# BOOK REVIEWS

*International Law, A Treatise* (Volume 2, Disputes, War and Neutrality): by L. Oppenheim, M.A., LL.D., 7th ed. 1952, by H. Lauterpacht, LL.D. London, Longmans, Green & Co., liii and 941 pp., £6/8/6 in Australia.

I

This new edition of Oppenheim's standard work on disputes, war and neutrality, by the distinguished Whewell Professor of International Law at Cambridge, is long overdue. It is literally overdue as the first serious revision covering the developments of World War II. It is overdue also in the deeper sense that books on war-law have almost always been overdue. Written, as they usually are, about the last war rather than the next one, they manifest a current of doubt as to their own value in view of the feared perdition or the hoped-for regeneration of mankind. As swords seem half-beaten into ploughshares, and the wartime "excesses" are relegated to the museum of horrors of a disappearing institution, the law of war suffers equally under wartime passions and peacetime euphoria. Hall, indeed, thought that belligerent mutilation of war-law would invariably be more than redeemed by its post-war rehabilitation. The law of war, he inferred, is really a sturdy plant, which grows by stimulus of reaction to its wartime mutilation. In the present view, however, the rhythm of war-time violation followed by post-war rehabilitation displays, not the strength of war-law, but a root cause of its weakness. This is that war-law, which has to be *applied* in the heat and stress of war, has usually been *formulated* in the piping days of peace, and even in the very trough of pacifist reaction to war. The lack of social-psychological support at the next crisis of action follows almost inexorably.[1]

II

The essential objective of this seventh edition of Oppenheim is, then "to incorporate . . . the developments" of the Second World War and its aftermath.[2] And no reader will need reminding that these developments have been so grave that the capacity of this work to continue to bear its leading role must depend on how it fulfils this objective.[2a]

In one sense, that of testing the conduct of disputants and belligerents by the traditional formulations of the rules of disputes- and war-law, the Editor has obviously fulfilled this objective. The new topics or treatments introduced

[1] See Julius Stone, *Legal Controls of International Conflict* (Sydney, Maitland Publications Pty. Ltd., 1954, Am. ed., N.Y., Rinehart & Co., 1954; English ed. London, Stevens & Sons), c. xii, s. i. (here cited as Stone, *Conflict*).

[2] Preface, v.

[2a] Any reviewer of this edition must perforce approach it against the background of earlier editions. And the present reviewer has been sufficiently dissatisfied with earlier editions to have felt it necessary to prepare a new treatise (see *supra*, n. 1), which he believes more suited to mid-twentieth century needs. Since the present edition of Oppenheim appeared when preparation of that new treatise was already well-advanced, it may be of interest (and not unfitting) to indicate in these footnotes some of the departures of the latter from the Oppenheim model.

include treaties for non-political means of international conciliation[3]; the integration of the International Court of Justice as a part of the United Nations Organisation[4]; the *locus standi* of individuals and non-State entities before the Court[5]; the competence of the Court[6]; the binding force and execution of judgments of the Court[7]; United Nations settlement of disputes[8]; the protection given by the Geneva Conventions to forces engaged in civil war[9]; the status of guerrillas and commandoes, especially in occupied territory, and in the light of the war crimes decisions and the new Geneva Conventions[10]; how far United Nations peace enforcement action is "war"[11]; the status of trust territories as part of the region of war[12]; the effect of instruments for outlawry of war on the obligation to issue a declaration of war or ultimatum[13]; claims by belligerents against neutrals for the restoration of property unlawfully seized by the opponent and held in the neutral country[14]; the distinction between armistices and unconditional surrenders[15]; the plea of superior orders[16]; the responsibility of commanders for acts of subordinates[17]; and the war crimes trials after World War II generally[18].

On these, as on numerous other topics, the new Oppenheim on disputes, war, and neutrality, remains the best of the older treatises. In its clarity of statement, its wide bibliographical reference, and its comprehensiveness, and its avoidance of national insularity, it still excels other treatises on both sides of the Atlantic; the more so as war-law comes to be sadly but surely neglected.

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[3] Pp. 16-20. A curiously disproportionate addition in view of the lack of results he attributes to them.

[4] Which, ignoring the weighty contrary view, Professor Lauterpacht declares to be a beneficent innovation. See pp. 46-48, esp. 48, and contrast Stone, *op. cit.*, c. v. s. iii.

[5] At 54-57. In which he presses his well-known plea for the extension of such *locus standi.* In the present view, he insufficiently stresses those cases, such as the claims of individuals for protection against their own State (minorities protection), where the need of change is functional as well as theoretical, no alternative mode of recourse being available.

[6] Bringing references up to date. See pp. 56-68.

[7] The absence of any mandatory requirement on the Security Council to give effect to a Court judgment under Art. 94 of the Charter is noted (76), and proposals to render it mandatory and free of the Great Power veto are optimistically offered (77).

[8] By a striking concentration on texts, as distinct from practice, the learned Editor is able to hail the United Nations as "an advance" on the League of Nations system (98). The paralysing frustrations of the veto are dismissed with the pronouncement that they must be "removed" if the United Nations is to become an effective instrument of international peace (98); and the main problems obstructing the Security Council's fulfilment of its functions are dismissed as "outside the purview of this work".

It is symptomatic of the merely formal approach that the difficult questions of the peace-enforcing competence of the General Assembly, its Interim Committee and its machinery under the Uniting for Peace Resolution, receive no serious consideration (see pp. 110-11, 151-176); the only consideration is on p. 17. See for the present writer's views, Stone, *Conflict*, cc. vi, vii, viii and ix, and Discourses 9-14.

[9] At 210-12. As to the need for a more interrelated treatment of the protection of all persons in a belligerent's power, see Stone, *Conflict*, cc. xxiii-xxvi, and *infra.*

[10] At 212-16, 259-260.

[11] At 224-25, on which the reviewer is in general accord with the learned Editor's position; although his treatment overlooks the important legal differences which may arise between peace enforcement by a *collectivity* of States, and that by coordination of the actions of *individual* States. See on this, Stone, *op. cit.*, c. xi, s. viii.

[12] At 241-44.

[13] Professor Lauterpacht's nice demonstration that Hague Convention No. 3 is *functus officio* proceeds on the assumption that the Security Council's peace-preserving function will not become paralysed—an assumption obviously quite contrary to present fact. See 297-98.

[14] At 332-33.

[15] At 552-54. The learned Editor's treatment does not perhaps sufficiently appreciate the new factors tending to push both the armistice and the unconditional surrender into the functional role of the old treaties of peace. See *id.* 596-620, and contrast Stone, *Conflict*, c. xxiii.

[16] At 568-572.

[17] At 572-74.

[18] At 576-582 (Nuremberg International Tribunal), 582-584 (national tribunals), 584-586 (proposals for a standing international instance). Professor Lauterpacht recognises the problem of unilateralism of the victors' action in this field (587-588); but he does not, perhaps, adequately distinguish in his proposed solution between the ordinary "war crimes" and the crime of aggressive war-making. The problem of unilateralism as to the latter is scarcely tractable at all. See Stone, *Conflict*, Discourse 16.

## III

Yet, in the full sense, "incorporation" of World War II developments must go far beyond the mere passing of judgments on belligerent conduct of the last war. In an age when the fundamentals of war have been quite transformed, and continue to change under our very eyes, a standard work must also concern itself with the degree of continued validity of traditional formulations in face of economic, political, and technological change.

It is scarcely, for example, an adequate "incorporation" of the Anglo-American practice of "target area saturation" bombardment, to measure it against the traditional combatant-non-combatant distinction as it existed in 1907, and pronounce it probably illegal. It must be obvious that neither the United Kingdom nor the United States, for whom the destruction of the enemy's economy and industrial structure in the hinterland may be *the decisive* means of their own survival, would accept so simplified a solution, either on paper or in practice. Any book on war-law which seeks thus to turn back the flood-tide of mid-century change, must finally be overrun. Nor is such an attitude, despite its idealism, of any service to humanity. Quite the contrary. Such condemnation actually tends to put beyond practical reach the search for internationally based mitigations of human suffering and destruction in face of new weapons. The lamentable failure of our generation to adjust the life-preserving qualities of war-law to modern conditions, thus exposing whole populations to unmitigated technological violence, springs in part from such "idealistic" attempts to dispose of facts by words. For a modern work to present only a "correct" but self-defeating formalism in face of the facts of contemporary international conflict is to disappoint the urgent need, at many critical points, for guidance and inspiration in face of new perplexities.

## IV

So serious a criticism requires a bill of further particulars, even though space will not permit an exhaustive bill. Thus, to the great debate as to atomic weapons, the learned Editor contributes two firm and three tentative opinions.[18a] In his firm opinion, atomic weapons may be used in reprisal against such use by the enemy. Moreover, they may also be used against an enemy whose violations of warfare are on so vast a scale as to put the enemy "beyond considerations of humanity and compassion". In his tentative opinion, however, the contaminating effects of injuries from the weapons, especially beyond the immediate range of impact, forbids their use even against military objectives, if these include human beings. For they thus violate the rules against causing needless suffering, and against poison gases and analogous deleterious substances. Second, in his tentative view, the combatant - non-combatant distinction forbids the use of an atom bomb against a city save "in very exceptional cases".[19] His third tentative opinion is that the customary principle of humanity forbids the use of the atom bomb even by Powers like the United States, who are not parties to the Gas Protocol. Nowhere here, any more than on strategic air bombardment of hinterland cities, is there serious recognition that the final legal answers must be given in terms of the objectives of economic warfare[20], rather than in verbal exegesis on the old rules of land warfare.

A similar formal traditionalism affects the discussion of attacks on merchant vessels. Here the learned Editor is engaged in a rearguard action, not only against belligerent practice, but against that of the Nuremburg International Military Tribunal. He is faced with that Tribunal's refusal to sentence Admiral

[18a] At 347-352.
[19] At 349.
[20] See the treatment in Stone, *Conflict*, Discourses 30, 31 and c. xxii.

Doenitz for ordering the sinking of merchantmen without warning, on the grounds that the United Kingdom and the United States had themselves ordered such sinking by their units in the Skagerrak and in the Pacific respectively. Yet Professor Lauterpacht still seeks to rehabilitate the London Naval Protocol, at almost any cost in fiction and rationalisation.[21] Here again he ignores or overrides the inexorable implications of modern economic warfare and technological change for the traditional rules.[22]

In his new treatment of the sanctions of the Kellogg-Briand Pact, Professor Lauterpacht blandly declares that each Signatory is free to cancel the treaty on breach by another Signatory, and (simultaneously) that this is a "sanction" of the Pact. A sanction of the outlawry of war which *pro tanto* cancels the outlawry, is an odd guarantee of the public peace. He sees no reason for *discussing*, as distinct from merely *asserting*, that the Pact establishes the *criminality of individual conduct* violating the Pact.[23] Nor does he satisfactorily explain (as distinct from assert) the basis on which he turns the Pact into a quasi-customary "fundamental treaty".[24] To assert that the Pact is of higher rank than the Charter[25], and that these two are "the two most important international treaties", is to mislead mankind. And this is not rendered the less so by his afterthoughts that "the danger of the purpose of the Pact being frustrated lies not in the normal operations of its provisions, but *in the possibility of their violation by the Signatories*", and that such instruments "*may* be illusory if not accompanied by parallel developments in the direction of an effective political organisation of the society of States".[26]

By contrast with such extraordinary stress on paper obligations, the epoch-making Geneva Convention for the Protection of Civilian Persons in Time of War, 1949, is pressed into the interstices of chapters on the outbreak of war, and belligerent occupation.[27] So pressed, its wide sweep and rich principles are hampered and distorted; and its functional kinship with other topics, such as the protection of prisoners of war, is concealed. So, too, new sections on the treatment of wounded and dead bodies[28], the shipwrechek[29], and captives[30], properly base themselves on the revised Conventioned signed at Geneva in 1949; but the problem of repatriation of unwilling prisoners, already a central bone of contention in 1951, is scarcely foreshadowed in his laudation of Articles 118-119 of the Prisoners Convention.[31] The sections on belligerent occupation[32] and "war treason"[33] take adequate account of the hideous lawlessness of German occupation practices, of war crimes trials thereon, and of the new Civilian Persons Convention. But the deeper problems thereby raised are barely hinted at. Nowhere, for example, is there a real discussion of Colonel Baxter's fruitful questionings on the duty of obedience of the local population[34], or of Professor

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[21] On pp. 492-93 he even criticises the Tribunal's view that the British orders to sink at sight in the Skagerrak were relevant, on the ground that that zone of sinking was only a limited one determined by the German operations in Norway. But it is difficult to see how this criticism can itself be relevant; for the prohibitions of sinking by the Submarine Protocol are in no way conditioned on the *size of the zone* of operation.

[22] See Stone, *Conflict*, Discourses 30-31.

[23] No glimpse is given in this treatment of the perplexities which may surround the fixing of responsibility for what the learned Editor terms "premeditated violation" in future wars. This is the more striking since in another context (218) he states as almost self-evident "that there may be no means by which an authoritative judgment can be arrived at on the question as to which State is the aggressor".

[24] See pp. 192, 194. His argument that the Pact must be assimilated to treaties of peace in its permanency, and in the inability of Signatories to denounce it, seems ingenious to the point of fantasy. Under customary law the "permanence" of treaties of peace was subject to sudden termination by further war "as an international prerogative of the sovereign State". To assimilate a Pact *renouncing war*, to treaties which are *subject to termination by war*, is, with respect, to set vain traps for history.

[25] Since containing no provision for denunciation.

[26] At 196-97. Italics supplied.

[27] At 313-321. Contrast Stone, *Conflict*, c. xxiv.

[28] At 353-368.

[29] At 500-08.

[30] At 366-396.

[31] At 392-93.

[32] At 430-456.

[33] At 425-26.

[34] See Stone, *Conflict*, Discourse 33.

Feilchenfeld's thesis that existing occupation law is simply not designed to meet modern occupation techniques of economic exploitation and ruination.[35]

Such criticisms can be multiplied even as to those parts of the subject on which current political interest is centred. The regulation of armaments[36] is dealt with by a rehearsal of successive proposals, down to those of the United Nations, a rehearsal which scarcely merits ten pages of a crowded text.[37] The League of Nations Covenant and United Nations Charter are analysed[38], with little reference to practice, ending with the usual (but nonetheless misleading) conclusion that the machinery of the United Nations Charter is superior. In particular, the treatment of the Security Council's voting rules is inadequate even as the barest guide to Security Council practice. The effect of these rules, and of the other escape and evasion clauses of the Charter on United Nations peace enforcement machinery is critical[39], but no reader would infer this from this volume of Oppenheim.

Yet even when the learned Editor's attention is duly focussed on present urgencies, the solutions offered too often remain on a verbal level. Thus, on the question how far the principle *ex iniuria ius non oritur* taints with illegality all the subsequent operations of an aggressor State, he offers an attractive distinction. He would insist that *during the war* the rules of war-law must be observed on both sides, regardless of the illegality of the war; but that after the end of the war, the principle should be fully observed that no rights and benefits may accrue to the aggressor from his unlawful act.[40] If this be tested in its most important field of application, that of the legal force to be attributed to acts of an aggressor Occupant, its inadequacy becomes apparent immediately. For how can legal powers be attributed to an Occupant *during the war* and the effect of their exercise denied to the Occupant *after the war*, without placing the Occupant under disabilities which prejudice the local inhabitants even more than they prejudice the aggressor[41]?

## V

It should not be assumed for a single moment that the learned Editor's reluctance to face the facts of international life manifests any favour towards British or Anglo-American standpoints or disputed doctrines. As already observed, for example, his view of the legal standing of Anglo-American "target area saturation" bombing goes quite the other way. And this example so well illustrates both the moral integrity and the intellectual and humanitarian futility of the rearguard actions which this volume fights, as to merit some further attention.

Anglo-American strategic bombing of Germany admittedly caused heavy loss of life and property to civilians whom no one would seriously assimilate to combatants. The Anglo-American position was that such areas contained a concentration or spread of objectives, critical to the enemy's military or economic war effort, and that a substantial part of its inhabitants were the workforce[42] of these objectives. In view of the virtual certainty that future belligerents commanding the necessary air power will conduct themselves in precisely a similar manner, the fruitful mission for international law might seem to be to devise workable plans for removing to sanctuaries (or *lieux de Geneve*) those civilians

[35] *Id.*, Discourse 34.

[36] At 121-131.

[37] For instance, the discussion of the Soviet-American *impasse* on atomic armaments control shows but little awareness of the central issue of priorities as between destruction of stockpiles and the operation of the inspection system. See Stone, *Conflict*, Discourse 19.

[38] At 159-176.

[39] Contrast the present view, *supra* n. 8.

[40] See pp. 210-222, esp. 218-19.

[41] See the practice, somewhat inconsistent with Professor Lauterpacht's position, cited in Stone, *Conflict*, c. xxvi, nn. 100, 166a and Discourse 33, esp. n. 26.

[42] See *id.* c. xxii, s. v, E.

who are not a part of the workforce. The new Oppenheim advocates rather that even the workforce should be immune from attack, except when it is actually at the plant.

It is obviously absurd to expect airmen to make such discriminations under intolerable ground-flack, and fighter and guided missile attack. But, even this apart, the thesis lacks reality. In the first place, it can scarcely come to a test at all. Up to the present, the "target areas" have included workmen's dwellings in terms of physical proximity within an urban concentration; and in future wars, when munitions production units move underground, attack on the work-force away from the plant may be the most effective way of reaching either the workforce or the war industry itself. Professor Lauterpacht's distinction will thus not sustain itself, even on paper. It will not have aided anyone to survive; and it may have prevented more promising approaches to the protection of civilians who are neither combatants nor members of the "quasi-combatant" workforce. Here, as elsewhere, the facing of the cruel realities is necessary before energies can be released for the practical tasks of devising such *temperamenta belli* as may command a degree of belligerent conformity.[43]

## VI

Despite the great virtues stressed at the beginning of the review, this second volume of Oppenheim must thus remain a frustrating book for the student, publicist and chancellery of 1953. Our troubled times may, indeed, have turned its very virtues into vices. Its clarity of statement too often conceals the real difficulties and complexities by circuity or ambiguity and simplification. Its wide bibliographical reference tends to become an indiscriminate piling up of symbols, leaving the reader destitute of guidance as to the issues at stake and the precise principles involved. Its comprehensiveness and cosmopolitanism are too often achieved by raising (or reducing) problems to a level of abstraction and formalism quite barren for our dynamic period of transition.

Both its virtues, and the vices of its virtues, will determine the value of this new Oppenheim. In the present view, they render it, on balance, an inadequate and even misleading book on most topics which are of contemporary, as distinct from mere historical, importance. They address themselves to the last war and the Millenium, rather than to the next war and the World-As-It-Is.

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*The Australian Constitution: An Analysis*, 2nd ed. 1952, by H. S. Nicholas, Law Book Company of Australasia, xxxvii and 458 pp., £3/10/0 in Australia.

Four hundred odd pages of constitutional law read through as a book rather than fumbled in as a wardrobe or work-table drawer inevitably prompt reflection on the nature of this so-called "law". One begins with reflections upon the rules set out in page upon page of sober accumulation. Then in the background the insistent query reverberates — "Not, what are the rules, but how come they?" As the total accumulation rounds itself off and one endeavours to perceive the whole, the Devil whispers between the leaves — "It's clever, but is it Law?"

To the work-a-day practitioner to whom Palmer's *Precedents* and the loose-leaf supplement to Gunn represent reasonable stability in a fluctuant world, the

[43] *Cf.* the general aspect of this matter examined in the Introduction to Stone, *Conflict.*

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