CRITICAL REMARKS ON LAUTERPACHT'S "RECOGNITION IN INTERNATIONAL LAW"

The problem of recognition in international law has been the subject of a far-flung practice of states, of many decisions of national and international courts, of many treaties and of an enormous literature. It has often been treated by learned societies and was again on the agenda of the 1950 Annual Meeting of the American Society of International Law. It has played a great rôle in the League of Nations, in the inter-American system and in the United Nations. Yet, this problem "has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial."[1] The reason is that recognition "is a subject of enormous complexity, principally because it is an amalgam of political and legal elements in a degree which is unusual even for international law."[2] This situation explains why recognition was the only proposed topic of the Harvard Law School Research in International Law upon which no report was drafted. In 1928 this writer published a comprehensive monograph on recognition,[3] in which he tried to state the positive international law on the basis of a full study, summary and critique of the practice of states, court decisions and the literature. His neutral and impartial study led to the adoption of the so-called "declaratory doctrine." He proved that under positive international law there is no right to recognition by new states or *de facto* governments, nor is there a legal duty to recognize them.

Certainly much has happened in this field since 1928, and a new comprehensive monograph was in order. The book by Professor Lauterpacht,[4] a great and truly leading international lawyer, is, as everything which Lauterpacht writes, entitled to the greatest interest. The book has many excellent qualities, publishes hitherto unknown documents, gives exceedingly interesting discussions and highly valuable analyses of difficult recent recognition cases, especially with regard to the Italian conquest of Ethiopia and the Spanish Civil War. But Lauterpacht's principal thesis which probably constitutes the reason why the book was written, namely, his assertion of a right to recognition and a duty to recognize, is certainly entirely untenable as not being in accord with positive international law.

To understand fully Lauterpacht's position, it is necessary to point out an article, published in the period between this writer's monograph of 1928 and Lauterpacht's monograph of 1947, from the pen of the scholar from whom we both theoretically stem: Hans Kelsen.[5] In his usual power-

[1] H. Kelsen, "Recognition in International Law—Theoretical Observations," this JOURNAL, Vol. 35 (1941), p. 605.

[2] Alwin V. Freeman, in this JOURNAL, Vol. 44 (1950), at p. 378.

[3] Josef L. Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (*Handbuch des Völkerrechts*, II/3, Stuttgart, 1928, pp. 218).

[4] H. Lauterpacht, Recognition in International Law (Cambridge, England, 1947, pp. xx, 442).

[5] Kelsen, *loc. cit.*, pp. 605–617.

ful logical reasoning and wonderful lucidity Kelsen distinguished between the political and the legal act of recognition. The first, consisting of the willingness to enter into political relations, is an act wholly within the discretion of the recognizing state. But the legal act of recognition is the ascertainment (*la constatation*) that certain requirements, prescribed by international law, have been fulfilled by a legal community or a body of persons (government). Legal recognition is for Kelsen strictly constitutive in character, a theory which was at once attacked [6] as not being in accord with the practice of states. The position of Kelsen is wholly one which he felt compelled to adopt from purely logical reasons: law cannot deal with "naked facts," but only with facts as ascertained by the legally competent authority in a legally prescribed procedure. This idea entered Kelsen's "Pure Theory of Law" relatively late and that explains that the same Kelsen earlier [7] held that the norm of general international law laying down the conditions for the coming into existence of a state in the sense of international law establishes recognition and that, therefore, recognition by existing states has only a declaratory, and no juridical, importance.

It is from this idea of recognition as a legal act of ascertaining the fulfilment of requirements laid down by international law that Lauterpacht's book is written, coupled with the idea of a right to, and a duty of, recognition. This principal thesis the author tries to prove as positive international law from the practice of states. In this endeavor, it must be said in the interest of scientific truth, he has failed completely. Criticisms of his untenable thesis are not lacking.[8] As to the right to and duty of recognition, the author is also in contradiction with Kelsen's above-quoted article. Kelsen correctly states that "existing states are only empowered, not obliged to recognize," and that "refusal to recognize is no violation of general international law." Also Philip C. Jessup, writing *de lege ferenda*, correctly states that under positive international law "states are free to accord or to withhold the recognition of new governments." [9]

This writer has always been and is, of course, entirely in agreement with the statement that it is a norm of general international law which lays down the requirements for the coming into existence of a "state in the sense of international law." Because of the existence of this norm, Jessup's [10]

[6] See Philip M. Brown, "The Effects of Recognition," this JOURNAL, Vol. 36 (1942), pp. 106–108; and Edwin Borchard, "Recognition and Non-Recognition," *ibid.*, pp. 108–111.

[7] See H. Kelsen, *Das Problem der Souveränität* (1921), pp. 224–241, and *Allgemeine Staatslehre* (1925), pp. 126–127.

[8] See, *e.g.*, the book review by E. J. Cohn in Law Quarterly Review, Vol. 64, No. 255 (July, 1948), pp. 404–408, and the critical remarks by Herbert W. Briggs, "Recognition of States, Some Reflections on Doctrine and Practice," this JOURNAL, Vol. 43 (1949), pp. 113–121.

[9] Philip C. Jessup, A Modern Law of Nations (New York, 1948), pp. 43–67, at p. 55.

[10] *Ibid.*, p. 46.

proposal *de lege ferenda*, according to which the United Nations should adopt a treaty or declaration fixing "certain definite criteria for determining whether an entity has the necessary attributes of statehood," is unnecessary. This writer also fully agrees with the statement that effectiveness of governmental power and reasonable permanency are the only tests to determine in law whether a certain body of persons is a general *de facto* government. This writer further is in complete accord with the statement that the origin of a new state or government which may be violative of pre-existing constitutional law is irrelevant from the point of view of international law. It is exactly the positive norm of effectivity of international law which validates the new state or government. Unsuccessful secession or civil war is treason; successful secession or civil war creates new law. But the rule of effectivity governs also in international law. That is why Lauterpacht's discussion of the so-called "non-recognition doctrine" is of doubtful value.

Leaving aside this non-recognition doctrine as well as the problem of the recognition of belligerency, this writer wants to concentrate his criticism on the heart of Lauterpacht's book: the assertion of the constitutive character of the recognition of new states and governments, coupled with the assertion that positive international law gives a legal right to be recognized and imposes a legal duty to grant recognition. As far as this principal thesis goes, Lauterpacht has entirely failed to prove it; the law is exactly to the contrary.

How did it come about that so serious a scholar as Lauterpacht was led into what must be called a falsification of the positive law? First, it seems, that the wish was the father of the thought. Just as, within dramatic literature, a so-called "*pièce à thèse*" is always in danger of falling short of being a work of art, thus in science a book, written with the preconceived wish to "impress upon the student the fact that the practice of states in the matter of recognition is more permeated with law and principle than is currently assumed,"[11] is in danger of falling short of scientific truth. Not logical reasons, as with Kelsen, but ethical considerations moved the author; if there were no legal right to, and legal duty of, recognition, "the problem of recognition would constitute a serious defect in the structure of international law." That is why the author teaches that recognition is "an act of law," not a political act; that recognition, "although declaratory of an existing fact, is made in the impartial fulfilment of a legal duty, and is constitutive";[12] that "recognition is declaratory of facts and constitutive of rights";[13] that "the correct and reasonable rule is that both the unrecognized government and its acts are a nullity."[14] While recognizing

[11] Lauterpacht, *op. cit.*, p. vi.
[12] *Ibid.*, p. 6.
[13] *Ibid.*, p. 75.
[14] *Ibid.*, p. 147.

that states—sometimes, the author believes—are moved by national interests, that recognition is sometimes a matter of bargain or political pressure, in a word, that there are abuses of recognition, the author holds that in general, states, in granting or refusing to grant recognition, act in an impartial and judicial capacity to administer international law. When the conditions required by international law are present the existing states, he teaches, are under a legal duty to grant recognition and the corresponding entities have a legal right to be recognized.

In teaching these doctrines, in contradiction to positive international law, Lauterpacht forgot that the science of international law cannot by its fiat correct the structural defects of the primitive international legal order. He forgot what his predecessor, in words which are equally true today, warned against forty-two years ago,[15] what he himself recently emphasized:[16] the scholar of international law is not in the rôle of a legislator, but of a judge; of a judge, and not in the rôle of counsel for plaintiff or defendant. It is the duty of the scholar to state what the law is, whether he likes it or not. It is fundamental to distinguish between *lex lata* and *lex ferenda*. Lauterpacht's dialectic efforts to make the practice of states tell what it does not contain, however talented and powerful, are of no help; neither is the attitude of joining the now fashionable accusations against positivism. What is to be discarded is the pseudo-positivism of the nineteenth century which often posed as positivism.

Lauterpacht's basic attitude that, if there is no right to, no duty of recognition, the whole problem belongs only to politics, not to law, is hardly justifiable. The existing states have a right, but not a duty, to recognize. Does the right to vote, without duty to vote, not belong to law? And, to anticipate Lauterpacht's argument of "premature recognition," even where there is merely a right, not a duty to vote, the law lays down the conditions for the exercise of this right. Although there is no duty to vote, a person may make himself guilty of illegal voting.

Lauterpacht's argument of premature recognition is no argument for his thesis of a legal duty to grant recognition. First, we deal here only with a special case of recognition. In the case of revolutionary secession positive international law lays down, apart from the normal condition of effectivity, the further condition that the revolutionary struggle with the mother country must have been virtually ended. If this second condition is not fulfilled, premature recognition constitutes an international delinquency toward the mother country; but this norm creates no duty to recognize the new state. The problem of premature recognition, therefore, does not arise in the frequent cases, where a new state comes into existence with

[15] L. Oppenheim, "The Science of International Law: Its Task and Method," this JOURNAL, Vol. 2 (1908), pp. 313–356.

[16] U.N. General Assembly, International Law Commission, Survey of International Law (Lake Success, N. Y., 1948), pp. 64, 66.

the consent of the mother country (Baltic Republics, 1919, India, Pakistan, Burma, Ceylon, Philippines), or where there is no mother country (Congo State, Israel). And if there were a duty to recognize, why does Lauterpacht not also teach the international delinquency of "tardy recognition," as Borchard would have it? Does Lauterpacht hold that the United States, by not granting recognition for so long a time to the effective Soviet Government, has made herself guilty of an international delinquency in positive law?

The practice of states gives no support to the constitutive theory. Within the Pan American orbit the declaratory doctrine has been emphatically adopted.[17] This brings us to a further methodologically untenable procedure. The author restricts himself to the practice of Great Britain and of the United States and identifies this practice with the "practice of states." Having quoted certain paragraphs of British utterances, containing nothing about a duty of recognition, but merely considerations of convenience and expediency, the author speaks about the "preponderant practice of states,"[18] of the "bulk of state practice."[19] He tells us that

> effectivity, evidenced by freely expressed popular approval has been acted upon for a long period by Great Britain and the United States, the two countries which have made the greatest contributions to the development of recognition. To that limited extent the right of man to be governed by consent has become, through the doctrine of recognition, part of international law.[20]

Such language must not only nourish non-English accusations against an Anglo-American superiority complex of righteousness,[21] but is also scientifically untenable.

Italian courts apply the law indicated as governing by their conflict of laws rule, regardless of whether the state in question has or has not been recognized by Italy.[22] The constitutive theory is contradicted by many American court decisions, stemming from the leadership of Cardozo.[23] It is contradicted by Taft's famous decision in the *Tinoco Arbitration*, 1922,[24]

[17] Montevideo Convention of 1933 on Rights and Duties of States, Art. 3.

[18] Lauterpacht, *op. cit.*, p. 6.

[19] *Ibid.*, p. 32.

[20] *Ibid.*, p. 171.

[21] Thus recently Rolando Quadri speaks of the "*paesi anglo-americani che tradizionalmente si considerano investiti di una specie di superportere internazionale,*" *Diritto Internazionale Pubblico* (Palermo, 1949), p. 298.

[22] G. Balladore Pallieri, *Diritto Internazionale Privato* (2nd ed., Milan, 1950), p. 95.

[23] See *e.g.*, the well-known cases: Wulfsohn *v.* Russian Socialist Federated Soviet Republic (1923), 234 N. Y. 372: "Its recognition does not create the state"; Sokoloff *v.* National City Bank (1924), 239 N. Y. 158; Salimoff & Co. *v.* Standard Oil Co. of New York (1933), 262 N. Y. 220.

[24] 116 British and Foreign State Papers, p. 438; this JOURNAL, Vol. 18 (1924), p. 147.

and, even more so, by the decision in *United States (George W. Hopkins) v. Mexico*, 1926.[25] The constitutive theory is not only untenable on precedent and authority, but also on reason and principle. Lauterpacht has succeeded in dispelling neither the powerful argument of a legal vacuum, of what Cavaglieri admitted constitutes an *"intermezzo agiuridico,"* nor the absurdity of the simultaneous existence and non-existence of the same entity. What he has to say is not a legal answer at all, but merely a political prediction: things will not be so bad. It is further clear that a sovereign state cannot be created through recognition by other states; one of the very requirements of international law is independence. No amount of recognitions can supply the lack of the fulfilment of the requirements laid down by international law. Recognition, in such a case, is simply ineffective in law.

A right to, a duty of, recognition has been supported by writers, especially those of the school of natural law, or for political reasons, particularly by Latin American writers,[26] who are always fearful that recognition may be made a tool of intervention. But no such norm exists in positive international law; it is a mere postulate *de lege ferenda*. Even if it existed, as Jessup [27] pointedly remarks, it would "afford slight satisfaction in the absence of organized international machinery to enforce the obligation." Lauterpacht's proposal of collectivization of recognition has little chance, as actually it has been the usual practice of the United States to refrain from participating in such joint action.[28]

Even the practice of the two states, to which alone Lauterpacht refers, completely negates a legal right to, and a legal duty of, recognition. It will suffice to cite a few recent examples: The long non-recognition of the effective Soviet Government by the United States: British and American non-recognition of effective *de facto* governments in Bolivia in 1943, and Argentina in 1944; on the other hand, American recognition of the revolutionary government of General Odria in Peru, which at once abolished constitutional guarantees; British and American recognition of the revolutionary governments of the "peoples' democracies" in Europe. As to Israel,[29] the United States recognized it *de facto* within a few hours of the declaration of independence, whereas Great Britain declared it will not recognize Israel, because it has not fulfilled the basic criteria of an independent state. Was this contrasting attitude of the two states, to which Lauterpacht restricts himself, in both cases the exercise of an impartial and

[25] Opinions of Commissioners, 1927, p. 42; this JOURNAL, Vol. 21 (1927), p. 160.

[26] See, recently, Jiménez de Aréchaga, *Reconocimiento de Gobiernos* (1947).

[27] Jessup, *op. cit.*, p. 44.

[28] Hackworth, Digest of International Law, Vol. I (Washington, 1940), p. 173.

[29] See Philip M. Brown, "The Recognition of Israel," this JOURNAL, Vol. 42 (1948), pp. 620–627.

judicial attitude? On the other hand, Great Britain has recognized the effective Communist government of China, whereas the United States refuses to recognize it and recognizes the Nationalist Government, which is today reduced to Formosa and, therefore, sits, legally speaking (as no peace treaty with Japan has yet come into force), on Japanese territory. The contrast between the "impartial and judicial" attitude in recognition between the United States and the Soviet Union threatens, as Secretary General Trygve Lie fears, to wreck the United Nations. Both Great Britain and the United States have recognized the new state of Viet Nam and the Bao Dai régime. Has it fulfilled the requirement of independence? The states of the Soviet bloc have recognized the rebel government, India has recognized none, as she holds that the Bao Dai régime is a "puppet government."

In spite of all his dialectic efforts, Lauterpacht must admit that he has been unable to find a clear statement in the practice of states in favor of a legal duty of recognition. But, to the contrary, a study of American state practice discloses with all clarity that international law knows no such duty. Hackworth, whose *Digest of International Law* gives the American practice from 1906 to 1940, clearly states: "The existence in fact of a new state or government is not dependent upon its recognition by other states. Whether and when recognition will be accorded is a matter within the discretion of the recognizing government." [30]

Mr. Warren Austin, in reply to a strong criticism by Syria of America's quick recognition of Israel, said in sharpest terms that "no country on earth can question the sovereignty of the United States in the exercise of that high political act of recognition of the de facto status of a state." Recently, a Pan American draft treaty on recognition was discussed. Article 1 stated that a *de facto* government has the right to be recognized. The American representative made at once a reservation and stated in unmistakable terms: The formulation of conditions of recognition in terms of a right vested in the *de facto* government necessarily implies a legal duty in other states to grant recognition. Adequate basis for any such duty is lacking in existing international law, which on the contrary, delegates to each state the faculty of determining whether and when to grant recognition.[31]

JOSEF L. KUNZ

[30] Hackworth, *op. cit.*, p. 161. He also clearly states: "There is no obligation to recognize that a status of belligerency exists." *Ibid.*, p. 391.

[31] See Alwyn V. Freeman, *loc. cit.*, p. 379.