Lassa Oppenheim's Nine Lives


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Kazantzakis notwithstanding,¹ there is something more than faintly incongruous in the very idea of "updating" Homer. Or Hugo Grotius, for that matter. Great art endures for the ages. Great treatises, whether in law, medicine, or engineering, are distinctive because of the coherence of their organizing vision and the rigor and persuasiveness of the data they marshal. The data obsolesces, yet the power of the treatise's conception and the authority it comes to command impel others to attempt to bring the data up to date.

Alas, renovating a work of genius inevitably changes it, sometimes depriving the work of the very quality that warranted "updating." The change may be stylistic. James Brierly's slim Law of Nations,² the distillation of his lectures at Oxford, is still a wonderful and easily readable book for the beginning student, even though it is plainly out of date. Sir Humphrey Waldock's 1963 edition of this book³ brought Brierly up to date but added enough middle-aged bulges to render it, overall, rather stuffy. Waldock was an outstanding international lawyer, Brierly's successor at Oxford, and certainly his intellectual peer. Before turning to international law, however, Waldock had been trained as a property lawyer and had taught in that field for a quarter of a century. Given the almost obsessive demand for precision and detail of that branch of the law, the poor man may have suffered an irreversible déformation occupationnelle. Whatever the reason, he lacked that rare gift of elegant generalization that made Brierly's Law of Nations so distinctive and useful.

More often the change is in substance or, more precisely, its surfeit. Hundreds of additional, carefully digested cases obscure the innovative structure of the original. Edited versions, like renovations in the vieilles villes of Europe, either entirely replace the interior of the original, leaving only the

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façade intact, or try to strike a compromise by merely supplementing the views of the originator. The updated treatise takes on a "paleontological" character: the careful reader discerns different layers and sediments in a state of uneasy coexistence. Increasing discrepancies between the views and the times of the originator and those of successive editors may be concealed. Fault lines below the surface, however, may leave the superstructure shaky.

Now, the premier modern international law treatise in English has been updated — for the ninth time. After a hiatus of almost forty years, the reappearance of Lassa Oppenheim's *International Law* is, in itself, a significant international legal event. Part of the significance will lie in the practical consequences of the reappearance; the more recent predecessors of this volume have been quoted and relied upon by governments and domestic and international tribunals, often as the final authoritative statement of international law on a particular point. Indeed, Arthur Nussbaum, in a review of systematic treatises in international law, concluded that Oppenheim's was "by common consent the outstanding and most frequently employed systematic treatise on the subject in the English-speaking countries."4

Much as the work of the great American jurist, John Bassett Moore,5 became synonymous at the beginning of the twentieth century with the American approach to international law, Oppenheim’s *International Law* became the apotheosis of the English approach. Still, for all the parallels, there are also intriguing differences. Born and trained in the United States, Moore joined the State Department at the age of twenty-five, serving for several years before assuming a professorship at Columbia. After his departure from the State Department, Moore was frequently consulted by presidents and cabinet members and ultimately served on the bench of the Permanent Court of International Justice.6 Both Oppenheim and Hersch Lauterpacht, who edited the Fifth through the Eighth Editions of Oppenheim's treatise, were Central European Jews who immigrated to England as adults. Moore's work was based on international law chiefly as practiced by the United States. The work of Oppenheim and Lauterpacht was international in scope and integrative; each man's scholarly talent was matched by a distinctive, though quite different, international vision.

With the Ninth Edition,7 *International Law* is now entirely refashioned by two men, born, intellectually formed, and professionally trained in England, both Queen's Counsel at the English Bar. One can immediately discern differences in approach and result. The Ninth Edition is very much an English legal treatise, better than some of its predecessors in certain ways. Some of the spaciousness of vision of the earliest editions is gone, but it is a magnifi-

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5. *John Bassett Moore, A Digest of International Law* (1906) (8 volumes).
cent, encyclopedic achievement. Still, for all the change, some aspects of the original *International Law* remain intact. Considering the political changes that have taken place over almost a century, it is remarkable how faithfully the structure of the book follows that of the First Edition. And the treatise remains a Cambridge book, refashioned once again by a distinguished holder of the Whewell Chair in International Law (Sir Robert Jennings) at that great university.

Consumers of international law, particularly those who must decide some issue quickly and perforce turn to treatises and digests, will inevitably look toward the Ninth Edition for the same sort of guidance as did users of its recent predecessors. Yet the significance of the Ninth Edition goes beyond the practical application to which the book will surely be put. As a manifestation of the genre of treatise, the new *International Law* is an event in an evolving sociology of international legal knowledge.

I

The modern treatise is a systematic collection of rules. It is based, in its various forms, on a conception of decisionmaking as the application of rules to factual situations, which can be categorized in advance with enough precision so that the rules can be readily applied. The evidence of law is to be found in past decisions, each of which may be juridically analyzed in order to confirm and further clarify the rule in question. Prudential elements of law, such as considerations of idiosyncratic contexts or projections and evaluations of the political and wider social consequences of specific applications, have little room for play. They undermine the validity of the rules — indeed, the validity of a rule-based conception of law. They appear in the treatise, if at all, marginally or subliminally.

This sort of treatise, as a genre of legal scholarship, can be quite useful in a highly bureaucratized decisionmaking environment. It fits less easily into fluid contexts, particularly where the power matrix, the hidden foundation of an apparently routine and stable process of decisionmaking, is changing. In the fluid environment, the rule-based treatise is always in danger of sliding toward one of the two poles of unreality. It may become largely prescriptive, elaborating the way the world should work rather than the way it does work. Or it may become delusory, so that the treatise writer believes he is describing the way the world actually works.

As long as users know that the book they are consulting is an affirmation of the myth system and does not purport to be a description of the operational

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code, the book can be useful. This is not, however, an easy perspective to maintain, for so much legal reading and citation is an urgent search for "authorities" that support the client's position. In the everyday operation of law, aspirational statements reemerge as authoritative statements of the law with astonishing frequency.

Superficially, modern treatises in international law fall into two general categories. One, a continuation of a much older tradition, is essentially a theoretical statement and an exercise in general principles. Because the writers are often nominalist and think that what should be will be, they view their writing as, in some sense, descriptive. These writers may cite some cases and treaties, but largely as selective examples and illustrations of the general principle. They do not attempt to confirm the general principle by reference to practice. Much of the treatise in this category is essentially deductive and operates on some variant of a natural law theory.

A second, more distinctively modern type of treatise is essentially descriptive, and assumes the law to be the product of state "will." Accordingly, law is manifested in certain types of authorized state action. This second type purports to be inductive and empirical in a very limited sense, supporting each proposition by appropriate "authorities." The treatises of Georg Schwarzenberger's "inductive method" are surely the most systematic effort in this genre.°

Each type of treatise carves out a different role for international law. The first type of treatise tends, by its nature and method, to hold that international authority derives from some international source or grundnorm. The source is not empirically referential and serves as the authoritative source for lower-level rule derivations. Because it treats international authority as deriving from a single source, this type of treatise is "monistic."° The influence of the formal rules and institutions of international law, in this view, is extensive. In the second, more descriptive treatise, propositions are tested by reference to trends of decision, in many of which international law rules do not seem to prevail. This genre tends to be what international theorists call "dualistic" or, more properly, as Hans Kelsen observed, "pluralistic."° It views all

10. Georg Schwarzenberger, International Law (3d ed. 1957) (2 volumes). The English and American municipal variants of this type of treatise are based entirely on statutory and case material. They are designed for practicing lawyers and are based on the jurisprudential assumption that law is what the courts say, and that courts will say in the future what they said in the past. Hence they are an exercise in reproducing the judicial product in abbreviated form. The case law is supposed to be consistent. Of course, it is not. A simple code, with terms such as "accord," "cf.," and "but see," indicates the often rich inconsistencies and provides a clue to the discretionary choices of the editor. From time to time, the editor in this genre will state modestly, "It is submitted that" and suggest a legal formula that is not yet available in the case law or that is inconsistent with it. When the submission is of the latter type, the treatise begins to take on naturalistic or policy tones. What is most striking in this genre is the complete absence of an explicit teleological or policy discussion.
12. Id. at 404.
international authority as ultimately deriving from the will of individual states. Generally, it carves out a much less significant role for the institutions of international law than do natural law approaches.

But naturalist elements also infiltrate the second type of treatise, for "general principles of law" frequently provide the matrix that guides the scholar in looking at some things and ignoring others. The matrix is usually traditional and rarely corresponds to actual patterns of international decision. The general principles are often drawn upon to fill a lacuna in practice. Moreover, the method of collecting examples of practice is frequently anecdotal and sometimes inconsistent, as when a scholar or a practitioner takes a dictum in a judicial holding or even a scholarly statement as "practice." The approach is also quite unscientific, since the scholar follows no rigorous method for determining the quantum or intensity of practice necessary to establish "law."

Paradoxically, for all the apparent methodological differences, the results of the inquiries in both types of treatise often coincide. We may be encountering differences in "style" (in Karl Llewellyn's sense\textsuperscript{13}) rather than in substance. In the universe of international legal writing, much as in art, we have mosaicists and Baroque painters, each working on the same model. Alongside them, we also have assemblagistes, the creators of the great modern digests. The progenitor of the latter approach is probably John Bassett Moore, who updated and greatly expanded a digest for the State Department based on materials in its files. Moore's digest served as a description of U.S. conceptions of international law and a guide for the perplexed legal and political officers of the Department.\textsuperscript{14}

As a title, the word "digest" is really a misnomer. Digests of international law do almost no "digesting." Like the American casebook, they select and reproduce chunks of documents and cases relevant to particular problem areas that the decisionmaker is likely to encounter. In this sense, the digest is a useful counterweight to rule-oriented treatises. The documents and particularly the diplomatic correspondence show human beings applying policies and adapting institutional arrangements to ever-changing situations. So despite its nominal jurisprudence, the digest is much more representative of the actual process of international decisionmaking. On the other hand, the materials that are selected for inclusion and exclusion reflect policy choices. Documents and incidents that could be extremely relevant to subsequent practice may be suppressed or reproduced so selectively that they give the reader quite a different impression of what transpired. Most digests hew to a positivistic jurisprudence, but the nature of the material and its presentation cannot help but reveal international law as a flow of authoritative responses that take account of policy and political possibility in unique situations.

\textsuperscript{13.} KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 5-6 (1960).
\textsuperscript{14.} MOORE, supra note 5.
Digests and detailed treatises were essential developments in international law, because nothing akin to the reporting system of the common law courts developed in the polyglot of international law until well into the twentieth century. National collections of treaties were, at best, irregularly published. Many states to this day do not publish an index of the treaties that they believe to be in force. Relatively few collections of arbitral decisions existed until the beginning of this century, and they were usually privately collected and published. National court decisions on international law matters were not systematically collected and published until two decades after the first appearance of *International Law*, and then they were published by two editors of the treatise.\(^5\) The inaccessibility of information about state practice generated the need for compendia of decisions that were organized for ready retrieval: digests and treatises.

Things have changed. The explosion of reporting systems of international decisions after the middle of this century may well make the Ninth Edition of *International Law* the last of its kind. In a world of on-line data bases, future treatises, no longer needed to digest and assemble data that would otherwise be unavailable, will probably revert to something much closer to Lassa Oppenheim's original treatise: a coherent vision and overview of the entire field, and a review of the sociology of knowledge to facilitate the reader's own research. Subsequent treatises will, in short, return to what Lassa Oppenheim's First and Second Editions were — a student's book, in the best sense of those words.

II

Lassa Francis Lawrence Oppenheim was born near Frankfurt on March 30, 1858, into a well-known Jewish family.\(^6\) For some reason, he did not go directly to university after completing gymnasium. At the age of twenty, he went to Göttingen, where he heard Rudolph von Jhering lecture. German university education was then peripatetic, and Oppenheim followed the

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15. The first such collection, the *Annual Digest of Public International Law Cases*, was introduced in 1929. The first two volumes, covering the years 1925-26 and 1927-28, were edited by Arnold McNair (the editor of the Fourth Edition of Oppenheim's *International Law*) and Hersch Lauterpacht (who would become the editor of the Fifth through Eighth Editions of Oppenheim's treatise). Lauterpacht joined with Sir John Fischer Williams to produce the volumes covering 1919-22 and 1923-24, published in 1932 and 1933. From 1933 onward, Lauterpacht assumed sole editorship of the *Annual Digest*. In 1956, when the volume for 1950 was published, Lauterpacht changed the title of the series to *International Law Reports*, reflecting his view that the volumes had grown from digests into full reports. Since Lauterpacht's death in 1960, when the work for the 1957 volume was underway, the *Reports* have appeared under the editorship of his son, Eliahu Lauterpacht, joined in 1990 by C.J. Greenwood.

custom. From 1876 to 1880, he studied at Berlin. In 1880, he went to Heidelberg to hear the lectures of Johann Bluntschli and then back to Göttingen where he wrote a dissertation in commercial law and took his degree. In that year, he also served as a judicial clerk at Neuwied.

In 1883, Oppenheim moved to the university at Leipzig, where he was greatly influenced by Karl Binding, the renowned professor of criminal law, who apparently viewed him as a protegé. He also studied philosophy under Wilhelm Wundt. In 1885, he moved to Freiburg im Breisgau, first as lecturer and then as extraordinary professor.

In 1892, Oppenheim immigrated to Basel, Switzerland, where he became professor of criminal law. His post did not pay a salary. He also lectured at Basel on philosophy of law, constitutional law, and international law. In 1895, at the age of thirty-seven, he resigned the professorship and moved to London, with no prospect of another academic appointment. A biographical note by Edward Whittuck, a close friend to whom Oppenheim dedicated the First Edition of his *International Law*, cites the state of Oppenheim’s health and his difficulty sleeping as the reasons for his move. To our therapy-conscious generation, these comments might hint at emotional difficulties, for why would one sleep better in London than in Basel? We have no evidence to confirm these suspicions, however, and all reports indicate that Oppenheim was a contented and happy man. Politics may have been a factor in his decision to move. Apparently, Oppenheim did not wish to return to Germany because political developments there were incompatible with his moderate liberal preferences. Oppenheim had traveled to England regularly to visit his brother, who had settled there, and on leaving Basel decided that Albion’s climate and mode of life suited him.

Upon arriving in England, Oppenheim took rooms in London and devoted himself intensively to the study of international law. Three years later, in 1898, the London School of Economics, which had recently opened, made him a Lecturer of International Law. He married Elizabeth Cowan, the daughter of a one-time sheriff of London, and became a naturalized British subject.

In 1905 and 1906, Oppenheim published his *International Law* in two volumes, one for international law during peacetime (Volume I) and the other for international law during wartime (Volume II). Although it was essentially a teaching book for his students, the book was admired in professional circles. Indeed, the book so impressed John Westlake, then Whewell Professor at Cambridge, that when Westlake resigned his chair in 1908, he persuaded Oppenheim to let his name go forward as a candidate. Oppenheim had not himself applied for the post.

Oppenheim held the Whewell chair until his death in 1919. The Fourth Edition (ironically, the edition in which the process of banishing Oppenheim

from his own treatise took its great leap forward) contains a photograph of the
author as the frontispiece. A short, stocky man, bald, close-shaven, jowly,
dressed in an English walking suit, sits at his desk, turning toward the
camera. In the style of the day, the subject stares unsmilingly through the
small lenses of wire-framed glasses. Despite the period-piece stiffness, the
photograph conveys decency, honesty, and warmth. Oppenheim seems
content, seems indeed a happy and fulfilled man.

Oppenheim published a number of other works alone and in collaboration.
He wrote an impressive essay on the future of international law and also
co-authored a book prepared for the War Ministry on the law of war. He
was prominent in scholarly organizations in Europe. Nevertheless, the Second
Edition of his treatise and the preparation of the Third were the major
focus of his efforts and remain the work for which he is remembered. The
Second Edition exceeded the success of the first: "The second edition,
published in 1912, was soon exhausted by the demands from libraries,
Departments of State, lawyers, and students in all countries; and early in the
war it became impossible to obtain copies."

Oppenheim, as mentioned, acquired British nationality in 1905. During the
First World War, he identified with the Allies and openly criticized Ger-
many. He became a supporter of the League of Nations, the subject of his
last publication, although he was plainly sensitive to the difficulties it
would encounter. He died in the course of preparing the Third Edition of his
International Law.

III

In 1905 and 1906, when Oppenheim published his treatise, a systematic
and positivistic approach required a comprehensive and detailed categorization
of international law and, if not point-for-point authority for propositions, then
at least a roadmap for finding that authority. The amount of doctrinal

   (2 volumes) [hereinafter FOURTH EDITION].
    OF WAR ON LAND FOR THE GUIDANCE OF OFFICERS OF HIS MAJESTY'S ARMY (n.d.).
21. L. OPPENHEIM, INTERNATIONAL LAW (2d ed. 1912) (2 volumes) [hereinafter SECOND EDITION].
22. Professor Oppenheim, 2 J. Comp. Leg. & Int'l L., 3d Series 158, 159 (1920).
23. In 1915, Oppenheim denounced the German attack on Belgium as
    the greatest international crime since Napoleon I . . . . The ravaging of Belgium finds no
    parallel in history since the Thirty Years' War. As regards the latest crimes . . . . I cannot find
    words to express my feelings. These and other acts are not merely violations of rules of
    international law, but appalling outrages which have roused the righteous wrath of the world.
    [hereinafter LEAGUE OF NATIONS].
   14.
authority Oppenheim marshaled is indeed impressive. Still, Oppenheim did not have to provide authority for everything, because his book was initially a textbook rather than a treatise. As he stated in the Preface, the book was designed as "an elementary book for those who are beginning to study International Law. It is a book for students written by a teacher."²⁶ (Indeed, the style of marginal notations that was so characteristic of a teaching book survived until the Ninth Edition.) One obituary notice observed:

Professor Oppenheim's work on International Law had an advantage over many other treatises on the same subject, for it was intended not only for law students, but also for laymen who are trying to think out great international problems. He boldly declared his opinion that the majority of the people in this country who take an interest in international law are not jurists and have no legal training. His complete survey is within the grasp of students of this type, while it supplies purely legal students with a sufficient prolegomenon.

The First Edition was, in no small part, a democratic and popular educational initiative.

Although the number of treaties, diplomatic correspondence, treatises, monographic studies, and scholarly articles then available seems minuscule compared to the avalanche we now have, finding the material in "real time" for a particular problem was truly daunting. On-line data bases, updated and indexed treaty series, or current case indexes did not exist then. Most of the material was published in languages other than English. Hence, for the English-speaking lawyer, the treatise had to function as a citator, translator, and synthesizer.

The First Edition of the treatise was remarkably rich in reference material drawn from all major European languages. On source material, Oppenheim stated proudly:

All important points are discussed, and in notes the reader is referred to other books which go more deeply into the subject. And the list of treatises as well as monographs printed at the commencement of each topic will, I hope, be welcome to those who desire to look up a particular point. There is no English treatise which provides such a bibliography. Naturally, my catalogue is not exhaustive, although English, French, German, Italian, Russian, Swiss, Belgian, Portuguese, American and Spanish-American authors are represented.

Each subsequent volume exceeded its predecessor in citations.

The heuristic for a general introduction had to be comprehensive. Oppenheim’s structure, which was systematisch in the full German sense, was a major reason for the success of his book.²⁹ It was, in fact, a transposition of the standard German treatment of the subject at the time and largely follows the table of contents of Johann Bluntschli’s work on international law.³⁰

²⁶. 1 First Edition, supra note 8, at vi.
²⁷. Death of Professor Oppenheim, supra note 16, at 11.
²⁸. 1 First Edition, supra note 8, at vii-viii.
²⁹. See infra pp. 281 to 284.
³⁰. See Johann C. Bluntschli, Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt ix-xii (Nördlingen, Verlag der C.H. Beckschen Buchhandlung 1878).
The success of the first two editions of Oppenheim's treatise derived, in part, from the successful transposition to and execution of the contemporary German comprehensive approach in an accessible English text cast in the style of English positivism. Bluntschli, who taught Oppenheim international law, was one of the great scholars of international law of his time and wrote with authority. His statements on what the law was carried much weight. Oppenheim, the comparative novice, provided more details than Bluntschli and cited many more doctrinalists. He gave fair and generous praise, even when he disagreed, and possessed none of the racism and eccentricity that unfortunately contaminated Bluntschli's work. Thus, all of what appeared to be relevant to the contemporary international "law of peace" was now available in a single, apparently empirically based volume.

The decisive factor in the First Edition's success, however, was the coherence of an explicit theory. The First Edition was didactic, concerned with persuading the student that international law is indeed law and that its rules are essentially stable through time. To succeed in this endeavor, Oppenheim had to set forth some theoretical postulates. He had to contend with the work of the positivist John Austin, whose jurisprudential view, dominant in England at the time, seemed to be entirely at odds with his own approach. For Austin, the distinctive feature of law was the existence of a "political superior," who imposed sanctions for deviations from his commands. The absence of such a superior had led Austin to doubt whether international law could be properly called law. Oppenheim, however, saw a functioning international community, even if that community lacked centralized, politically superior institutions to enforce its law. Oppenheim claimed that the community existed and was effective, because enforcement necessarily fell to individual states acting unilaterally:

And in the necessary absence of a central authority for the enforcement of the rule of the Law of Nations, the States have to take the law into their own hands. Self-help and the help of other States which sympathize with the wronged one are the means by which the rules of the Law of Nations can be and actually are enforced.

Although Oppenheim believed that the predispositions for international law had deep historical roots, which he spelled out in detail in Volume I, he conceived of international law as the empirically identifiable product of the political will of states rather than as a natural feature of life. Indeed, Oppenheim dismissed natural law summarily:

We know nowadays that a Law of Nature does not exist. Just as the so-called natural philosophy had to give way to real natural science, so that Law of Nature had to give way to

33. Id. at 142.
34. 1 FIRST EDITION, supra note 8, at 13.
jurisprudence, or the philosophy of the positive law. Only a positive Law of Nations can be a branch of the science of law. 35 Yet what emerges is a curiously theoretical positivism, concerned more with rejecting some natural law formulations than with assembling empirical evidence of the collective will of states. Indeed, the 594 pages of the first volume cite only fifty-four cases and incidents. Like Austin, Oppenheim took an analytical and definitional approach. The empirical data that he marshaled is largely anecdotal.

But if the data were thin, the lessons to be learned (the "morals," as he called them) were, at least to Oppenheim, very clear and quite contrary to most naturalistic visions of international law. First, power played a major and, essentially, eufunctional role in Oppenheim's theory of law. Oppenheim believed that a balance of power was a prerequisite to the operation of the international legal system. Without it, stronger states would impose their will on weaker ones; the promise of law would be empty. 36 Second, Oppenheim acknowledged that international law could develop only insofar as new norms were congruent with real state interests. 37 Third, Oppenheim believed that the history of international law demonstrated that nationalism could not be curbed. 38 Nevertheless, law should not simply yield to nationalism's pathological excesses: "What international politics can do and should do is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority." 39 Fourth, Oppenheim believed that change in public international law would occur only gradually. 40 Fifth, Oppenheim felt that progressive development would depend upon growth in public morality and economic interests. 41

These morals reflected an interesting blend of the conservative and the progressive, the idealistic and the very pragmatic. Oppenheim's belief in the critical influence of power upon law conditioned all of them. As it turned out, the English political elite, for whom balance of power was a virtual article of faith, accepted these morals. Oppenheim's lessons, however, did not simply celebrate the status quo. The emphasis on nationalism may have anticipated the great movement of decolonization in the second half of this century and certainly the rise of new nation-states in Central Europe after the First World War.

35. Id. at 92.
36. Id. at 73-74.
37. Id. at 74.
38. Id.
39. Id. at 74.
40. Id. at 74-75.
41. Id. at 75.
Oppenheim himself prepared the Second Edition of his treatise. The Third Edition, which was based in part on his notes, was completed after his death by Ronald F. Roxburgh, his student and friend and the author of a work on treaty law. Roxburgh incorporated Oppenheim's notes but elected not to indicate, by brackets or otherwise, where he was introducing new material. Hence the reader has no easy way of discerning where Oppenheim has become Roxburgh. Even without those signposts, however, the Third Edition is still very much in the Oppenheim mode. Roxburgh, as Oppenheim's student, shared many of his views. As far as context was concerned, the League of Nations and the Permanent Court of International Justice notwithstanding, the world was still largely the world of Lassa Oppenheim. As is often the case when a treatise is updated, however, the Third Edition was marked by an increase in the number of cases cited, particularly English judgments.

The character of Oppenheim's treatise began to change more markedly in the Fourth Edition. It was edited by Arnold McNair, with substantial assistance from Hersch Lauterpacht, a young jurist from Eastern Galicia who had been trained in Vienna and completed his Doctor of Laws in London. Both of these men would emerge as major international legal scholars and practitioners. Both would become important members of the International Law Commission and, thereafter, judges on the International Court of Justice. McNair had matriculated at Cambridge during Oppenheim's tenure and then returned to teach there from 1926 to 1937. He was the Whewell Professor from 1935 to 1937, when he was succeeded by Lauterpacht, who held the chair until 1955.

The method that Oppenheim had extolled underwent changes in the Fourth Edition. Oppenheim purported to rely on state practice, although, as noted earlier, he cited only fifty-four cases. McNair relied on and discussed more than four hundred cases in Volume I. On the other hand, the notion of a probative case, which in Oppenheim's conception included incidents, narrowed considerably to the judicial opinion.

42. SECOND EDITION, supra note 21.
43. THIRD EDITION, supra note 16.
44. RONALD F. ROXBURGH, INTERNATIONAL CONVENTIONS AND THIRD STATES (1917).
45. See 1 THIRD EDITION, supra note 16, at xvii-xxii.
46. See 1 FOURTH EDITION, supra note 18, at xxi-xxvii.
47. On the distinction, see generally INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1988).
McNair, in his introduction, noted that his edition was seventy-two pages longer than its predecessor. In fact, much more new material was added, for McNair moved substantial parts of Oppenheim's text into smaller type or entirely into footnotes. In places where the text remained as written by Oppenheim, McNair sometimes indicated, in footnotes, his disagreement. For example, on Oppenheim’s positivism and staunch anti-naturalism, which had formed the spinal column of the previous editions, McNair observed in a footnote:

The editor has left this and the preceding sentences as they appeared in the previous edition. But it must be pointed out that the rather uncompromising opinion expressed by the author on this point is no longer in keeping with recent developments in the science of international law. It is now urged by many writers that

(a) International Law may, without losing its character as a legal science, be fittingly reinforced and fertilized by recourse to rules of justice, equity, and general principles of law, it being immaterial whether those rules are defined as a Law of Nature in the sense used by Grotius, or a modern Law of Nature with a variable contents . . . 48

The political metaphysics of positivism that Oppenheim had spelled out so clearly in the First Edition also underwent drastic and far-reaching changes in the Fourth Edition. McNair emphatically noted that the creation of the League of Nations did not obviate the need for a balance of power: "The existence of the League of Nations makes a balance of power not less, but all the more necessary, because an omnipotent State could disregard the League of Nations." 49 McNair, however, added a new "moral" not found in Oppenheim:

[The progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or, what is the same thing, of democracy over autocracy. Autocratic government, not being responsible to the nation it dominates, has a tendency to base the external policy of the State, just as much as its internal policy, on brute force and intrigue; whereas constitutional government cannot help basing both its external and its internal policy ultimately on the consent of the governed. And although it is not at all to be taken for granted that democracy will always and everywhere stand for international right and justice, so much is certain, that it excludes a policy of personal aggrandisement and insatiable territorial expansion, which in the past has been the cause of many wars. 50

This is a very modern thesis, but it is not compatible with the balance-of-power function to which Oppenheim gave pride of place and McNair and Lauterpacht retained in the Fourth Edition. If democratic constitutional governments are not prone to violate international law, then the balance of power, with all its controlled but purposeful violence, becomes unnecessary. Indeed, it becomes systemically undesirable, for it then operates to limit the progressive development of international law.

48. Id. at 121 n.2.
49. Id. at 100.
50. Id. at 100-01.
Hersch Lauterpacht, who had assisted McNair in the preparation of the Fourth Edition, assumed sole responsibility for editing the Fifth Edition. He proceeded, thereafter, to edit the next three editions, although only the volume on the law of peace was produced in the Eighth Edition. While the reader can plainly see the intellectual lineaments of Lassa Oppenheim in the Fourth Edition, the Fifth Edition represents a real transformation of the book. Lauterpacht largely preserved the structure of Oppenheim's treatise, but deleted many of his discussions and did not hesitate to put forward his own views when they differed from those of previous editions. Lauterpacht sometimes, but not always, indicated where he was departing from the progenitor. Lauterpacht also substantially expanded the book by persuading the publishers to produce it in smaller type and by consigning even more of Oppenheim to the "basement" of his own house, the footnotes, if he was allowed to remain at all. Lauterpacht probably left an imprint on the book as great as that of Oppenheim himself. Indeed, the Oppenheim my generation knew and regularly consulted was really Oppenheim-Lauterpacht, or perhaps more precisely, Lauterpacht-Oppenheim, as it was often cited.

Not surprisingly, Lauterpacht continued the retreat from positivism that began with the Fourth Edition. By the Fifth Edition, Professor Lauterpacht simply suppressed Oppenheim's manifesto of strict positivism and incorporated McNair's footnote on the Law of Nature into the text. Lauterpacht concluded his textual discussion by remarking, "Whatever may have been its merits in the past history of International Law, rigid positivism can no longer be regarded as being in accordance with existing International Law. Probably what has been described above as the Grotian school comes nearest to expressing correctly the present legal position." The content and pattern of citation also changed. Obviously, with the passage of years, many of the treatises Oppenheim had cited for research purposes were less relevant. Lauterpacht deleted some and introduced many more. He also introduced more monographic and article material and discussions in the text than Oppenheim had. Much of this was on the order of pruning and cutting back the underbrush rather than fundamental relandscaping. Nevertheless, Lauterpacht's naturalism had a great effect on the treatment of particular sections.

Lauterpacht had planned a Ninth Edition and, at his death, left substantial notes for the revision, which were subsequently published as part of his

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53. 1 FIFTH EDITION, supra note 51, at 100 (footnote omitted).
Collected Papers.\textsuperscript{54} From these, it is apparent that Professor Lauterpacht intended a "re-writing almost more than a new edition."\textsuperscript{55} Still, the changes would not have been on the level of theory or ideology. By the Fifth Edition, it was clear that the major theoretical struts of Lassa Oppenheim's work had already been dismantled.

Lauterpacht also made significant changes in the "morals" that Oppenheim believed international legal history taught. Balance-of-power analysis disappeared entirely. The prime lesson to be learned was the core of McNair's notion, now elaborated to the theorem that "the progress of International Law is intimately connected with the victory everywhere of constitutional governments over autocratic government."\textsuperscript{56} Lauterpacht retained Oppenheim's principle of nationality and his moral and economic prerequisites for the progressive development of international law. Most distinctive and unlike Oppenheim was Lauterpacht's third lesson — indeed Lauterpacht's credo of international law:

The third moral is that the progress of International Law depends to a great extent upon whether the legal school of international jurists prevails over the diplomatic school. The legal school desires International Law to develop more or less on the lines of Municipal Law, aiming at the codification of firm, decisive, and unequivocal rules of international law, and working for the establishment of international courts for the purpose of the administration of international justice. The diplomatic school, on the other hand, considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm precise rules. The diplomatic school opposes the establishment of international courts, because it considers diplomatic settlement of international disputes, and, failing this, arbitration, preferable to international administration of justice by international courts composed of permanently appointed judges. There is, however, no doubt that international courts are urgently needed, and that the rules of International Law require now an authoritative interpretation and administration such as only an international court can supply.\textsuperscript{57}

To be sure, the League of Nations and the Permanent Court of International Justice had intervened since Oppenheim's initial work. Nevertheless, one senses, both from the original edition of the treatise and Oppenheim's final work,\textsuperscript{58} that, while hopeful, he remained skeptical about the League and its various organs approximating the Austinian sovereign, whose absence he had tried to fill with a balance-of-power theory. Indeed, Oppenheim chose to place on the title page of his last work, which was on the new League, the epigraph "Festina lente."\textsuperscript{59} McNair, as we saw, may have shared some of his predecessor's reservations; he did not believe that the presence of the League obviated the need for balance of power. Had Oppenheim been alive to comment on Lauterpacht's moral in the Fifth Edition, he probably would have remarked that a legist approach was fine in theory. As long as the fundamen-
tal dynamics of international politics remained unchanged, however, a more diplomatic approach to international law would continue to be necessary. Be that as it may, the Fifth Edition veered from one of Oppenheim's fundamental positions.

VII

The editors of the Ninth Edition are Sir Robert Jennings, the President of the International Court of Justice, and Sir Arthur Watts, formerly the Legal Adviser to the British Foreign Office. Jennings studied at Cambridge with Lauterpacht and succeeded him to the Whewell Chair in 1955, which he held until 1981, when he was elected to the International Court of Justice. Watts was also trained at Cambridge. He made his career in the British Foreign Service, concluding it as Legal Adviser to the Foreign Office, from which he retired in 1991. The editors make clear in the preface and the body of Volume I that the Ninth Edition is a revision of Lauterpacht's Oppenheim and not Oppenheim. Almost all of the references are to the Eighth Edition and apologies or justifications for whatever changes are made are to the editor of the Eighth Edition.

The Ninth Edition is much larger than any of its predecessors. Volume I contains 1,333 pages; each page is larger and, thanks to smaller type, contains more. Volume I is actually in two separate tomes, each larger than Oppenheim's original. The table of cases is sixty pages long. The Ninth Edition contains more scholarly citations than Oppenheim's original, but the geographic scope is not any more expansive. While an abundance of Western European and North American treatises and journals are consulted throughout, Eastern European, Latin American, and Asian materials are not. The wide-ranging bibliographical lists at the start of each new section have become mostly English and Western European. On the other hand, with English now acknowledged as the lingua franca of international law, the Ninth Edition is at least as diverse in what it selects to examine from among English-language materials as any previous edition.

Arguably, there may be more international legal material to deal with in 1992 than at previous times, but every writer confronts the problem of selectivity. It is precisely the increase in the amount of material and this absence of selectivity in the Ninth Edition that is striking. This may be due to greater ambition, a desire to create a Dicey and Morris-type English treatise that synthesizes every judicial sound that is "on point," an inability to summarize, an unwillingness to make choices about the comparative value of material, or perhaps the lack of theoretical criteria that would make such

60. Curiously, the table of cases and the index are reproduced in both tomes of Volume I, increasing the size of the volume by nearly seven percent.
61. DICEY AND MORRIS ON THE CONFLICT OF LAWS (Lawrence Collins et al. eds., 11th ed. 1987).
choices systematic and cogent. Whatever the reason, the more one reads the Ninth Edition, the more one is struck by this absence of selectivity: the co-presence of the important and enduring with the peripheral and ephemeral. One is reminded, in many places, of the extraordinarily dense text of the last edition of Charles Cheney Hyde’s treatise. Previous editions of *International Law* did not share this characteristic.

Oppenheim's treatise started as a book for the student and the layperson. In later editions, marginal summaries of material, the hallmark of the student text, disappeared. The Ninth Edition is plainly and unapologetically a practitioner's book. Indeed, the editors remark in the Preface that they were concerned with preserving "its status as a practitioner’s book, rather than as an academic treatise." Theory is apparently not relevant to the work of the hard-nosed practitioners for whom this edition has been prepared. The Ninth Edition contains no explicit theoretical discussions, no larger systemic conception, and none of the morals that gave insights into the theoretical orientation of the prior editors and the original author. Still, to escape theory entirely is impossible in any legal exposition. The Ninth Edition thus has plenty of theory to offer; it is simply less explicit than before. In this regard, the Ninth Edition breaks quite sharply with the original conception of Oppenheim’s treatise.

VIII

The essential intellectual problem of a treatise in international law, indeed of any treatise, has been brilliantly expounded by Richard Falk in his review of the *Restatement (Third) of Foreign Relations Law*. I share those views for the most part, and yet believe that the international law treatise is a valid genre entitled to be considered on its own terms. The ultimate judgment of its worth will turn on the extent to which it facilitates the intellectual tasks of decision: clarifying the goals or objectives of particular sectors of international law, identifying and reviewing the salient trends of decision with regard to those objectives, relating those trends to the environment of conditions that prevail, making matter-of-fact projections of future lines of decision, and suggesting alternative decision modes that might better secure the authorized goals. The approach to law adopted by the editors concerned will influence how these tasks are conceived and performed — whether the editors know it or not. I propose to examine certain features of the Ninth Edition in this fashion, after briefly exploring the operational conception of law the editors apply.

62. **CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (2d rev. ed. 1945) (3 volumes).**
63. 1 NINTH EDITION, *supra* note 7, at xiii.
The historic changes that make an important treatise obsolete also necessarily make its successor different. Plainly, the development of the League of Nations and later the United Nations, the proliferation of international organizations, and the end of the Cold War have combined to present an international political system quite different from the one that prevailed at the time of earlier editions, even the Eighth Edition. The fundamental jurisprudence, however, need not change. In fact, the Ninth Edition makes a clear choice and presents a jurisprudential vision that is different from those of Oppenheim and Lauterpacht. Oppenheim, it will be recalled, acknowledged the ineffectiveness of those international institutions that then existed and purported to find the functional equivalent of Austin’s requirement in self-help, or unilateral action. In effect, he adopted an observational standpoint outside the institutions under examination. The editors of the Ninth Edition, in contrast, look from the inside out. They take the formal institutions of contemporary international law on their own terms, for the most part, and not on the terms of a disengaged observer who asks whether particular auto-descriptions are accurate descriptions.

By observing an institution from the inside out, the observer is much more likely to take the official view of the institution as valid and accurate. Thus, for example, the editors find Austin’s center of power in the U.N. Security Council. They acknowledge its structural weakness and must, like Oppenheim, resort to self-help to plug the gap. Oppenheim, with a conception of law that accounted for power relations among states, was comfortable with this sort of Ptolemeiac epicycle. The editors of the Ninth Edition are not. With a footnote, the editors link self-help to a later discussion on intervention. In so doing, they create a major contradiction. Self-help is what ultimately maintains the international legal system. If self-help is intervention, and intervention is unlawful, then the international legal system is ultimately sustained by illegal action.

This contradiction is at once theoretical and willful. It is a jurisprudential ambiguity stemming from the editors’ failure to select and maintain a single, consistent observational standpoint. It also reflects an unwillingness on the part of the editors to look hard at things and not to recoil from what they see. Oppenheim’s willingness to do this was one of the things that made his work so refreshing. The result in this critical part of the Ninth Edition is reminiscent of a patchwork quilt whose parts don’t quite go together. My quibble, I emphasize, is not merely a theoretical one. The question of the lawfulness of unilateral uses of force is a recurring, practical issue — one that runs to the very heart of the effectiveness of international law.

65. See 1 NINTH EDITION, supra note 7, at 10.
66. Id. at 11.
67. Id. at 10 n.10.
The editors of the Ninth Edition also follow Lauterpacht in treating every dispute as potentially justiciable, even those involving force and collective self-defense. Moreover, the editors view judgments of the International Court of Justice as filling gaps in the law. In other words, the Court may create law. However, the editors do not suggest any coordinate political limitations that act upon the Court when it purports to make law of the sorts that operate in the openly political arena of a legislature. Oppenheim tempered his work with realism by insisting that state interests imposed severe limits on the evolution of the international legal system and the establishment of particular new laws. Those limits restrained international law, but also kept it realistic. What sorts of political limits operate on the Court in the world of the Ninth Edition?

These theoretical propositions are important. Throughout the two tomes that Volume I comprises, the editors fail to apply the distinction between what scholars now call "hard law" — legal formulations that are attended by the requisite political force to make them effective — and "soft law" — legal formulations for which political support is intermittent, quite thin, or simply nonexistent. In the Ninth Edition, everything seems to be treated as law. The law reported there is textual in the sense that it tends to be drawn from formal legal documents. The editors make little effort to correct formal legal statements by examining supporting or deviating practice or incidents. As a result, the picture that emerges — one of a consistently strong system — fails to capture the reality of international law.

The world of the Ninth Edition is, at last, the legists' world for which Hersch Lauterpacht had first argued in the Fifth Edition. In this world, whatever the International Court says is international law. Thus the editors invoke *Military and Paramilitary Activities in and Against Nicaragua* in many places, as establishing a variety of principles. There are compelling reasons for doubting both the soundness of the jurisdiction of the Court in that case (indeed, some on the Court itself belatedly seemed to entertain some doubts about it) as well as the statements of international law made therein. Many of those statements were apparently made on the basis of

68. Id. at 12.
69. See id. at 13.
evidence that was subsequently revealed to be of doubtful veracity. Yet the Ninth Edition presents whatever the ICJ said in *Military and Paramilitary Activities* as a clear statement of international law.

Nonetheless, the Ninth Edition does have remarkable sections where it takes a broad and, at least once, a breathtakingly contextual view. In the midst of a very thorough and rather dry discussion of international title law, the editors remark:

> Territorial title *erga omnes* no longer has its origin wholly in a kind of international system of conveyancing, but involves or may involve, an element of international decision. This is not to suggest that any organ of the United Nations has a legal discretion to determine the destiny of territory. It is nevertheless clear that the opinion and will of the international community cannot but be other than a factor of considerable importance in the process of historical consolidation of title...\(^7\)

The formal structures of international law often lack real effective power. As a result, other institutions frequently perform latent functions they are not formally assigned, the *dedoublement fonctionnel* in Georges Scelle's felicitous expression.\(^6\) This aspect of modern international law is extremely important. In the passage quoted above, the editors of the Ninth Edition acknowledge it. Because the implicit approach of the Ninth Edition is rule-based, however, the editors sometimes fail to acknowledge instances where institutions are performing latent functions. For example, in the *Nuclear Tests Cases*,\(^7\) the Court attempted to play a diplomatic and mediating role, a fact that can only be appreciated if the case is put in its political context. The Ninth Edition does not do this.

The implicitly rule-based approach even limits how the authors read and analyze the judgments and opinions of the Court. In several key cases, one is struck by the rather superficial reading of judgments and the mechanical logic that seems to be applied to their holdings. For example, in the *Asylum Case*,\(^8\) involving a dispute over Colombia's grant of asylum to Víctor Raúl Haya de la Torre, the leader of an attempted rebellion against the Peruvian government, the Court effectively confirmed a right of asylum. The Court stated that even when an asylum had been improperly granted and had to be terminated, the state granting it was not obliged to surrender the asylee.\(^9\)

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75. 1 *Ninth Edition,* supra note 7, at 715-16 (footnote omitted).


77. *Nuclear Tests Case (Austl. v. Fr.),* 1973 *I.C.J.* 99 (June 22) (instituting interim order calling upon France not to conduct atmospheric tests of nuclear weapons in South Pacific Ocean pending final decision); *Nuclear Tests Case (N.Z. v. Fr.),* 1973 *I.C.J.* 135 (June 22) (same); *Nuclear Test Case (Austl. v. Fr.)* 1974 *I.C.J.* 253 (Dec. 20) (declining to adjudicate claim against France because France had conveyed its intention to terminate atmospheric testing program, thus satisfying object of claim); *Nuclear Test Case (N.Z. v. Fr.)* 1974 *I.C.J.* 452 (Dec. 20) (same).

78. *Asylum Case (Colom. v. Peru),* 1950 *I.C.J.* 266 (Nov. 20).

79. *Id.* at 280.
The Ninth Edition reads the case without regard to context and turns it on its head:

Thus, in the absence of an established legal basis, such as is afforded by treaty or established custom, a refugee must be surrendered to the territorial authorities at their request and if surrender is refused, coercive measures may be taken to induce it. Bearing in mind the inviolability of embassy premises, the permissible limits of such measures are not clear. The embassy may be surrounded by soldiers, and ingress and egress prevented; but the legitimacy of forcing an entry in order forcibly to remove the refugee is doubtful, and measures involving an attack on the envoy's person would clearly be unlawful. Coercive measures are in any case justifiable only in an urgent case, and after the envoy has in vain been requested to surrender the refugee. 80

The Ninth Edition concludes that the Court did not decide between the two positions in the case, preferring to leave the task "for direct settlement by the parties." 81 When the case is put in context, it is clear that the Court was saying, as diplomatically and indirectly as possible, that the asylum must be respected and a safe conduct granted, even when the granting of the asylum itself was arguably improper. No other interpretation was possible and, indeed, the parties got the message: Señor Haya de la Torre, safe-conduct in hand, was soon on his way to refuge in Santa Fe de Bogotá.

A closer look at particular parts of the treatise further reveals the authors' disregard of context. Thus, in the discussion of alliances, the pact of the Arab League is listed, without comment, along with the Warsaw Pact and the North Atlantic Treaty Organization, 82 even though one of those pacts is politically much less significant while the others were major struts of world order during the Cold War. And even if the volume's devotion of nearly ten pages to the Commonwealth 83 — a treatment that certainly overstates its significance — is understandable in a British treatise, the editors' treatment of other categories appears to lack flexibility and contextuality. Protectorates are treated historically, 84 with no reference to their contemporary analogues, "associated states" and "commonwealths," which need not be "non-self-governing territories." Similarly, the discussion of confederations overlooks the United Arab Emirates, which would appear, in terms of its constitution, to qualify. Spheres of influence, we are told, are a legacy of the past. Would that it were so.

Choices about allocating space within the treatise, especially in the first volume, are sometimes puzzling. The authors maintain and even elaborate upon a great deal of material that was current in earlier editions of the treatise but now is largely historical. As mentioned, the Commonwealth occupies

80. 1 NINTH EDITION, supra note 7, at 1083-84 (footnotes omitted).
81. Id. at 1086.
82. Id. at 1321.
83. Id. at 256-66.
84. Id. at 271-74.
nearly ten pages. Protection of the environment is, astonishingly, allocated six pages.85 Nevertheless, the extraordinary accomplishments of this treatise overshadow these criticisms. Overall, where the material lends itself to the general type of legal craftsmanship of the English treatise, the Ninth Edition excels and is, in many places, peerless. The treatment of state responsibility in fifty-five pages is simply outstanding,86 as are the long sections on treaties87 and the short piece on unilateral declarations.88 The discussion of jurisdiction in only forty-two pages is thorough, remarkably detailed, contextual, and balanced.89 A minor cavil: one discussion of Banco Nacional de Cuba v. Sabbatino90 does not take account of subsequent U.S. Supreme Court decisions that revisited the problem and changed Justice John Marshall Harlan’s conception of the act of state doctrine in critical ways.91 The discussion of state organs92 — heads of state and foreign offices, diplomatic envoys, consuls, armed forces, and state ships — is very thorough, indeed more so than specialized monographs, like Satow’s.93 One regrets, here, that the state emphasis prevailed and that the treatment of new and increasingly important categories, like international observers and inspectors, is so brief.94

The treatment of state territory and, particularly, maritime areas, is comprehensive. Here and there, one appreciates the advantage of having the President of the International Court of Justice as one of the authors. The prescient discussion of pluristatal bays95 may well illuminate why a Chamber of the Court decided as it did in the Gulf of Fonseca case.96 But the discussion of uti possidetis blurs the respective de jure and de facto predicates of the Latin American and Organization of African Unity doctrines.97 Nor, curiously, is there reference to the implications of the Helsinki Agreement98

85. Id. at 410-15.
86. Id. at 499-554.
87. Id. at 1197-1317.
88. Id. at 1188-93.
89. Id. at 456-98.
91. See 1 Ninth Edition, supra note 7, at 374.
92. Id. at 1033-1178.
94. 1 Ninth Edition, supra note 7, at 1177-78.
95. Id. at 632-33.
98. Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, art. III, 14 I.L.M. 1292, 1294 (“The participating States regard as inviolable all one another’s frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of
and the possible emergence of an *uti possidetis jure gentium*, unrelated to decolonization. The discussion of the Law of the High Seas in 106 pages is superlative. On the other hand, the treatment of a new area such as outer space, like the treatment of the environment, is rather thin and disappointing.\(^9\)

The editors' discussion of individuals, including nationality and human rights issues, is thorough and detailed in its description of current institutions.\(^{100}\) It is, however, very conventional and conservative in formulation of many rules of law. The authors of the Ninth Edition do not treat the Universal Declaration of Human Rights\(^{101}\) as customary law. It is not even clear from the discussion that the authors view the Universal Declaration as the authoritative interpretation of human rights obligations in the U.N. Charter. In an uncharacteristically unfootnoted statement, the authors go no further than allowing that "there is some support for the view that [the Universal Declaration] may properly be resorted to for the interpretation of the provisions of the Charter in the matter of human rights and fundamental freedoms."\(^{102}\) In this section, the reader gets no sense of why the remarkable developments that have radically changed international law occurred nor of the dynamics and direction of emerging trends. Perhaps this is because the Ninth Edition cannot quite accept an international legal world in which individuals *qua* individuals play direct roles:

> International law is no longer — if it ever was — concerned solely with states. Many of its rules are directly concerned with regulating the position and activities of individuals; and many more indirectly affect them. Nevertheless, international law has been primarily a law between states, with states the principal subjects of that law. Even though individuals can enjoy certain rights and duties in conformity with, or according to, international law . . . those individuals have not thereby become subjects of international law.\(^{103}\)

Unlike so many other masterful parts of the treatise, this section, for all of its thoroughness and industry of execution, gives the reader the sense that the authors did not have a "feel" for the material.

The treatment of human rights highlights what I found to be a recurring problem in the Ninth Edition. Although it excels in those mansions of the law that lend themselves to a black-letter method, the treatise loses its sense of certainty in those areas where the material resists black-letter formulations and where a theory of law — indeed, a theory of politics — is required to make

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\(^9\) NINTH EDITION, supra note 7, at 826-45.

\(^{100}\) I was particularly impressed by the description and treatment of the Inter-American Commission on Human Rights, although one very important point was not mentioned: the Commission has a conventional jurisdiction over all parties to the American Convention on Human Rights and a jurisdiction for matters arising under the American Declaration over *all* parties to the Charter of the Organization of American States.


\(^{102}\) NINTH EDITION, supra note 7, at 1002.

\(^{103}\) Id. at 846.
sense of trend data. For example, some interesting initiatives seem to lose their vector. Thus, with regard to anticipatory self-defense, the authors of the Ninth Edition move far from Professor Lauterpacht's views in previous editions, suggesting:

The better view is probably that while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances. In conditions of modern hostilities it is unreasonable for a state always to have to wait until an armed attack [sic] has begun before taking defensive action.°

The approach could have come from McDougal and Feliciano.° One would think that the approach would carry over to the Ninth Edition's theory of intervention. It does not. Surprisingly, the authors acknowledge that "the practice of states does not yet permit the conclusion that intervention in strictly limited cases and in a manner not inconsistent with the Charter of the United Nations is necessarily excluded."° While they allow a remarkably broad range for unilateral action,° including covert actions,° they insist, following Military and Paramilitary Activities,° that the action must be justiciable under international law.° The discussion of the criteria against which the lawfulness of unilateral initiatives must be measured, however, is muddy. The authors do not propose measuring lawfulness by focusing on the objective of the coercion. Nor do they discuss the consequences, in terms of international law, if the state in question elects not to act. Rather, the test of lawfulness is framed in terms of level of coercion. Intervention is generally unlawful but "interference" is not.° Interference becomes intervention when it is "forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question."° Given that the editors accept, though uneasily, unilateral action as important to the maintenance of the system, it seems odd to suggest that coercions that do not succeed are lawful, while those that do succeed are not.

The Ninth Edition's treatment of assistance to a government during a civil war again reflects the editors' unwillingness to acknowledge that international law is a process of making choices:

104. Id. at 421-22.
106. 1 Ninth Edition, supra note 7, at 439.
107. Id. at 439-47.
108. Id. at 443 n.18.
110. 1 Ninth Edition, supra note 7, at 439.
111. Id. at 431-32.
112. Id. at 432.
But when there exists a civil war and control of a state is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law.113

One doubts that this reflects national and inter-governmental practice.

A review must, by its nature, be critical. Overall, one is struck, in reading the Ninth Edition, by the extraordinary richness of materials the editors have gathered and digested, the sheer amount that has been covered, and the remarkable sweep of the text. Perhaps an approach that was more judgmental and evaluative, was more explicitly sensitive to policy, and took account of why certain changes have occurred or are underway would have made this a more valuable book. Then again, this was not the authors' self-assigned task. They set out to create an English-style legal treatise in a field whose research is far more challenging than any in municipal law. There is no doubt that they have achieved their objective brilliantly. The Ninth Edition of Oppenheim's *International Law* will be the essential tool of any serious scholar, practitioner, or student of international law.

IX

Finally, the bottom line. The headnote to this review included, among the vital statistics of the volume under consideration, its price. Although I have not researched the matter, I would surmise that the first volume of the Ninth Edition is a worthy candidate for the Guinness Book of World Records. Moreover, it is a record that its own publishers will probably break when the second companion volume appears. In this respect, the Ninth Edition departs from a tradition that Oppenheim and his publishers followed. Volume I of the First Edition of *International Law* cost $6.50. Volume I of the Second Edition cost $6.00. Even if one accounts for inflation, the price of the current volume is still over six times more expensive than Lassa Oppenheim's original first volume.

At $617.00 for the combined 1333 pages in the two tomes comprising Volume I, the reader is, the publisher might argue, only paying 46 cents per page, and, to be sure, there is a great deal on each page. Even so, relatively few governments, few libraries, and even fewer students, the future of our discipline, will be able to buy their own copies. Perhaps the price is the result of the inverse ratio between the number of a run and its production cost: small runs, we are told, do not enjoy economies of scale and, hence, each copy must cost more. If this, rather than avarice, was the reason, then I would submit that it was an error. The price shows a lack of confidence, both in the authors who are being published and in the market for good international law work. Effectively, the publisher's price fulfills its own prophecy, for it will confine the new edition of Oppenheim's *International Law* to government and

113. *Id.* at 438.
to public and private libraries and, at that, to libraries only in wealthier countries. That is a disservice to this important and imposing book, to all of its editors through time, and to the world community.
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