On the Science of International Law

Oppenheim Revisited

Harald Christian Scheu

Introduction

The 9th edition of *Oppenheim's International Law* was issued in 1996. Almost a hundred years after the first edition was published in 1905-1906[1] it is still one of the best-known treatises on international law.The name Oppenheim has become a successful trademark. In 1966 Wight called *Oppenheim's International Law*, the 8th edition of which was edited in 1955 by Sir Hersch Lauterbach (judge at the International Court of Justice from 1955 to 1960), "probably the most influential English textbook of international law."[2] There are certainly a wide variety of reasons why a number of distinguished internationalists decided to re-edit a treatise which in its last authentic version reflected the development of international law down till the end of the First World War.[3] But one of the main reasons is obviously the fact that *Oppenheim's International Law* has established itself as a classic of its kind among academics and practitioners.

The current edition was prepared by Sir Robert Jennings, from 1982 to 1995 member of the International Court of Justice (and at the time of the publication President of the Court), and Sir Arthur Watts, Legal Adviser to the Foreign and Commonwealth Office between 1987 and 1991. They consider one of the principal characteristics of the treatise to be its status as a practitioner's book and its attempt to provide a helpful beginning for an inquiry into particular problems. Without any doubt the 9th edition of *Oppenheim's International Law* is - like its predecessors - an essential basis for reference in the field of international law.

In the present article we will look at the founder of the tradition, Lassa Oppenheim, and we revisit one of his most systematic contributions concerning the theoretical and methodological implications of international law. His study entitled "The Science of International Law" was published in 1908[4] in the then brand-new "American Journal of International Law" which had been founded in 1907. Oppenheim focused on the main issues confronting contemporary international law such as the problem of codification, historical research and arbitration as a means for the peaceful settlement of international disputes. As one of the main tasks of the science of international law he defined not only the description of existing legal rules, but also the popularisation of international law. His comprehensive analysis of methodology presents a complex and interesting picture of struggles, which were present among internationalists at the beginning of the 20th century.

Oppenheim's Background

It seems astonishing that it was a lawyer who had been raised in the continental legal tradition (more precisely in the German legal tradition) who modernised the British science of international law and produced England's first comprehensive treatise on international law. Lassa Oppenheim was born near Frankfurt am Main in 1858 as a son of a Jewish horse trader.[5] At university he showed a great interest in metaphysical as well as in psychological issues. But his main field of study was law which he studied in Göttingen, Berlin and Heidelberg. During his studies he was able to get acquainted with representatives of the *crème de la crème* of German legal doctrine in the fields of Roman law (Rudolf von Jhering), history of law (Heinrich von Treitschke), international law (Caspar Bluntschli) and criminal law (Karl Binding). Subsequently criminal law became his main field of research and teaching. His habilitation took place in Freiburg in 1885, where he was appointed Extraordinarius in 1889. In order to receive the chair of an Ordinarius Professor he had to leave Freiburg and go to Basel where he was appointed in 1893.

A big change in his life took place in 1895 when he moved to London. He left Germany and his career in criminal law behind and started to focus on international law. In 1900 he acquired British citizenship. The success of the 1st edition of his *International Law* was one of the reasons why he gained the Whewell Professorship in International Law at Cambridge University in 1908. He held that chair until his death in October 1919. In his obituary Charles N. Gregory pointed out that Oppenheim became "thoroughly English in feeling" and that in the 1st World War he stood loyally by his adopted country and sharply attacked German practices.[6]

Oppenheim made international law his main field of interest, and indeed his profession, at a time when the international community was faced with extraordinary change. The Hague Peace Conferences of 1899 and 1907 signified the starting point in the process of codification of international law. Oppenheim commented on this development in 1908:[7] *"International law is at present an unfinished and uncrowned system and building. (...) The science of international law has a great future to look forward to. Hundreds of hands are wanted to enable a future generation to start codification. And when this task is once achieved, hundreds of hands will again be wanted for the working up of the material supplied by codification."* Oppenheim looked on the historical changes going on

at the beginning of the 20th century in a spirit of idealism. He considered his own role and the role of internationalists in general not only as being observers of the progress of international law, but also in playing an active part in its development.

Reflections on Methodology

In 1908 Oppenheim stated that there was no generally recognised method for the science of international law. He considered that there existed three different schools: the Grotians, the Naturalists and the Positivists, whose methods were different. When defining method, the first key question according to Oppenheim relates to the existence of any natural law that forms part of international law.

The Science of International Law and Naturalism

Hugo Grotius developed the distinction between natural and positive international law and at the same time he considered the law of nature as the basis for the law of nations. As Grotius was, and continues to be, almost universally regarded as the founder not only of the law of nature but also of the law of nations, his teaching had over the centuries a huge influence on internationalists. Oppenheim, though appreciating the importance of Grotius and his "immortal merits," points out that "Grotius was not an infallible Pope."[8] He was a "child of his time and a product of his age."[9]

Oppenheim here was following the thinkers of the Enlightenment when he repeated their criticism that it is impossible to find a law which is rooted in human reason only. He therefore stands in the tradition of Kant who doubted the possibility of perfect understanding. It is in this light that Oppenheim's statement is to be viewed that *"the place of the theory of the law of nature is no longer in our textbooks, law schools, and universities, but in the museums where the scientific tools are preserved with which former generations did their best to lay the foundation of our present scientific knowledge."*[10]

The Deniers of International Law

When discussing the issue of methodology Oppenheim also makes reference to the so-called deniers of international law. Obviously he was aware of the fact that in the common law countries this position was not without relevance. The tradition of denying the existence of international law had its strong roots in the doctrine of Hobbes, Blackstone and Austin. The followers of Austin in particular adhered to an understanding of international law as something like "positive morality" and not "law properly so called." Oppenheim viewed the arguments of the deniers as a problem of wrong method. According to Oppenheim the deniers take municipal law as the starting point of analysis and define law as a body of rules imposed by a sovereign on his subjects. Since international law does not correspond to such structure they arrive at the conclusion that it is not law.

Oppenheim reminded them that saying that international law exists as law should not be taken as meaning that international law is a law of the same character as municipal law. This discussion, however, does not concern only a matter of terminology. The difference between Oppenheim's approach and the deniers' position is in practice a fundamental one. The deniers do not treat any rule of international law as law with the effect that governments have a great liberty of action, since they are not considered to be bound by legal rules. Oppenheim, on the other hand, states that rules of international law have to be interpreted and applied as legal norms. This approach restricts the liberty of governments on the international level and holds governments responsible for violations of international legal rules.

A Plea for Positive Method

In his study of 1908 Oppenheim demonstrated what he understood as being positive method. In contrast to the view of the Grotians the basis of international law cannot be found in the law of nature. According to Oppenheim, the internationalist has to start from existing recognised rules which can be found in the customary practice of states or in treaties. At the beginning of the 20th century there could be no doubt that international law was mainly based on customary rules. The identification of custom is certainly much more difficult than the identification of treaty norms. Oppenheim observed that textbooks on international law differed significantly as far as the question of customary rules was concerned.[11] *"Many of these book rules are mere fancies, the outcome either of what the respective authors consider the law of nature, or of patriotic prejudice, or of misunderstood authority, and the like."*

Oppenheim points out the importance of distinguishing between the approaches *de lege lata* and *de lege ferenda*. He states that it is irrelevant whether an author approves or condemns a rule, whether he wants to abolish or to replace it. The task of the internationalist is to ascertain the precise meaning of rules which have been identified as customary rules or treaty provisions. Oppenheim acknowledges the value of active criticism of the existing law. This is, however, considered a different task. Oppenheim admits that *"this task of the science of international law is very important and must not be neglected, if we want international law to develop progressively and to bring more and more international matters under its sway."*[12]

From a reading of Oppenheim's study it becomes clear that he is highly dissatisfied with the state of the science of international law at the beginning of the 20th century, although the character of international law was at that time dominated by states which had – in comparison with today's international community – rather homogenous political concepts. Oppenheim criticises the lack of impartiality and the presence of prejudices. According to his view jurists from different nations apply different approaches to

interpretation. When they have to interpret treaties, "they do it with the rules of interpretation worked out by their municipal jurisprudence."[13]

Oppenheim indicates what he considers the difference between English and continental jurists.[14] *"The continental jurist has gone through a course of training which has accustomed him to apply abstract rules of abstract codes; he always thinks in the abstract way, and his method of interpretation is therefore likewise abstract; he believes in principles and starts from them. The English jurist, on the other hand, has gone through a training which always makes him think in the concrete way; he starts from the cases and tries to find out in what points a new case resembles the old ones; he mistrust principles, and only believes in the characteristic traits of individual cases."*

But Oppenheim identifies fundamental differences inside the continental approach as well. According to him, a German lawyer will choose an interpretation which is based on the possible meanings of the words. A French lawyer will start from the *esprit* of the treaty. Such observations led Oppenheim to call for the elaboration of rules of interpretation which would find universal recognition. He tends to leave the concrete character of those rules open for future development when he admits that "what kind of rules these will be is at present impossible to say."[15] However, in a different context he seems to prefer methods of interpretation which come close to his own German legal education. He fiercely refuses an approach which is based only on the quoting of cases.[16] *"The (...) sin of method frequently committed by writers making use of case-law is to bring case after case, with all details, without defining the principles which are the basis of the decisions given in the cases concerned. If wrong method is applied, the writers as well as the readers can not see the wood for the trees! The right method is to abstract the principles from the decisions, and then to quote the decisions themselves as examples of the application of principles."*

Another important issue raised by Oppenheim is the problem of political bias. As an example of bias he presents the European attitude towards the **Monroe Doctrine**.[17] In contrast to American writers European internationalists considered the Monroe Doctrine to be a violation of international law. Oppenheim points out in answer to the American jurists that there cannot be two different rules governing the acquisition of territory and intervention on the American Continent and in the rest of the world. So, European states were allowed to acquire territory in the same way as anywhere else. However, Oppenheim also draws to the attention of European jurists that the Monroe Doctrine has to be interpreted in a different way. For Oppenheim such a doctrine is only a political statement. The statement suggests that the USA will intervene in conflicts between a European and an American state whenever such conflicts endanger the balance of power on the American Continent. According to Oppenheim, such a doctrine could not violate international law, since at that time there was no rule prohibiting this kind of intervention.

Oppenheim and Contemporary International Law

International law has undergone many fundamental changes in the course of the last hundred years. Such changes concern e.g. the position of international organisations and individuals as subjects of international law, the executive power of the UN Security Council, the growing importance of adjudication as a means of settling international disputes. The codification of international law which Oppenheim predicted in 1908 comprises such divergent fields such as human rights protection, international trade law, the law of the sea, the law of treaties. It is perhaps not surprising that the last authentic edition of *Oppenheim's International Law* has had to be fundamentally revised. Nevertlieless revisiting Oppenheim is interesting not only for historical reasons.

Oppenheim very clearly pointed out fundamental differences in the method applied by international lawyers from different countries. His consideration of the method used by the science of international law was largely concerned with the problem of identifying a unified approach to international law. The American Charles N. Gregory stated that "Oppenheim's continental training enabled him to strike a balance between the Anglo-American and the continental schools in a way which found general acceptance."[18] With regard to the fact that international law today is taught at various universities in various legal and cultural circles considerations regarding method should also be of relevance today.

The problem of unifying international criminal law has emerged e.g. in the context of the elaboration of the **Rome Statute of the International Criminal Court**. In particular the discussions on procedural questions have shown that, although it is possible to establish a consensus regarding the principles involved, various details of the procedure before the future ICC remain unresolved. Divergence can also be found in the dissenting opinions accompanying the decisions of international judicial and quasi-judicial bodies, regarding issues of the law of the sea, human rights protection or the law of international investments.

Codification of international law, as predicted by Oppenheim, has brought a positive basis for the interpretation of international treaties. The rules of interpretation have been laid down in the 1969 **Vienna Convention on the Law of the Treaties** (Art 31-33). Nevertheless, the methods of interpretation described in the Vienna Convention are applied by internationalists in different ways sometimes giving priority to the wording of a provision, at other times to the structure of a treaty in which a provision occurs or to the aim and purpose of a treaty. In 1995 the present President of the International Court of Justice, Gilbert

Guillaume, stated with regret: "At the regional level, the Luxembourg and Strasbourg Courts are developing a case law which, in some respects, diverges from general international law (for instance, as regards the interpretation of treaties)."[19]

If we look at *Oppenheim's International Law* we have to ask whether textbooks on international law are able to serve as a means of unification for different legal doctrines. Oppenheim was very sceptical concerning such a possibility. According to Oppenheim, textbooks do not have the status of a source of law. As a matter of fact, in the USA in particular, the role of textbooks has been nearly eradicated and the function they fulfilled has been taken over by restatements of the practice of courts and governments.[20] The sceptical approach towards textbooks has also been confirmed by the International Court of Justice. Although the Court may according to Article 38 of its Statute apply "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law," in practice it does not make use of this opportunity.

The example of *Oppenheim's International Law*, however, shows that textbooks of great authority can have an important influence on decision-makers when they try to find reliable points of orientation in the fast-changing field of international law. The complex development of international law, the creation of new international norms and the proliferation of international judicial organs which in their turn have produced a huge quantity of judgments and decisions call for a systematic overview that only textbooks can provide. In this context the authority of *Oppenheim's International Law* will remain outstanding.

---

1 The first volume on "Peace" was edited in 1905, the second volume on "War and Neutrality" in 1906.

2 Wight, The Balance of Power, H. Butterfield and M. Wight (ed.), Diplomatic Investigations, 1966, 172 (quoted according to M. Schmoeckel, The Internationalist as a Scientist and Herald. Lassa Oppenheim, EJIL, 2000, pp. 699-712, 701).

3 Oppenheim rewrote important parts of the textbook in 1919. Although the 3rd edition was edited shortly after his death by his student Roxburgh, this version can be still considered authentic. The 3rd edition was translated into Czech language and edited in 1924-1925.

4 L. Oppenheim, The Science of International Law. Its Task and Method, AJIL, 1908, pp. 313-356.

5 Regarding L. Oppenheim's biography see Charles Noble Gregory, Professor Oppenheim, Editorial Comment in American Journal of International Law, 1920, pp. 229-232. M. Schmoeckel, supra note 2, pp. 699-701.

6 Noble, supra note 5, p. 230.

7 L. Oppenheim, supra note 4, pp. 355-356.

8 Oppenheim, supra note 4, p. 328.

9 Oppenheim, supra note 4, p. 328.

10 Oppenheim, supra note 4, p. 329.

11 Oppenheim, supra note 4, p. 334.

12 Oppenheim, supra note 4, p. 318.

13 Oppenheim, supra note 4, p. 350.

14 Oppenheim, supra note 4, p. 351.

15 Oppenheim, supra note 4, p. 351.

16 Oppenheim, supra note 4, p. 341.

17 The Monroe Doctrine was formulated by the US President James Monroe in his speech before the US Congress in December 1823. According to the Doctrine the USA considered any attempt of European states to intervene on the American continent as danger for peace and security and as an unfriendly act. In the Doctrine the USA further promised not to intervene with the relations between European states and with the existing colonies.

18 Noble, supra note 5, p. 230.

19 In: International and Comparative Law Quarterly, 1995, pp. 848-862, 862.

Harald Christian Scheu, Mag. phil., Dr. iur., Ph.D. Educated at the University of Salzburg (Dr. iur., 1995, Mag. phil., 1996) and the Law Faculty of Charles University in Prague (Ph.D., 1997). Since 1997 at the Department of International Law at the Law Faculty of Charles University in Prague. Teaches and conducts research in issue concerning International Law and Human Rights Law.