be hoped that, although he has defied the international community and made himself an "outlaw" in the old English sense, he will still be restrained by fear of punishment, if not by respect for the standards of the international community.

What is said of the old laws of war is equally if not more true of the old law of neutrality, which has passed away with the new law of collective responsibility. Even in the case of recognized states which have not been admitted into the United Nations, it is not to be believed that they will be able to claim, if they should be so unwise as to attempt to do so, the former rights of neutrals and perhaps block the action of the United Nations against the aggressor. Clearly they cannot be permitted to stand in the way of the enforcement of law and order even if they are not called upon to take part themselves in the measures agreed upon.

The volume is still to be written, in all of its numerous details, describing step by step the transition from the old law to the new, showing the progress

during forty years from war as a legalized institution to war as a crime against the international community, and the advance from neutrality to collective responsibility. The past tense could then be used freely, without the encumbrance of a text which in fact marked the end of an era. Who better could write the volume than the distinguished scholar now holding the Whewell Professorship held by Oppenheim before him?

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COGNITION AND RECOGNITION

The article on "The Quasi-Judicial Function in the Recognition of States and Governments," published in this JOURNAL in its issue of October, 1952,[1] merits careful consideration and comment. The author, Charles Henry Alexandrowicz-Alexander, Research Professor of the University of Madras, draws a correct distinction between the "cognition" or "cognizance" of facts, and the political nature of the recognition of states and governments. He states that: "Unrecognized communities are treated in many respects as if they were subjects of international law, and unrecognized governments are often considered as endowed with quasi-governmental capacity." In other words, *de facto* situations, irrespective of formal recognition, cannot be ignored. Cognizance of such facts must be taken either diplomatically or judicially.

The practice of American and British courts of taking cognizance of actual conditions, regardless of political recognition, was noted in an editorial on "The Effects of Recognition" in this JOURNAL.[2]

The author of the article under immediate consideration acknowledges that, irrespective of the objective facts which might warrant recognition, the function of extending formal recognition is a political function, depending on various factors that may not be judicial or even quasi-judicial. When a nation considers such factors as political organization, capacity to fulfill international obligations, viability, and the attitude of the unrecognized community towards other states, it can hardly be said to be exercising a judicial function.

In treating the subject of the collective recognition of states and governments by the League of Nations and by the United Nations, or as in the instance of the Treaty of Paris of 1856, the author falls into the error of considering such action to be in conformity with international law. It would seem evident that, until the Members of the Family of Nations have surrendered their freedom of diplomatic action to an international organization, any collective act of recognition must conform to special treaty agreements, notably the Charter of the United Nations. It may not properly be considered as the exercise of a judicial function under international law. The most glaring evidence of this is to be found in the

[1] Vol. 46 (1952), pp. 631–640. [2] Vol. 36 (1942), pp. 106–108.