matically critical. At all events, the record has a value in itself in disclosing the policy of the particular government.

In drawing conclusions from the observations taken as a whole, three points may be emphasized. First, that there was a manifest solidarity of the nations of the Western Hemisphere in specific acceptance of the principles. Second, that the problem of intervention in international law has become complicated by the fact that the respective dominant political parties of certain countries assume to extend their sphere of action beyond the territory of their own state, thus engendering a conflict of ideologies without being guilty of intervention in the hitherto accepted sense. Third, that too much reliance must not be placed upon the acceptance of general principles and that the actual and factual elements of international differences must be explored to their foundations if any real contribution is to be made to the maintenance of international peace.

ARTHUR K. KUHN

RECOGNITION OF BELLIGERENCY

During the course of the past summer a discussion, having some of the features of a debate, on the recognition of belligerency took place in the columns of the *London Times* in which a number of well-known English jurists and scholars participated. The discussion was started by a letter published by Mr. Noel-Baker, M.P., in the issue of July 5 which was followed by another one by him in the issue of July 10, in both of which he defended, on grounds of policy and of international law, the policy of the British Government in declining to recognize the belligerency of the Spanish insurgents.

Recognition of belligerency of the Spanish insurgents, aided as they are by large contingents of German and Italian troops, he asserted, would be "to legitimize by implication what everyone agrees to be a covenant-breaking invasion." No one denied, he went on to say, that the action of the German and Italian Governments "in dispatching those troops and armaments was a flagrant violation of the Covenant and the Kellogg Pact." And he added: "If we granted belligerent rights to General Franco's forces, *i.e.*, to these Germans and Italians, the political interpretation placed on that concession by other Powers would inevitably be that we condoned the violation of the most important and the most solemn of all treaties." Moreover, a recognition of their belligerency would carry with it the duty of neutrality on the part of the recognizing state, but, as had once been asserted in a famous British Government White Paper, no member of the League of Nations is ever justified in adopting a policy of neutrality toward a state which is violating the Covenant. If, therefore, the British Government were to recognize the belligerency of Franco's military forces, including the German and Italian troops arrayed with them against the legitimate government of Spain, "it would be yet another blow at that 'rule of law' on which, as the Foreign Secretary has said, our hopes of peace depend."

There were in addition, he argued, reasons based upon international law

why recognition of belligerency in this case was not justifiable. Citing Dana, Hall and Sir Alexander Cockburn in support of his view, he declared that insurgents have no legal right to be recognized as belligerents and, adverting to the past practice of the British Government, he asserted that its "traditional policy" had been to refrain from recognizing the belligerency of insurgents, because "the *prima facie* reasons against that policy [recognition] are both in principle and practice very strong." The traditional policy of non-recognition was, moreover, "in full accord with the practice of other states and the rules of international law." He admitted, however, the *right* of the British Government to accord recognition in any case where the Government considered it "necessary to protect British interests or to promote [to use the language of Westlake] 'the general political good of the world.'" But the reasons which would justify recognition must amount to *necessity*. The mere convenience or interests of the insurgents themselves would not justify it.

Sir John Fischer Williams replied in two letters (*The Times* of July 10 and 13), in one of which he said he found it difficult to follow Mr. Noel-Baker's conclusion that a recognition of belligerency in the present Spanish situation "would be to legitimize by implication what everyone agrees to be a covenant-breaking invasion," since recognition of belligerency emphasizes the duty of impartiality and neutrality on the part of the recognizing state *vis-à-vis* both contestants rather than indicates any expression of approval, condonation or condemnation of the cause of either or any intention of favoring either side at the expense of the other. Adverting to Mr. Noel-Baker's statement that it was the traditional policy of the British Government—which policy, he said, was in accord with the practice of other states and with the rules of international law—to refrain from recognizing the belligerency of insurgents, Sir John stated that he could not accept this statement of British policy as correct. In fact, he asserted, it had always been the policy of the British Government to regard itself as free to recognize or to refuse to recognize a state of belligerency as it might judge to be in its own interests and, in the language of Westlake, "the general political good of the world." The wiser policy of the British Government—and of all governments, he thought—was to keep a free hand and judge each case on its own merits rather than allow its decision to be hampered "by any general bias (which is what is apparently meant by a 'traditional policy,' real or supposed), in favor of one line of conduct or the other."

Professor Zulueta, of Oxford University, in two letters to *The Times* written in reply to Mr. Noel-Baker's, said he was willing to argue on the assumption that the Spanish insurgents had no legal right to recognition as belligerents. Nevertheless, he believed that insurgents under certain conditions had a right to be treated as belligerents, and he thought Hall, whom Mr. Noel-Baker had quoted in support of the contrary view, "was inclined to admit a moral right to recognition in proper circumstances and that he would have regarded refusal of recognition in a case such as the present as hardly conceivable."

He believed that Westlake also was inclined to the same view. While he was willing to admit for the sake of argument that insurgents had no legal right to recognition, he preferred "as being more in accordance with principle and the sound development of international law, an older view, that, provided a certain state of facts exists (as it admittedly does in the present case), insurgents have a *legal* as well as a *moral* right to be accepted as belligerents," and consequently the British Government was under a duty to accord recognition in the existing case. This followed logically from the British duty of non-intervention in the Spanish struggle. If, therefore, the facts of the present case were taken into account it was as "plain as day" that the refusal of the British Government to recognize the belligerency of the Spanish insurgents—that is, its refusal to accept the position of a neutral, in the technical sense—was inconsistent with real non-intervention and had "forced us into open, positive and natural acts of serious interference with military operations." There was, in consequence, a "glaring conflict between un-neutrality and non-intervention."

On this latter point, Mr. Alexander P. Fachiri (*The Times*, July 22) took issue with Professor Zulueta, who had identified the effects of recognition and non-intervention. Mr. Fachiri distinguished between the policy of neutrality and the policy of non-intervention. Recognition of belligerency, he said, is usually the act of a foreign state acting alone and in isolation, whereas the policy of non-intervention as pursued in the present case involves the joint action of foreign states for the purpose of preventing either side from obtaining outside assistance. The policy of neutrality, which would follow from the recognition of belligerency, would not insure the stoppage of supplies from abroad since, unless expressly forbidden, individuals would still be free to furnish them. The policy of joint non-intervention, as it had been sought to carry it out in the present struggle, goes further therefore than the policy of simple neutrality which was all that recognition of belligerency implied. For this reason he thought it was preferable to the latter policy and to this extent he was in agreement with Mr. Noel-Baker.

Professor H. A. Smith, of the University of London, on the other hand (*The Times* of July 26), criticized the policy of the British Government—and the others which had coöperated with it in the non-intervention scheme—not for their refusal to recognize a state of belligerency, but for their failure to accept the implications which flow from recognition. In fact the British Government had recognized in various ways the existence of a war, and by necessary consequence the belligerency of the insurgents who, on their side, were carrying it on, but it had not pursued the matter to its logical consequences by a concession of the exercise of belligerent rights on the high seas as well as in Spanish territorial waters, *i.e.*, they had conceded only partial belligerent rights.[1] The non-intervention agreement, he thought, was itself equivalent

[1] This point is further developed by Professor Smith in his article "Some Problems of the Spanish Civil War", in the *British Year Book of International Law* for 1937, p. 26 ff.

to a collective declaration of neutrality. If it did not recognize the existence of war, it was singularly misnamed and was an unfriendly act toward a country which was at peace with all the Powers concerned.

Professor Smith was supported by Mr. P. A. Landon, of Cambridge University (*The Times* of August 30), who asserted that in declining to recognize a state of belligerency the British Government had not only denied "the existence of circumstances which are perfectly obvious to the whole world, but has also departed from all precedent. What the precedents show is that there is a clear principle upon which recognition of belligerency must depend; and that principle is that where a large part of the country is in the hands of the insurgents or where they exercise command of the sea, in such a way as to involve neutral interests, recognition should follow as a matter of course." And he added:

> It is a paramount principle of international law that neutral governments (as distinct from neutral individuals) must not render assistance to either belligerent. When our navy is used to prevent the capture of merchantmen on the high seas carrying contraband to the ports of the Valencia government we are, as a nation, as guilty of a breach of this fundamental principle as if we had sunk the cruisers of the Franco party. We have deprived the insurgents of the weapon which we used with such effect against the Central Powers throughout the Great War.

Parenthetically Mr. Landon denied that there is any such thing in international law as a "grant" of belligerent rights. Those rights, he asserted, cannot be granted or withheld at the discretion of neutral Powers; they follow automatically from the existence of a *de facto* state of war and when that stage is reached in the course of an armed struggle neutrals are bound to submit to the relevant rules of international law, including those, of course, which govern the capture and condemnation of contraband on the high seas. If this be true, insurgents have a right to be recognized whenever the struggle in which they are engaged has reached the proportions of war.

An opinion along the same line was expressed by Sir Francis Lindley (*The Times* of July 13) who, while admitting that the recognition of belligerency is a matter falling within the discretion of neutral governments, thought the British Government had committed a "serious blunder" in not recognizing a state of belligerency in the present case as soon as it was apparent that it was faced with a "regular civil war on the lines of the American Civil War of the last century." Had that been done "we should have known where we stood and our navy would have been spared a number of difficulties and absurdities."

The policy of non-recognition, however, found a defender in Lord Parmoor (*The Times,* July 17), who thought the granting of belligerent rights to the Spanish insurgents would be "reactionary and little calculated to promote peace either in Spain or in the larger areas which profess to a Christian rule in international disputes."

It may be remarked in passing that the reasons given by the British Gov-

ernment for refusing to recognize a state of belligerency in Spain were, as stated by Lord Plymouth, Chairman of the Non-Intervention Committee, at its meeting on July 16 (*The Times*, July 17), were the following: In the first place, the existence of the non-intervention agreement provided the machinery whereby arms and munitions were to be prevented from reaching either party from the outside and consequently rendered unnecessary to that extent the exercise by either party of the belligerent right of search at sea. In the second place, the presence of large numbers of foreign troops fighting on both sides made it "impossible for all the governments concerned to regard the combatants in Spain as being sufficiently independent of foreign ties and commitments to be treated in accordance with normal international principles as parties to a civil war in which other governments are neutral." In the third place, he said, "so long as the four naval powers were exercising jointly and by agreement naval patrol duty off the coast of Spain, it was reasonable to hope that the difficult naval situation which is always liable to exist when two naval forces are at war could be prevented by joint action from leading to dangerous consequences." He was forced to admit, however, that at the time he spoke the machinery referred to above was not adequate to prevent the shipment of contraband to Spanish ports, the German and Italian warships having withdrawn from the naval patrol, and it was therefore necessary to adopt a different policy. In these circumstances the British Government proposed to recognize the belligerency of both parties provided the foreign "volunteers" who were fighting in Spain were withdrawn. The French Government agreed to accord recognition subject to the same condition. But, no satisfactory agreement with General Franco for the withdrawal of the "volunteers" having been reached, neither the British nor French Government was willing to accord recognition.

With the merits of the action of the British and other governments in refusing to recognize a state of belligerency in Spain, so far as the reasons therefor are based on considerations of policy or expediency, we are not here directly concerned. But it may not be out of place to offer a few observations on some of the legal aspects of recognition which were touched upon by the authors of the letters referred to above. The traditional conception that recognition is from the legal point of view merely a "concession of pure grace," to use the language of Hall, which neutral states are entirely free to grant or withhold in their discretion, and that consequently insurgents have no right to demand recognition, was challenged by several of those who participated in the *Times* debate.

Dana was cited by Mr. Noel-Baker in support of his view that insurgents have no right (he does not distinguish between legal and moral right) to recognition and consequently neutrals are under no duty to accord recognition unless it is "necessary" for the protection of their own rights or the promotion of the "general political good of the world." Dana says:

> The reason which requires and can alone justify this step [accordance of belligerent rights] by the Government of another country is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent Government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent Government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion and of censure upon the parent Government.[2]

This somewhat narrow view, both as to the right of insurgents to recognition and the right of neutrals to accord it may perhaps be explained by the fact that Dana wrote in 1866 and that he had been an ardent supporter of the Government of the United States which had protested against British recognition of the belligerency of the Southern Confederacy as premature. He may therefore have been less inclined to admit that insurgents have any rights than he would have been had his opinion been expressed in different circumstances. Nevertheless, it will be noticed that Dana speaks of the "reason which requires" recognition and he admitted that recognition was justified "when the state of things between the parent state and insurgents amounts in fact to a *war*, in the sense of international law."

Hall, who was likewise cited by Mr. Noel-Baker in support of his position, while adopting the view that recognition is, "from the legal point of view a concession of pure grace," nevertheless admitted that humanity may require that insurgents be treated as belligerents and, he added: "if so there must be a point at which they have a right to demand what confessedly must be granted."[3] For this reason Hall was also cited by Professor Zulueta in support of his position as an author who was "inclined to admit a moral right to recognition in proper circumstances." Both writers also invoked the high authority of Westlake[4] in support of their opposing views. While admitting that foreign states are free to consult their own interests and the "general political good of the world" in deciding to recognize an insurrection as war, and that while "the right of insurgents to claim the recognition of their belligerency, as distinct from the recognition of their independence, has not yet become a legal one, either by the consent of approved authorities or by custom," Westlake thought "much may be said for it on the ground of reason when even those who deny its legal character can represent the consequences which might follow from its refusal as being inhuman."

The writer of the present note ventures to offer the following conclusions which he believes are justified not only on considerations of reason and sound policy but are supported by some of the best juristic opinion and practice:

First, recognition of belligerency is nothing more than recognition of the fact of the existence of war. It does not involve recognition of any govern-

[2] Dana's Wheaton, edition by Wilson, p. 29, n. 15. [3] International Law, 3rd ed., p. 34.
[4] International Law (1910), Part I, pp. 54–55.

ment or political régime, nor does it involve any expression of approbation or disapprobation or indicate any sympathy for or prejudice against the cause for which either side is fighting nor does the refusal to recognize carry any such implications.

Second, recognition is a matter entirely within the discretion of foreign states in the sense that they are free to judge for themselves whether the struggle has attained the proportions of a war, and, if so, whether they can recognize it as such without impairing their own rights or prejudicing the general interests of the community of states. But there are certain generally accepted tests by which the existence of a state of war are to be determined, and recognition prior to this stage is premature and may justly be regarded by the parent state as an unfriendly act. For the refusal to accord recognition, however, non-recognizing states cannot be held responsible by the insurgent organization should it come into power, even though it be admitted that the insurgents had a moral right to be recognized as belligerents. Dana's view that recognition by a foreign state is never justified unless its own rights and interests are so affected as to require a definition of its own relations to the parties would seem to be too strict, since it does not take into sufficient account the possible rights and interests of the insurgents.

Third, whenever an insurrectionary struggle reaches certain proportions in respect to its magnitude, its area of control, the strength of its military forces and the character of its governmental organization, it would seem that the insurgents have at least a moral right to be treated as belligerents by foreign states, and, if so, the latter are under a moral duty to recognize them as such, although neither the right nor the duty may in the present state of the law be said to be a legal one.[5]

Fourth, the situation in which a material state of war exists on a large scale but which other Powers refuse to recognize as war and the parties to which will not be treated as belligerents, must be admitted to be highly anomalous. In normal circumstances recognition ought to follow as a matter of course. Lord Plymouth in his statement referred to above explaining the reasons why the British Government had not recognized a state of belligerency in Spain, admitted that for some months the Spanish struggle had been of a "stature and nature which would have justified the recognition of the two parties as belligerents in normal circumstances." But, he added, the circumstances had

[5] As to the question of legal right there is little controversy among the better known writers on international law. McNair in a recent article entitled "The Law Relating to the Civil War in Spain" (Law Quarterly Review, Oct., 1937, p. 471 ff.), expresses the opinion that those who maintain that insurgents who fulfill certain tests have a legal right to be recognized as belligerents "have not made out their case" and that the balance of evidence is against their view. As to whether they have anything in the nature of a moral right to be recognized, he expresses no opinion. Other writers, Hyde, Oppenheim, Lauterpacht, and Wilson, for example, do not discuss the question of right, apparently assuming that recognition is entirely a matter of discretion on the part of foreign states.

not been normal. Secretary Eden remarked in the House of Commons on April 13 that "the natural thing to have done when the struggle had reached the large dimensions of the present war in Spain was to have recognized its belligerent character, and for those whose maritime interests were involved like ours to grant belligerent rights." It is believed that unless the circumstances of the particular case are quite abnormal, or where recognition would affect prejudicially the recognizing state's own rights or would operate to the detriment of the general interests of the community of states, the withholding of recognition cannot be justified, assuming of course that the struggle has acquired the proportions of a war in the material sense. It is hardly necessary to add that the decision of the foreign government should not be influenced by its own sympathies or prejudices.

JAMES W. GARNER

THE LIQUIDATION OF PERPETUAL LEASES IN JAPAN

Current discussion of "peaceful change" serves to emphasize the importance of the notes exchanged between the Japanese Government and eight other governments, during the months of March and April, 1937, "with a view to liquidating once and for all in a spirit of friendship and conciliation the system of perpetual leases" in Japan.

The perpetual leases had their origin at a time when aliens were not permitted to own lands freely in Japan, and when a number of foreign settlements existed there. Provisions for the residence of certain aliens were embodied in a series of Japanese treaties of 1858–1869. The treaty with the United States of July 29, 1858, was the first of the series, but the most explicit of such provisions were those in the treaty with Austria-Hungary of October 18, 1869 (Article 3).[1] Settlements were laid out to meet the needs of aliens in fulfilment of these treaty provisions, and within these settlements land was "held under governmental leases in perpetuity . . . subject to a fixed rate of rent

[1] Article 3 of this treaty provides in part: "The ports and towns of Yokohama (in the district of Kanagawa), Hiogo, Osaka, Nagasaki, Niigata, Ebisuminato on the island of Sado, Hakodate and the City of Tokei (Yedo) shall, from the day on which this Treaty comes into operation, be opened to the citizens of the Austro-Hungarian Monarchy, and to their trade.

"In the above ports and towns Austro-Hungarian citizens may permanently reside; they shall have the right, therein to lease land, to purchase houses, and to erect dwellings and warehouses.

"The place, where Austro-Hungarian citizens shall reside, and where they shall erect their buildings, shall be determined on by the Imperial and Royal Consular Officers in conjunction with the competent local Authorities; the harbour regulations shall be arranged in a similar manner.

"If the Imperial and Royal Consular Officers and the Japanese Authorities can not agree, the matter shall be submitted to the Diplomatic Agent and the Japanese Government." Treaties and Conventions between the Empire of Japan and other Powers (Tokio, 1884), p. 4. This provision has been said to "contain the sum of all privileges and immunities on the subject [of the leaseholds] granted by Japan under the Treaties of 1858–1869." Case of Japan in the Japanese House Tax Case, p. 13.