Clearly a court is not the appropriate agency to determine for the Government of the United States the particular way in which it should "cooperate with the United Nations." The fact that the United States has obligated itself to coöperate may be taken into consideration in determining the national public policy, however.

The California law applies to land ownership the same racial discriminations as the Federal law applies to naturalization. If higher courts should affirm the holding that California's Alien Land Law is unenforceable, some doubt might be cast upon the validity of the racial limitations embodied in Section 303 of the United States Nationality Law of 1940, as amended in 1946 (60 Stat. 416, 417).

MANLEY O. HUDSON

SOME THOUGHTS ABOUT RECOGNITION

In a letter of March 8, 1950, to the President of the Security Council, the Secretary General of the United Nations transmitted an originally confidential memorandum prepared by the Secretariat concerning the problem of recognition raised by the claim of the Communist government to represent China in the organs of the United Nations. This memorandum includes the following paragraphs:

> The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. It is true that some legal writers have argued forcibly that when a new government, which comes into power through revolutionary means, enjoys a reasonable prospect of permanency, the habitual obedience of the bulk of the population, other States are under a legal duty to recognize it. However, while States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation. . . .
>
> Various legal scholars have argued that this rule of individual recognition through the free choice of States should be replaced by collective recognition through an international organization such as the United Nations (e.g., Lauterpacht, *Recognition in International Law*). If this were now the rule then the present impasse would not exist, since there would be no individual recognition of the new Chinese government, but only action by the appropriate United Nations organ. The fact remains, however, that the States have refused to accept any such rule and the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations, would require either an amendment of the Charter or a treaty to which all Members would adhere.
>
> On the other hand, *membership* of a State in the United Nations and *representation* of a State in the organs is clearly determined by a collective act of the appropriate organ; in the case of membership,

by vote of the General Assembly on recommendation of the Security Council, in the case of representation, by vote of each competent organ on the credentials of the purported representatives. Since, therefore, recognition of either State or government is an individual act, and either admission to membership or acceptance of representation in the Organization are collective acts, it would appear to be legally inadmissible to condition the later acts by a requirement that they be preceded by individual recognition. . . .

The practice as regards representation of Member States in the United Nations organs has, until the Chinese question arose, been uniformly to the effect that representation is distinctly separate from the issue of recognition of a government. It is a remarkable fact that, despite the fairly large number of revolutionary changes of government and the large number of instances of breach of diplomatic relations among Members, *there has not been one single instance of a challenge of credentials of a representative* in the many thousands of meetings which were held during four years. On the contrary, whenever the reports of credentials committees were voted on (as in the sessions of the General Assembly), they were always adopted unanimously and without reservation by any Members.

The Members have therefore made clear by an unbroken practice that (1) a Member could properly vote to accept a representative of a government which it did not recognize, or with which it had no diplomatic relations, and (2) that such a vote did not imply recognition or readiness to assume diplomatic relations. . . .

It is submitted that the proper principle can be derived by analogy from Article 4 of the Charter. This article requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfillment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority in the territory of the State and is habitually obeyed by the bulk of the population.

If so, it would seem to be appropriate for the United Nations organs, through their collective action, to accord it the right to represent the State in the Organization, even though individual Members of the Organization refuse, and may continue to refuse, to accord it recognition as a lawful government for reasons which are valid under their national policies.

This memorandum is not concerned with the distinction between the recognition of states and the recognition of governments, but with the distinction between (1) the recognition of a state or a government and (2) the admittance of a state to membership or to representation in the United Nations. It is also concerned with the distinction between the policies of a Member of the United Nations in respect (1) to the recog-

nition of a state or government and (2) to the approval of the admittance of a state to the United Nations or of the credentials of a representative of a Member State. The latter distinction seems more verbal than real and so does the former, if attention is confined to the effect of these acts under general international law.

Recognition of a new state means only that the recognizing authority proposes to treat the entity as a state under international law and recognition of a government means only that the recognizing authority proposes to treat the government as representative of a state. In this sense, the United Nations, by admitting an entity to its membership, can be properly said to "recognize" that entity as a state, and if it admits an individual appointed by a government as a representative of a state, it can properly be said to "recognize" the appointing government as the government of that state. Admittance to the United Nations implies, of course, much more than recognition of statehood, because it adds to the rights and duties of a state under general international law, the rights and duties of a Member under the Charter, but Articles 2 (1) and 4 make it clear that every Member is regarded by the United Nations as a sovereign state with a position under general international law equal to that of other sovereign states.[1] The question is not whether the United Nations can recognize, but whether its recognition is binding on anyone else.

On this question, the important distinction seems to be that between "particular recognition" and "general recognition." The latter term means something different from "collective recognition." An international tribunal may be faced by the question of whether a given entity is a state or is a government capable of representing a state. In answering this question an international tribunal must utilize the conception which this writer calls "general recognition." That is, it must reach a conclusion whether the community of nations as a whole regards the entity as a state or as a government. Doubtless factors other than "recognitions" by states and international organizations, such as *de facto* existence, the probable duration of such existence, the stability of the

[1] It follows from this that in the contemplation of the United Nations the Ukraine and Byelorussia are sovereign states, and the Union of Soviet Socialist Republics does not include those two republics. British Commonwealth and League of Nations practice interpreted the term "British Empire" used in the Covenant to mean "Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League." Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 (Cmd. 2768, 1926 (append.); P. J. Noel Baker, The Present Juridical Status of the British Dominions in International Law (London, 1929), pp. 360 ff., 395, 401; Q. Wright, Mandates Under the League of Nations (Chicago, 1930), pp. 130–31. Goodrich and Hambro, Charter of the United Nations (2nd ed., Boston, 1949), pp. 98 ff., 124 ff., 132) point out the discordance between the legal and the factual situation in regard to certain Members of the United Nations.

entity, etc., will enter into the judgment of the tribunal as evidence of the probable intention of members of the community of nations which have not expressly recognized the entity, or of the probable motives of those that have explicitly refused to recognize it. But evidence of "general recognition" by the members of the community of nations, whether express, tacit or presumed, is of major importance for determining the position of the community of nations on the subject. In the case of a new government, *de facto* control of the organs and the territory of the state creates a presumption not to be overridden even by widespread failure to accord express recognition. In the Tinoco Arbitration between Great Britain and Costa Rica, Chief Justice Taft, as arbitrator, said:

> I must hold from the evidence that the Tinoco government was an actual sovereign government. But it is urged that many leading powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other powers is an important evidential factor in establishing proof of the existence of a government in the society of nations. [He then points out that twenty governments had recognized the Tinoco government and, after discussing the position of others which had not, including the United States, Great Britain, France, and Italy, continues:] The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.[2]

There can, of course, be no absolute criterion of how many recognitions, express or implied, it takes to constitute "general recognition." The importance of the recognizing states would undoubtedly deserve consideration. It is submitted, however, that, in view of the size of its membership and of its position with reference to the community of nations as a whole,[3] recognition of an entity as a state or a government by the United Nations would usually provide adequate evidence of "general

[2] This JOURNAL, Vol. 18 (1924), pp. 152–154.

[3] See especially Art. 2, par. 6, of the Charter.

recognition." By that is meant that a tribunal applying international law would normally have to hold that the entity in question was a state or a government in the sense of general international law.[4]

This, of course, does not mean that a particular state might not remain obdurate, and of course its own courts would have to follow the views of the political organs of the state. It would, however, be difficult for a state to long maintain such an attitude, particularly if it were a member of the United Nations and consequently had to deal with the entity recognized by the United Nations as a state or a government within the organs of the United Nations. It might refuse to deal with the entity at all outside the United Nations, but it would find it confusing to deal with another government of the same state diplomatically.

Therefore by the nature of the situation "recognition" by the United Nations does ordinarily constitute "general recognition" and has an objective effect different from that of recognition by any single state.[5] This results from the situation, and no amendment of the Charter or treaty conferring new powers on the United Nations is necessary to bring about this consequence.

The other question raised concerns the policy of states in extending recognition to other states and governments. The Secretariat memorandum asserts that "the Members have . . . made clear by an unbroken practice that (1) a Member could properly vote to accept a representative of a government *which it did not recognize, or* with which it had no diplomatic relations, and (2) that such a vote did not imply *recognition or* readiness to assume diplomatic relations" (Italics supplied). If both phrases had been confined to "diplomatic relations" and the underlined phrases concerning "recognition" had been omitted, the sentence would have been unexceptionable.[6] States may well vote to admit Yemen to the United Nations, even though they do not maintain diplomatic relations with it and have no intention of doing so, but it is submitted, that they have no right to vote for Yemen as a Member unless they consider it a state, *i.e.*, "recognize" it, since under Article 4 of the Charter state-

[4] The International Court of Justice as "the principle judicial organ of the United Nations" (Art. 92) would appear to be bound by such "recognitions" by the principal political organs of the United Nations, *i.e.*, the General Assembly and the Security Council. If they differed, the opinion of the General Assembly, as the more widely representative, would probably be held to prevail.

[5] This was generally accepted in respect to the League of Nations. Malbone W. Graham, The League of Nations and the Recognition of States (1933), pp. 34, 39; In Quest of a Law of Recognition (1933), p. 21; Lauterpacht, Recognition in International Law (Cambridge, 1947), pp. 401 ff.

[6] "The distinction must be asserted between recognizing a government and entering into diplomatic relations with it. No state is legally obliged to enter into and maintain diplomatic relations with a State or Government which it recognizes. On the other hand, it can not enter into full and normal diplomatic relations with a State or Government which it does not recognize" (H. Lauterpacht, London Times, Jan. 6, 1950).

hood is a prerequisite for membership in the United Nations. Furthermore, a Member has no right to vote to accept credentials emerging from "the government" of Yemen unless it thinks that government is really the government of Yemen, *i.e.*, unless it "recognizes" it. It could hardly think that, if it is at the moment dealing diplomatically with another government of Yemen. It is doubtful whether the instances on which the statement was based referred to cases where a Member of the United Nations definitely took the position that the entity seeking admission was not a state or that the representative was appointed by a group which the Member in question thought was not the government of a state. In the Chinese situation it is difficult to see how an American representative in any organ of the United Nations can vote to approve the credentials of the Communist government so long as the President of the United States continues to regard the Kuomintang government as the Government of China.

If the United States applied its traditional policy of recognizing *de facto* governments, it would probably find itself recognizing the Communist government. Professor Lauterpacht in the *London Times* for January 6, 1950, implied that the action of the British Government in recognizing the Communist government of China could be supported on that ground. This position can be accepted as an implication of traditional national policy without endorsing Professor Lauterpacht's position that there is a legal obligation for states to recognize a *de facto* government.[7] The doctrine asserted by Mexican Foreign Minister Estrada in 1930 went even further in demanding that *de facto* governments of recognized states be tacitly accepted without recognition. This doctrine contemplated, according to Philip Jessup, "the obliteration of the distinction between change of government by peaceful balloting and change of government by revolution or *coup d'état.*"[8] Though recognizing its consistency with the principle of the continuity of the state and the domestic character of governmental changes, Jessup notes that the Estrada Doctrine "will not always save foreign governments from the necessity of choosing between rival claimants," an observation supported by the present situation respecting China. Perhaps it is impracticable to go beyond the statement of Justice Taft in the Tinoco Arbitration[9] and the implication in the Secretariat Memorandum that recognition of new governments ought to be based only on considerations of actual control. The statement in the Memorandum that political considerations have frequently entered into such recognition, however, conforms with practice.[10]

[7] *Ibid.* and Lauterpacht, Recognition in International Law, pp. 6, 25.

[8] This JOURNAL, Vol. 25 (1931), p. 722. [9] Above, note 2.

[10] Professor Lauterpacht does not deny this but suggests that "the lawyer abandons his legitimate province once he begins to probe into the motives which have induced governments to express their obligation to act upon a legal rule. Such realism may be

The fact that different states and international organizations recognize the same entity independently creates possibilities of conflict. If, for example, the Security Council or the General Assembly should by the usual procedure for accepting credentials accept credentials from the Communist government of Chinese, even though the United States voted against it, it seems clear that for purposes of United Nations activities the United States would have to accept that decision, even though it continued to deal diplomatically with the Kuomintang government.[11] Furthermore, the fact that different organs of the United Nations might accept the credentials of different governments of the same state presents embarrassing possibilities, but it is in essence no different from the situation of a state which may have to deal with one government diplomatically and with another in the organs of the United Nations. Such situations actually arose during the history of the League of Nations.[12]

It has been reported that the Kuomintang government of China would be willing to accept the judgment of the General Assembly, but not that of the Security or other Councils, in respect to admitting the Communist representatives. Such a practice may prove desirable. All organs of the United Nations might well continue to accept credentials from the pre-existing government until the General Assembly has "recognized" a new government by acceptance of its credentials.

In making such a decision the General Assembly might well follow the criterion stated in the next to the last quoted paragraph of the Secretariat Memorandum formulating the *de facto* theory of recognition. Perhaps this theory should not entirely ignore the question of whether the government which at the moment is "in a position to employ the resources and direct the people of the state in fulfillment of the obligations of membership" is

appropriate for the historian and the sociologist. The jurist is concerned with the legal rule upon which governments profess to act" unless, he adds in a footnote, "a government uses grandiloquent language the insincerity or cynicism of which are so patent as to preclude it from being accepted at its face value" (*Ibid.*, p. 25).

[11] The Soviet Government has drawn a different conclusion in absenting itself since its recognition of the Communist government of China from all organs of the United Nations which continue to recognize the Kuomintang government. This interpretation seems to be irreconcilable with the obligations assumed by the Soviet Union under Arts. 2 (2), 9, 23 and others of the Charter. Other Members of the United Nations which have recognized the Communist government of China continue to deal with the Kuomintang government in United Nations organs.

[12] During the Spanish Civil War certain Members of the League of Nations dealt with Franco in respect to certain parts of Spain, while they dealt with the Loyalist government of Spain in the League of Nations. After the Italian conquest of Ethiopia certain Members of the League continued to deal with Haile Selassie's Government in the League while they dealt with Italy on interests in Ethiopian territory. In many cases Members of the League broke or refused to establish relations with the governments of other Members of the League outside of League organs (Lauterpacht, *op. cit.*, p. 402).

sufficiently stable to justify confidence that it will continue to do so for some time in the future, and in that connection the attitude of the population toward it would not be irrelevant.[13]

The Secretary General's memorandum indicates the complexities of the problem of recognition and the importance of an acceptable formulation of its principles. The observations here made have been based upon the following assumptions:

1. Recognition is the expression of judgment by a state, an international organization, or other subject of international law that a condition of facts has legal consequences, *i.e.*, constitutes a status or title.[14]

2. A great variety of facts have legal consequences and therefore may be the subject-matter of recognition. These include facts alleged to establish the status of states, protectorates, trusteeships, international organizations, and other subjects of international law; of governments, diplomats, consuls, commissioners and other representatives of subjects of international law; of belligerency, insurgency, neutrality, aggression and other abnormal situations; of treaties, national declarations of policy or law, resolutions of international conferences or organizations, awards of international tribunals and other transactions; of titles to territory, jurisdiction and other rights under international law.[15]

3. International law defines with varying degrees of precision the criteria and evidence which ought to establish these different statuses. Thus the conditions which should give status to a new government of an existing state are more clearly defined than those which should give status to a new state. In the first of these cases it has even been said that the criteria and evidence are so clear that recognition is unnecessary, although consideration of the actual situations gives ground for doubt.[16] In the case of new states

[13] Lauterpacht, *op. cit.*, pp. 98 ff., 339.

[14] Writers have usually been so intent in distinguishing the recognition of different things—states, governments, belligerency, etc.—that they have neglected to define the concept itself. But see H. Lauterpacht (Institute of Pacific Relations Inquiry Series, Legal Problems in the Far Eastern Conflict, 1941, p. 130), who defines recognition as "the treatment of a new title as valid"; and Georg Schwarzenberger (International Law, (London, 1945), Vol. 1, p. 53), who treats recognition as an act of a subject of international law which "can be adduced against it by other subjects of international law as a proof of acquiescence." To similar effect, a report presented to the Virginia Beach Conference of the Institute of Pacific Relations, 1939, declared "Recognition has the legal effect of waiving whatever legal opposition the recognizing state might be able to make to the assertion by another state of a new legal title." Legal Problems in the Far Eastern Conflict, p. 181.

[15] While instances can be found of applying the term "recognition" to all these situations, it has most commonly been applied to new states, new governments, belligerency, and territorial transfers.

[16] Above, note 8. The conditions which give title to territory are so clearly defined that recognition is usually, but not always, unnecessary (Lauterpacht, Recognition in International Law, p. 411). The conditions which constitute hostilities, belligerency,

international law in principle imposes limitations upon the discretion of other states in according or withholding recognition. Recognition of a new state may be premature, it may be unduly delayed, and it may, according to the Stimson Doctrine, be forbidden to states acting individually.[17] On the other hand, conditions which give status to unilateral declarations of policy, such as the Monroe Doctrine (1823) and the continental shelf doctrine (1945) or to unilateral declarations of international law such as the British navigation rules (1863) are hardly defined at all. Consequently states exercise almost complete discretion in according or withholding recognition of such acts.[18]

4. It follows that while in principle recognition is a juridical act applying legal criteria to factual evidence, in practice the insufficiency of legal criteria

aggression, insurgency, piracy, or police action are so unclear that recognition is always necessary. In fact the distinctions are so important and attitudes are so likely to differ that collective procedures, as contemplated under the United Nations Charter are especially desirable (Q. Wright, "The Present Status of Neutrality," this JOURNAL Vol. 34 (1940), pp. 403 ff.

[17] While premature recognition constitutes in principle a violation of the rights of the parent state, it is less certain that delayed recognition violates the rights of the new state or that recognition of the fruits of aggression violates rights of the victim or of the community of nations (see I.P.R. Report, above, note 14, and comments by Q. Wright, H. Lauterpacht and E. M. Borchard, *ibid.*, pp. 3 ff., 58, 115 ff., 129 ff., 157 ff.). Efforts have been made to define precisely the conditions of statehood (W. H. Ritsher, Criteria of Capacity for Independence, Jerusalem, 1934). The Permanent Mandates Commission formulated criteria, realization of which would justify or even require the emancipation of a mandated community, and these were accepted by the League of Nations Council and applied in the case of Iraq (Permanent Mandates Commission, Minutes, Vol. 20, p. 229; Q. Wright, "Proposed Termination of the Iraq Mandate," this JOURNAL, Vol. 25 (1931), pp. 436 ff.). Criteria formulated by the League of Nations and the United Nations in admitting new Members and by national governments in recognizing states and emancipating colonies are believed by some to be sufficiently precise to justify the assertion of a duty to recognize new states. "The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a State is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty" (Lauterpacht, Recognition in International Law, p. 24). "When a country has by any process attained the likeness of a State and proceeds to exercise the functions of one, it is justified in demanding recognition. There may be no reason or disposition on the part of States generally to withhold recognition provided the fact be established that the requisite elements of statehood are present and give promise of remaining. The method by which the new State comes into being may, however, cause delay in the according of recognition. Thus when an outside State proceeds to set up a new State within territory which prior to such action constituted part of the domain of an existing State, and in opposition to its will, the procedure may cause other States to be reluctant to acknowledge the validity of the achievement, and to withhold recognition of the new State whose birth takes place under such conditions" (C. C. Hyde, International Law (3rd ed., Boston, 1945), Vol. 1, pp. 148–149).

[18] For discussion of the recognition of these doctrines see Legal Problems in the Far Eastern Conflict, p. 77; C. G. Fenwick, International Law (3rd ed., 1948), p. 380; *The Scotia* (1871), 14 Wall. 170.

often gives it the character of a political or legislative act. In practice, even when the criteria of status are rather clearly defined, as in the case of new governments and states, recognition has often been granted or withheld on the basis of political considerations.[19]

5. This tendency arises because of the creative influence of recognition. A legal claim, however good, may not be effective until so judged by a competent court, and the judgment of a court of last resort acting within its jurisdiction is valid even though contrary to law and facts. Courts in principle declare and apply law, but in practice they sometimes make it. In the same way the claim to be a state or government or to enjoy some other status may be ineffective until generally recognized, but if generally recognized, it is valid even if contrary to law and facts. States can, therefore, promote their policies by recognizing facts not yet established or by refusing to recognize facts which are at the moment established. Recognition is in principle declaratory but in practice it is constitutive.[20]

6. Recognition or refusal to recognize by a single state controls the conduct of its own courts and other organs, estops the state from denying a status or title which it has recognized, and contributes to general recognition or non-recognition, but in itself it cannot create or deny status under international law. It does not, therefore, change the legal position of other states, though it may exert political influence upon them.[21]

7. General recognition establishes status objectively. All states, international tribunals, and international organizations are bound to give appropriate effect, when the occasion arises, to a status thus established. General recognition seems to be the only method known to customary international law whereby the legal consequences of facts, the validity of claims, the status of entities and changes of law can be authoritatively established.[22]

8. General recognition occurs when the important states which are in an important degree affected by the status in question, have expressly recognized the status, or, in case conditions exist clearly defined by international law as requisite for the status, can be presumed to have acquiesced by refraining from an explicit declaration of non-recognition. An international tribunal, in deciding whether a status exists, has to decide what states were

[19] In the jurisprudence of the Supreme Court of the United States recognition has usually been considered a "political question." Moore, Digest of International Law, Vol. I, pp. 744 ff.; Q. Wright, in Legal Problems in the Far Eastern Conflict, pp. 118 ff.; C. C. Hyde, International Law, Vol. 1, p. 156.

[20] Lauterpacht, who in general supports the juridical character of recognition, acknowledges that general recognition may be "quasi-legislative." Legal Problems in the Far Eastern Conflict, p. 145; see also Report to Virginia Beach Conference, *ibid.*, pp. 182 ff.

[21] Above, note 14.

[22] See Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), pp. 403 ff.

so unimportant or so little interested that their recognition or non-recognition can be ignored, and what statuses are so clearly defined by international law that their existence in fact creates a presumption of acquiescence or tacit recognition.[23]

9. General recognition may be effected by the accumulation of individual recognitions and the manifestation of acquiescences through the passage of time, or by collective action of a sufficient number of states in an international conference or organization.[24] Collective recognition may be effected directly by a conference resolution or a treaty binding the participants, or indirectly by treaty provisions establishing procedures or agencies competent to make decisions binding the parties. The admission of new Members to the United Nations, the acceptance of the credentials of new governments, and the passage of resolutions by the General Assembly of the United Nations are procedures by which the status of states, governments and principles may be established in respect to the United Nations and in some degree in respect to its Members. These procedures provide evidence of general recognition but the actual vote on particular measures is relevant in judging the conclusiveness of this evidence.

10. A state recognizes by any act manifesting the intention of the constitutionally authorized organ (usually the chief executive or representative authority) to recognize. Formal acts are to be considered as evidence of this intention and do not constitute recognition if performed by subordinate agencies contrary to the intention of the recognizing authority and repudiated in reasonable time. Recognition extends no further than intended. Thus intention to recognize a state may not manifest an intention to exchange diplomatic officers. Recognition of an international organization may not manifest an intention to recognize the statehood of all its members.[25]

11. An international organization recognizes by the procedures of admission, acceptance of credentials, and resolution provided in its constitution. Such recognitions extend only to those matters within the competence of the recognizing organ and bind the members of the organization only to that extent. Thus, while admittance of a state to the United Nations and acceptance of credentials from its government by an organ of the United Nations obliges Members to deal with that state and its government in the United Nations, it does not, in principle, oblige them to deal with the state or government elsewhere or to exchange diplomatic officers.[26]

12. As the relations of states, originally in large measure bilateral, become in greater degree multilateral, the decentralized and cumulative procedure for establishing "general recognition" of status has increasingly

[23] See also par. 3 above.

[24] Above, note 5.

[25] "A new state of affairs is not opposable to a State which has not recognized it, and, if it has done so, only within the limits of such recognition." Schwarzenberger, *op. cit.*, p. 53; Hyde, *op. cit.*, Vol. 1, pp. 149 ff.

[26] It may, however, constitute general recognition. See note 6 and par. 9 above.

led to uncertainty and confusion. There has been a tendency for states to accept collective procedures through the League of Nations and the United Nations for according general recognition. Further development of this tendency would add considerably to precision in applying international law.[27]

QUINCY WRIGHT

INTERNATIONAL LAW AND NATIONAL LEGISLATION IN THE TRIAL OF WAR CRIMINALS —THE YAMASHITA CASE

Since the decision of the United States Supreme Court in the case of General Yamashita, denying application for leave to file a petition for a writ of *habeas corpus,*[1] and the subsequent execution of the sentence of the Military Commission, there has been some effort to create opinion against the legality of the proceedings. Recently one of the counsel assigned for the defense has published a book entitled *The Case of General Yamashita.*[2] The argument is based largely, although not entirely, upon the dissenting opinions of Justices Murphy and Rutledge. It is not intended here to discuss the fairness of the trial nor to recapitulate the grounds upon which the Supreme Court held that the Military Commission was lawfully created and that the failure to give advance notice of the trial to the neutral Power (Switzerland) under Article 60 of the Geneva Convention did not divest the authority and jurisdiction of the Commission. However, the arguments now made against the legality of the proceedings are largely based on national legislation and this requires some comment from the point of view of international law.

It has not been sufficiently recognized that Congress, by sanctioning the trial by military commissions of enemy combatants for violations of the laws of war, has not attempted to codify the law of war. In *Ex parte Quirin,*[3] the Supreme Court held that Congress in the exercise of its powers to define and punish offenses against the law of nations had recognized the military commission as an appropriate tribunal for the trial and punishment of offenses against the law of war. The Articles of War[4] enacted under this authority declare (Article 15) that the Articles shall not be construed as depriving military commissions of concurrent jurisdiction in respect of offenders or offenses that, by statute or by the law of war, may be triable by such military commissions. Thus

[27] Lauterpacht, Recognition in International Law, p. 402; Graham, The League of Nations and the Recognition of States, p. 34.

[1] In the Matter of the Application of General Tomouki Yamashita, 66 Supreme Ct. Rep. 340 (1946). This JOURNAL, Vol. 40 (1946), p. 432.

[2] A. Frank Reel, The Case of General Yamashita (University of Chicago Press, 1949). A Memorandum in reply was issued by Brigadier General Courtney Whitney in mimeograph form from General Headquarters, Tokyo, November 22, 1949.

[3] *Ex parte* Quirin (1942), 317 U. S. 1; this JOURNAL, Vol. 42 (1948), p. 152.

[4] 10 U. S. C. §§ 1471–1593.