

Sir Hersch Lauterpacht, ***The Function of Law in the International Community***.  
Oxford: Oxford University Press, 2011. Pp. xlvii + 477. £29.95.  
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Almost eight decades after its publication in 1933, Oxford University Press recently republished Hersch Lauterpacht's book, *The Function of Law in the International Community*, with a new preface by Martti Koskenniemi that situates the work within the German legal tradition.<sup>1</sup> *The Function of Law* is a significant work for several reasons and its renewed accessibility therefore very much welcomed.

First, the work is an impressive piece of scholarship, regarding the stringency of argumentation and depth of analysis. In his attempt to dispel arguments for the non-justiciability of

<sup>1</sup> The preface is based Koskenniemi's illuminating text on this book, 'The Function of International Law in the International Community: 75 Years After', 79 *BYIL* (2008) 353.

certain international disputes, in particular due to their allegedly political nature, and in making the case for compulsory adjudication, Lauterpacht not only surveyed the existing provisions on third-party dispute settlement in numerous arbitration treaties, the Covenant of the League of Nations, and the Statute of the Permanent Court of International Justice; he also analysed a vast amount of state practice and case law, as well as doctrines of municipal private law, such as ‘abuse of rights’ or ‘*rebus sic stantibus*’ – always informed by the existing international law literature and works on Roman, Italian, German, French, and English law. Last but not least, Lauterpacht tackled the fundamental question of the philosophy of international law, the question as to the concept of international law, the origin of international law’s normativity. Criticizing the doctrine of co-ordination as exposed by Georg Jellinek and Erich Kaufmann, as well as Heinrich Triepel’s doctrine of international legal obligation as based on law-making agreements between states, he agreed with Hans Kelsen that the binding force of law could not be derived from either the individual or common will of states, but instead originated in an *a priori* assumption. While for Kelsen this *a priori* assumption was the norm *pacta sunt servanda*, Lauterpacht preferred it to be expressed not by reference to *pacta* as contractual agreements, but rather to the will of the international community, the *civitas maxima*. The ground for the bindingness of international law thus becomes the norm *voluntas civitatis maximae est servanda*. The international community for Lauterpacht, even though starting out as a postulate, was also a reality which over time would progress towards greater legal and political integration.

This belief in progress of the international community, Lauterpacht’s idealism, is the second feature that in my view makes the book important. For Lauterpacht international law was for states in their totality, not individual governments, and the states were to serve individual human beings. The international community for him, thus, was a community of individuals, whose will, due to the rudimentary stage of political integration, was expressed by states. For Lauterpacht compulsory arbitration was essential for the international community to exist as a community under the rule of law, and thus as a community in which peace could be realized. As a consequence Lauterpacht regarded the function of the international judge as the highest and most important function that could be placed in the hands of man, a function which Lauterpacht himself exercised as a judge at the International Court of Justice from 1954 until his death in 1960. Judges were not only indispensable to ensure the bindingness of international law (which did not exist if states were judges in their own cause), they could also, according to Lauterpacht, remedy certain injustices in the law resulting from a divergence between the legal rules on the one hand and the ‘essential purposes of law and requirements of international justice’ on the other. Judges could fill these material gaps through recourse to general principles of law, mainly derived from municipal private law, a subject on which Lauterpacht had written a doctoral thesis at the LSE which was published in 1927 under the title ‘Private Law Sources and Analogies of International Law with Special Reference to Arbitration’.<sup>2</sup>

When we read this book today we cannot but note that international law and legal integration did not progress as foreseen and hoped for by Lauterpacht. To be sure there is a high degree of legal integration, including compulsory dispute settlement in the field of international

<sup>2</sup> In *The Function of Law* Lauterpacht also recognized general principles of public law as sources of international law (at 123). For him these were, however, of lesser importance than private law analogies since he saw international law to be mainly concerned with the regulation of the external relations of states (at 257) a circumstance which also mitigated, in his view, the importance of the problem of change caused by the absence of an international legislature (*ibid.*).

economic law. It might be questioned, however, whether this body of law can be construed as reflecting a *voluntas civitatis maximae* and not just the will at a given time of a number of powerful governments. By contrast, other areas of law serving humankind, such as environmental and human rights law, have remained weak; much of Lauterpacht's criticism of voluntary dispute settlement, the institute of the national judge at the Permanent Court of International Justice, or the selection procedure of international judges remains valid. Reading *The Function of Law* today we might even feel sentimental, given the impossibility of adhering to a notion of progress of international society towards international solidarity and justice or the notion of legal logic as the foundation of a convincing argument. Despite our disillusionment, however, Lauterpacht reminds us of what many of us international lawyers are missing today, but is needed now no less than it was needed then: a vision of global justice and global public ordering against which we may assess the current state of international law and legal practice. Moreover, it is a reminder of our theoretical wealth. There exists a rich body of serious international legal theory which we can build on, the philosophy of international law may need to be reinvigorated, yet it need not be reinvented.<sup>3</sup>

Lauterpacht himself had intended to publish a revised edition of his work and had started working on revisions during his time in The Hague. His premature death prevented him from completing this task. Now, 50 years later, his son Elihu Lauterpacht took the republication by Oxford University Press as an opportunity to have the existing handwritten annotations added to the text of 1933. This choice as well as its execution seems quite unfortunate to me. In my view it would have been preferable not to insert any revisions. With the edits referring to developments after 1933, such as the creation of the International Court of Justice, the text is no longer a work of 1933. It is, however, also not a work of the 1950s since revisions were made to only the first 60 pages of the book. Finally, it is even less a book of 2011, although the new preface by Martti Koskenniemi for reasons not intelligible to the reader was not placed before the original body of text, but after Lauterpacht's own preface, the table of contents, table of cases cited, and list of abbreviations. What I find particularly troubling is that the book itself does not reveal – through notes or annotations – what exactly was added at the occasion of the republication. It merely includes a note from the publisher referring the reader to an OUP website for a full overview of the revisions. A further irritating side effect of the revisions, apart from the resulting textual inconsistencies, is the change of pagination. While the republication uses the same typescript as the 1933 edition the page numberings of the two editions do not correspond. The copy-editors seem to have overlooked the fact that this change of pagination necessitated a thorough checking of cross-references which in many places now direct the reader to the wrong page. Given these faults as well as the typographical and transcription errors which entered the book with the amendments, I wonder whether the extremely diligent author that Hersch Lauterpacht appears to have been would have been happy with the form of this republication.

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<sup>3</sup> For a discussion of a recent project on the philosophy of international law see Isabelle Ley's review in this issue of S. Besson and J. Tassioulas (eds), *The Philosophy of International Law* (2010).