Lauterpacht: The Victorian Tradition in International Law

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I

Less than two months after the capitulation at Munich, on 16 November 1938, Hersch Lauterpacht delivered an address to the League of Nations Union of Cambridge University, his new academic home. The general subject of his presentation was the League of Nations. In his opening remarks, he confided to his audience that this was a topic about which he felt so strongly that he was unable to trust the 'freely spoken word' and that, while it was not his custom, he would read from a manuscript in order to maintain restraint and deliberation.[1] Nonetheless, the address departed from Lauterpacht's customary detached and complicated, somewhat dry English at several points, most notably when, shortly after the middle of his speech, he switched to the first person plural. The address opened with the argument that the events of the 1930s – the Manchurian and Abyssinian wars, as well as the Munich accords – and the positions assumed by key League members had resulted in the Covenant's collective security provisions, the territorial guarantee (Article 10) and the obligation of collective response (Articles 15 and 16) falling into desuetude. In fulfilling its principal objective, Lauterpacht claimed, the League had failed. All that remained was the hope, he asserted without conviction, 'that the true spirit of man will assert itself in the long run'. Then followed the abrupt and uncharacteristic jump into informality and engagement:

> But what have we to do in the meantime? Ought we to abandon the League and start afresh as soon as the obstacles disappear? Ought we to maintain it and to adapt it to the needs of a retrogressive period? Ought we to pursue the ideal of universality by reforming the League so as to make it acceptable for everyone? Ought we to admit that if peace

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1 'The League of Nations', in *International Law, Being the Collected Papers of Hersch Lauterpacht*, systematically arranged and edited by E. Lauterpacht (hereinafter *CP*) vol. 3 (1977) 575.

> cannot be achieved by collective effort, there are other good things that can be achieved through it?'[2]

The questions are put forward in a rhetorical, anxious tone, as much to highlight the urgency of the situation as to indicate alternative ways of response. Should the law be abandoned, or modified? Should its content or scope be adjusted in accordance with political realities? The questions are familiar to international lawyers, who must continually juggle the distance between 'ought' and 'is', law and fact. Here, however, the issues at stake seem to be of exceptional moment. They concern the intrinsic rationality of federalism and its concomitant, law and order through collective security: 'progress in things essential has been arrested and the clock turned back'.

Lauterpacht's speech posits a cultural or political community which is estranged from the course of inter-war politics – the politics of national over common interests, of the reign of 'short-sighted benefits' over stable and balanced growth, and the rise of dictatorships 'on a scale unprecedented in history'.[3] There can be little doubt about the principles which identified Lauterpacht's Cambridge audience as a community. To invoke those principles, Lauterpacht turned to the past – as Grotius had once done in seeking authority from the customs of the Romans, 'better peoples and better times'.[4] Looking beyond the immediate past, the nationalisms and disorder of the *fin de siècle*, his gaze rested upon the words of the Prince Consort at the 1851 International Exhibition in London:

> Nobody who has paid any attention to the peculiar features of our present era will doubt for a moment that we are living a period of the most wonderful transition which tends rapidly to accomplish that great end to which indeed all history points – the realization of the unity of mankind.[5]

And in a tone of unmitigated Victorian nostalgia, he added: 'How immeasurably far backwards do we seem to have travelled from those days of unbounded optimism?'[6]

To find a place for law in a dangerous time, Lauterpacht looked back to the middle of the nineteenth century, hoping to resuscitate its liberal rationalism and its ideal of the rule of law, its belief in progress, its certainty about the sense and direction of history – Proust's *bon ange de la certitude*. For him, Munich seemed deadly because it was an un-Victorian, anti-traditionalist attack on the political ideals – and

2 *Ibid*, 583.

3 *Ibid*, 580–582.

4 H. Grotius, *De jure belli ac pacis. Libri tres*. Carnegie Endowment for International Peace, *The Classics of International Law 3* (1925) *Prolegomena* § 46 (p. 25).

5 'The League of Nations', *supra* note 1, at 587. In his monumental history of the nineteenth century, Peter Gay links this statement to the Lord Mayor's Banquet of 1850, anteceding the Exhibition. Nonetheless, he too considers it a good illustration of the Victorian mind's optimistic view of 'progress'. See P. Gay, *The Bourgeois Experience. Victoria to Freud, Vol. I, The Education of the Senses* (1984) 46 and generally 45–56.

6 'The League of Nations', *supra* note 1, at 587. Examples of nostalgia abound. Outlining in 1925 Westlake's progressive doctrine as expressed in an 1895 book, Lauterpacht notes that the supervening political changes would require only 'minor alterations' in his work, 'Westlake and Present Day International Law', *CP*, vol. 2, at 400. Discussing in 1959 the 1871 London Protocol Lauterpacht notes that '[i]n comparison of what was to follow, this was a law-abiding age', 'International Law and Colonial Questions, 1870–1914', *CP*, vol. 2, at 99.

the political system – that had become entrenched during the heyday of the bourgeois century. The way to combat it was to engage public opinion in defence of the idea of the League of Nations as a world federation, the 'culmination of the political and philosophical systems of leading thinkers of all ages ... the final vision of prophets of religion'.[7]

This was no sudden turnabout in Lauterpacht's thought. Throughout the 1920s and 1930s he had critiqued a 'positivism' which extolled the virtues of statehood and sovereignty and, allying itself with aggressive nationalism, had been responsible for the cataclysm of the Great War. In Lauterpacht's mind, this was to be replaced by a comprehensive and professionally administered system of cosmopolitan law and order in the image of the liberal state.

Historians debate the 'modernist' and 'traditional' understandings of the effects of the First World War on European consciousness.[8] In this perspective, I see Lauterpacht as a traditionalist for whom the war of 1914–1918, together with the aggressive nationalism that provoked it and the twenty-year crisis that ensued, constituted an irrational rupture in the peaceful and inherently beneficial international developments associated with the nineteenth century. Lauterpacht always characterized the inter-war years as a period of 'retrogression'.[9] It was retrogression from the cosmopolitanism that inspired Wilson in Paris in 1918–19, but which owes its origin to the high liberalism of half a century earlier.[10] Lauterpacht never gave up the ideals of liberalism and progress. On the contrary, he reasserted them in response to the experience of the Second World War in a famous 1946 article on 'The Grotian Tradition in International Law' as well as in his post-war writings on human rights, grounding them expressly in the rationalist philosophy of the Enlightenment.[11]

Lauterpacht's traditionalism sets him apart from his Viennese teacher and contemporary Hans Kelsen, a legal modernist *par excellence*. Although Lauterpacht held Kelsen in the highest esteem (and is reputed to have kept a photo of him on

7 'The League of Nations', *supra* note 1, at 583, 585. Lauterpacht's general lectures in Lent Term 1938 founded international law under the Covenant on the peace schemes of Dubois (1305), Sully (1603) and William Penn (1693), and invited students to read inter-war commentary on them. It then presented the 'legal organisation of peace' in five parts: i) the duty not to resort to force; ii) the duty of peaceful settlement; iii) the duty to accept arbitral or judicial settlement; iv) the duty to enforce collective decisions; and v) the duty to participate in the machinery of peaceful change. This was a complete constitutionalization of international affairs, a system of Rule of Law writ large. *Syllabus of Six Lectures by Professor Lauterpacht on the Legal Organisation of Peace in the Lent Term, 1938.*

8 For the modernist view, cf. P. Fussell, *The Great War and Modern Memory* (1975). For the traditionalist interpretation, cf. J. Winter, *Sites of Memory, Sites of Mourning. The Great War in European Cultural History* (1995).

9 Cf., e.g., 'International Law after the Covenant' (1936, *CP*, vol. 2) 145.

10 For Lauterpacht's early enthusiasm about Wilson and the League of Nations, cf. 'The Mandate under International Law in the Covenant of the League of Nations' (1922, *CP*, vol. 3) 40.

11 McNair remembers Lauterpacht telling him that the article on the Grotian tradition 'contained more of his essential thinking and faith than anything else he had written', 'Memorial Article', *Annals of the British Academy* (1960) 379. Cf. also *International Law and Human Rights* (1950, hereinafter *Human Rights*) and sections V and VII *infra*.

the wall of his study, together with one of his mentor Arnold McNair and an engraving of Grotius) and was impressed by the Pure Theory of Law, they held strongly differing viewpoints regarding the place of natural law in legal construction. While Kelsen, in a pure modernist fashion, sought refuge in pure form from a politics gone awry, Lauterpacht insisted on the need to incorporate by reference fundamental (Victorian) values as the only guarantee against the politics of irrationalism.[12]

However, had Lauterpacht been *simply* a naturalist critic of nationalism and sovereignty, there would be little reason to distinguish him from the mainstream of the reconstructive scholarship that burgeoned during the 1920s in Europe and elsewhere, was branded 'utopianism' in the 1940s and 1950s, and is now practically forgotten. To be sure, he does confess to a utopian federalism, liberal humanism and the associated values of cosmopolitan individualism. Kant (together with Grotius) is his acknowledged spiritual father. But the liberal legacy is ambiguous and in his professional work Lauterpacht treads a more complex path than that which could have been taken by such traditionalist inter-war figures as, for instance, Politis in France or Krabbe in the Netherlands – names which, unlike Lauterpacht, enter legal texts only to mark the discipline's historical continuity and pedigree, like ancestral portraits in the house of legal pragmatism, irrelevant beyond decorative purposes.[13]

Lauterpacht belongs also to the modernist camp in that he, like Kelsen, shares a non-essentialist epistemology. He is sceptical about the ability of juristic method to act as a safeguard against arbitrariness. Hence, for example, his emphatic and repeated criticism of judicial recourse to the doctrine of 'normal meaning' which assumes what is to be proved and simplifies out of recognition the constructive aspects of judging.[14] Principles of interpretation 'are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means'.[15] Nor are pure facts impartial arbitrators of normative disputes. Whether an

12 'Kelsen's Pure Science of Law' (1933, *CP*, vol. 2) 404, especially 424–429 where Lauterpacht argues that Kelsen's rejection of a natural law basis for his system was unnecessary. My reading of Kelsen as a legal modernist is elaborated in slightly more depth in 'The Wonderful Artificiality of States', 88 *ASIL Proceedings* (1994) 22 *et seq.* An interesting modernist interpretation sees Kelsen's 'fetishism of the form' as a repression of social reality, a 'fear of the masses'. Cf. Carty, 'Interwar Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt', 16 *Cardozo Law Review* (1995) 1239. In a recent survey Alfred Rub has, however, piled Kelsen together with the other 1920s reconstructivists that aimed to combine naturalism with positivism, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (1995) 19.

13 Unlike his ultra-traditionalist Viennese contemporary, Alfred Verdross, Lauterpacht did not assume that the unity of mankind could realize itself by an incessant repetition of its intrinsic rationality. Where Verdross relied on the self-evident beneficiality of natural law, Lauterpacht saw it as more equivocal, stressing the constructive role of enlightened judicial practice in fixing its meaning, cf. e.g. *Human Rights*, 103–111.

14 'The Doctrine of Plain Meaning', *CP*, vol. 4, at 393. Likewise *The Development of International Law by the International Court* (2nd edition, 1958) 49–60, 116–141.

15 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', *CP*, vol. 4, at 410.

entity is a state is not imposed on the observer through an 'automatic test' but is the result of construction, undertaken, of course, 'in good faith and in pursuance of legal principle'.[16]

Law is how it is interpreted. Lauterpacht's modernity lies in his constant stress on the primacy of interpretation over substance, process over rule, in a way that leads him into an institutional pragmatism that is ours too. However, it raises the further question of *power*, about who is vested with the interpreting, meaning-giving authority. It thereby creates what for Lauterpacht became the single most important problem of the international legal order, the problem of *self-judging obligations*, the state's ability to interpret for itself what its obligations are.

Now Lauterpacht is able to dispose of this difficulty only by returning to a liberal historicism which sees in public opinion, interdependence, common interests and the indivisibility of peace the compelling causes for a federalism that will do away with self-judgment. As the international community outgrows the temporary phase of state sovereignty, a system of public administration will emerge which fulfils the ideal of the Rule of Law. Interpreting the law becomes the task of impartial and responsible public officials, in particular, lawyers. Even as the League was struggling with the Abyssinian fiasco, and neutrality and alliances surfaced to replace collective security, Lauterpacht continued to profess

> faith in the ultimate assertion of reason in the relations of man [from which] conceptions like the League of Nations and collective security must be regarded as manifestations of a permanent and ever recurring purpose, and their eclipse must be regarded as temporary and transient.[17]

Finally, Lauterpacht always saw himself, and frequently characterized himself, as a challenger of orthodoxy, a 'progressive'.[18] His main works open up as criticisms of doctrines and theories that marginalize international law as a 'primitive' law or that seek to limit its application by recourse to concepts such as 'political' or 'non-justiciable disputes'. Situating international law within a historical trajectory of European thought towards a Kantian, cosmopolitan law, he attacked entrenched substantive doctrines on the nature of recognition of states and governments, the position of the individual in international law, the criminal responsibility of states, state immunity, and so forth, all of which in one way or another appeared as obstacles in the law's great passage to universalism.

It is important to be clear about the sense of these critiques. The 'progressivism' from which they emanate is not in conflict with nineteenth century liberal sentiments. Rather, it is perfectly compatible with those values, as indeed is evidenced by the above quote from the speech by Victoria's husband. The target is not (European)

16 *Recognition in International Law* (1947) 50, 48–51.

17 'Neutrality and Collective Security', 2 *Politica* (1936) 154.

18 He does this most frequently in an indirect way, by praising the progressive spirit of scholars with whom he agrees. Cf. e.g. 'The Grotian Tradition in International Law', *CP*, vol. 2, at 359–363; 'Westlake', *supra* note 6, at 402; 'Brierly's Contribution to International Law' (1955, *CP*, vol. 2) 431. Cf. also *Human Rights*, 103–111.

tradition *per se*, nor even the main current of that tradition, namely Enlightenment thought. Lauterpacht's critical posture is *internal* to its cosmopolitan and rationalist mainstream and is directed at the margins, against the 'metaphysical' or outright 'mystical' doctrines of nationalism, statehood and sovereignty. Thus, for instance, Lauterpacht criticizes Spinoza's doctrines of the reason of state and the separation of individual and state morality as an illogical deviation from the healthy rationalism of his general political philosophy. Somehow, when dealing with international relations, 'a fatalistic determinism took the place of reliance upon the power of reason ... the master's hand lost its cunning'.[19]

As I will argue more fully later on, Lauterpacht's critique issues from, or at least can be understood against, the background of the Austrian liberalism which had its heyday in the 1860s but then disintegrated under the pressures of the nationalist, anti-Semitic mass movements of the *fin de siècle* years. For Lauterpacht, 'Hegelian' philosophy, together with the associated code names of 'Hobbes' and 'Machiavelli', assume the role of respectable scholarly representatives for those anti-liberal sentiments, the separation of law and statehood from the rationally right.[20] From such posturing, Lauterpacht's critique extends to 'politics' in general, branded as irrational, egotistic, short-sighted, and certainly 'unscientific'. All of this ensues from his aim to liberate history's intrinsic rationality through a legal ordering of international affairs.

Lauterpacht's ambivalence towards colonialism may illustrate the direction and limits of his liberalism. On the one hand, Lauterpacht regards the nationalist, exploitative face of imperialism as 'the most ruthless economic exploitation of native peoples, maintained by the despotic rule of military administration'.[21] On the other hand, he admires the 'liberal tradition in British foreign policy' that abolished slavery and the Congo Free State and led to treaties to protect the natives. Lauterpacht saw these activities as marking a progressive turn in the doctrine of the subjects of international law which became concrete in the League's Mandates system.[22] The differentiation works on the basis of humanitarian sentiments that were quite central to the mid-Victorian liberal consciousness. Awareness of complexity, ulterior motives, the powers of desire and the effects of its repression – essential to modern mentality and especially its (tragic) realism – are non-existent. Whereas Kelsen, for instance, was quite conversant with Le Bon's theories of the irrational behaviour of the masses, it would have been unthinkable for Lauterpacht to integrate such disturbing evidence into his ordered world. For Lauterpacht, even at the worst of times,

19 'Spinoza and International Law' (1927, *CP*, vol. 2) 374, 375.

20 *Ibid*, 366–384. Thus as 'totalitarianism and its denial of fundamental human freedoms drew their mystical inspiration from the philosophical revolt against reason – one of the most characteristic manifestations of the German National-Socialistic and Italian Fascistic doctrines – it was inevitable that the drive to vindicate human rights should, once more, ally itself with the rationalist foundations, truly laid by Locke, Newton and Jefferson, of the philosophy of natural law', *Human Rights*, 112.

21 'The Mandate under International Law', *supra* note 10, at 39.

22 'International Law and the Colonial Question', *supra* note 6, at 101.

the world remains a whole, united in the rational pursuit of liberal ideals. Here he is in 1941, defending the 'reality of the law of nations' before the Royal Institute of International Affairs, Chatham House:

> The disunity of the modern world is a fact; but so, in a truer sense, is its unity. Th[e] essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing status quo. The ultimate harmony of interests which within the State finds expression in the elimination of private violence is not a misleading invention of nineteenth century liberalism.[23]

Today, international law remains one of the few bastions of Victorian objectivism, liberalism and optimism. After realism, however, we may no longer feel comfortable in speaking the (paternalistic) language of the 'harmony of interests'. When called upon to defend our nineteenth century doctrines, irony may remain our only weapon: 'so what better have you got?' Not so with Lauterpacht. His seriousness is attested to by his faith and his faith by a temporal displacement. Even if irrationality is here today, rationality will prevail tomorrow.

Lauterpacht's work combines Victorian ideals and a hermeneutics of judging that gives it both a historical and contemporary feel. We have been able to add little to the analysis of the relationship of law and politics since the debates between Lauterpacht, E.H. Carr and Julius Stone.[24] We still regard as authoritative his writings on the Permanent Court or its successor, indeed his writings on any substantive international law problem. As the hundredth anniversary of his birth approaches, Lauterpacht remains interesting for he belongs to the era of our fathers and grandfathers, bridging the gap between the liberal rationalism of the nineteenth century and the functional pragmatism of the late twentieth century. Close and distant at the same time, he is uniquely placed to provide an understanding of why it is that we stand now where we do. Whatever Oedipal urge may be satisfied by a recounting of his work will, I hope, be excused by the fact that we too are historically situated in a project that is not only an abstract exercise in ideas but a continuum of political, moral and professional choices.

II

That law is an effect of lawyers' imagination is nowhere clearer than in the development of international law from the isolated diplomatic practices of the nineteenth century into a legal order sometime early in the twentieth. Professional jurists took it

23 'The Reality of the Law of Nations', *CP*, vol. 2, at 26.

24 Cf. E.H. Carr, *The Twenty-Years' Crisis 1919–1939* (2nd edition, 1946 [1981]), especially Chapters 10–13 and J. Stone, *Legal Controls of International Conflict* (1954), especially at 144–164; and from Lauterpacht, e.g., his 'Some Observations on the Prohibition of "*Non Liquet*" and the Completeness of the Law', *Symbolae Verzijl* (1958) 196, as well as Stone's response 'Non Liquet and the Function of Law in the International Community', 35 *BYbIL* (1959) 124.

upon themselves to explain international affairs in the image of the domestic state, governed by the Rule of Law. For that purpose, they interpreted diplomatic treaties as legislation, developed a wide and elastic doctrine of customary law, and described the state as a system of competences, allocated to the state by a legal order.[25] A culture of professional international law was created through the setting up of the first international associations of jurists (the *Institut de Droit International* and the *International Law Association*, both in 1873), doctrinal periodicals (such as the *Revue général de droit international public* in 1894 and the *American Journal of International Law* in 1907) as well as the publication of many-volumed presentations of state practice in the form of systematic legal treatises.[26]

It was not a simple task to conceive of diplomatic correspondence and a few arbitrations as manifestations of an autonomous legal order. In 1935 a sceptic still described the situation in the following terms:

> There is in fact, whatever the names used in the books, no system of international law – and still less, of course, a code. What is to be found in the treatises is simply a collection of rules which, when looked at closely, appear to have been thrown together, or to have been accumulated, almost at haphazard.[27]

Two strategies seemed possible. One could either take whatever materials – treaties and cases – one could find that bore some resemblance to domestic law and explain the inevitable gaps in the system as a result of the 'primitive' character of international law.[28] Otherwise one could try to expand the law's scope by arguing, as Grotius had done, from Roman and domestic law, general principles and ideas about a common morality.[29] Although in fact both avenues were followed, the former seemed to realize better the statism and the objective of the 'scientification' of law that had been the great aim of nineteenth century jurisprudence.[30]

However, such a 'primitive' law proved unable to prevent the First World War or even to regulate its conduct. Whereas in many aspects of intellectual life the shock of the war was expressed by a turn away from traditionalism, mainstream reconstructive thought in international law sought to bring to completion the project of creating an international public order on the same principles that had underlain

25 A. Carty, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (1986) especially at 13–39.

26 Cf. generally M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989) 98–100, 106–127; A. Truyol y Serra, *Histoire de droit international public* (1995) 115–129.

27 Sir A. Zimmern, *The League of Nations and the Rule of Law 1918–1935* (1935) 98.

28 'International law does not conform to the most perfected type of law. It is not wholly identical in character with the greater part of the laws of fully developed societies, and it is even destitute of the marks which strike the eye most readily of them.' W.E. Hall, *A Treatise on International Law* (4th edition, 1895) 15 and (comparing international law with primitive Teutonic law of self-help) 16.

29 For arguments about the basis of international law in Roman law, cf. H.S. Maine, *International Law* (2nd edition, 1915) 16–20.

30 Cf. Koskenniemi, *supra* note 26, at Ch. II. For this interpretation of nineteenth century jurisprudence, cf. also B. de Sousa Santos, *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition* (1995) 56 *et seq*, 72–76.

the domestic, peaceful order of European states during most of the preceding century.[31]

Hence, Lauterpacht's early work is written in the form of a doctrinal polemic against a voluntarist and state-centred 'positivism', castigated as the main obstacle on the way to universal legal organization.[32] That the critique was doctrinal, and not directed against diplomacy, follows from the view of politics (and diplomacy) as the rational application of doctrines. In order to constrain politics, one had to develop better doctrines.[33] The problem was the low level of ambition in pre-war doctrine, its readiness to compromise with aggressive nationalism and to leave a large field of activity – such as the right to wage war – outside legal regulation. Lauterpacht's constructive work was directly aimed at such self-amputation. This enterprise began with his 1925 dissertation at the London School of Economics, *Private Law Sources and Analogies of International Law* (1927, hereinafter *Analogies*), came to fruition with his most important doctrinal work, *The Function of Law in the International Community* (1933, hereinafter *Function of Law*) and is conveniently summarized in his 1937 Hague lectures, *Règles générales de la droit de la paix* (hereinafter 'General Rules').[34]

Lauterpacht's thesis is that the law that regulates the affairs of states is neither 'special' nor 'primitive', but is like any other branch of the law. He critiques the 'tendency of international lawyers to treat fundamental questions of international law apart from the corresponding phenomena in other fields of law'.[35] While international law does have 'imperfections' (the absence of a doctrine on the vitiating effect of duress, the broad scope left for the doctrine of *rebus sic stantibus*, the voluntary character of third-party dispute solution), these are merely transient difficulties that the inevitable development of economic interdependence, democracy and enlightened public opinion will do away with.[36]

The form of Lauterpacht's argument is important. It reconstructs the law's unity as a *scientific* postulate. Law, no less than physics, shares a *horror vacui*; it detests a vacuum.[37] For scientific evaluation, a topic must be construed as a totality. This can be achieved by legal analogy, that is 'an application to the domain of law of that

31 This was, of course, the Wilsonian ideal, enthusiastically shared by the international law establishment.

32 For him, 'positivism' was a kind of pedestrian Hegelianism, nationalism with a legal face, the doctrinal defence of the *raison d'état*. It was divided into a seriously philosophical strand, associated, for example, with the work of Kaufmann, Anzilotti and Jellinek, and a technically oriented pragmatism, building on the primacy of sovereignty or state will to law and prevalent, for instance, in the writings of Hall.

33 As he points out in 1927: 'the relationship between international law and political theory is of a more pervading character than is commonly assumed. It is the ultimate results of the theory of the state which are resorted to by international lawyers in the foundations of their systems', 'Spinoza and International Law', *supra* note 19, at 368.

34 62 *Hague Recueil* (1937, IV) 99, published in English as 'General Rules of the Law of Peace', *CP*, vol. 1, at 179.

35 *Function of Law*, 248.

36 *Ibid*, 403–407, 431–434.

37 'Succession of States with Respect to Private Law Obligations' (1928, *CP*, vol. 3) 126.

conception of analogy which logicians and scientists necessarily apply in their respective disciplines'.[38] Though more uncertain, and prone to misuse for special pleading, analogy is the lawyer's means of supplementing fragmentary or contradictory materials so as to ensure systemic unity.

In the liberal fashion, Lauterpacht's attack was conducted in the name of the universal principles of science – logical consistency and correspondence with facts. Positivism failed in both. It was logically incoherent: state will cannot be the ultimate source of the law. Where does the rule that says that will binds originate? To avoid circularity, the *pacta sunt servanda* or an equivalent metanorm must be assumed to exist as a non-consensual norm.[39]

More importantly, positivism is in variance with 'facts'. *Analogies* shows that judges and arbitrators use maxims of municipal jurisprudence and general principles of law (equity, justice) to fill gaps between consensual norms.[40] States acquire and dispose of territory in a manner analogous to transactions over private property.[41] Domestic notions of occupation and possession structure controversies in the law of the sea.[42] Practice concerning state servitudes, succession and responsibility is based on the application of private law concepts.[43] Treaties are applied, interpreted and terminated like private contracts.[44] Rules of evidence and procedure (such as estoppel or the *res judicata*) have no special international sense.[45] Positivists, however, have failed to notice these facts and use 'ingenious reasoning' to protect their 'arbitrary dogma[s]'.[46] Lauterpacht uses expressions like 'metaphysical' and 'mystical' in their modern sense, as synonymous for unreal or unscientific, to challenge the special position given by positivists to sovereignty.[47]

Here as elsewhere, scientism is accompanied by methodological individualism, a liberal political theory. Statehood cannot set up a permanent veil between the international legal order and individual human beings. Being 'an artificial personification

38 *Analogies*, 83. It is not absolute but an 'inductive and experimental method subject to correction', *ibid*, 84.

39 *Ibid*, 54–59; *Function of Law*, 416–420. In Lauterpacht's own reformulation it becomes, however: *voluntas civitatis maximae est servanda*, 'General Rules', *supra* note 34, at 233.

40 Cf. especially the series of case analyses in *Analogies*, 215–296.

41 *Ibid*, 91–104.

42 *Ibid*, 108–116.

43 *Ibid*, 119–151.

44 *Ibid*, 155–202. The admissibility of duress (i.e. the validity of peace treaties) does not compel a conceptual distinction between treaties and municipal contracts but follows from the 'shortcomings of international law as a system of law' (156, 156–167). However, the analogy concerns only general principles of municipal contracts, not individual rules (176–180).

45 *Ibid*, 203–211.

46 *Ibid*, 75, 74. The ingenuity being the use of 'principles of general jurisprudence' which in fact cloak natural law arguments or generalizations from municipal laws (31–37).

47 *Ibid*, 74, 79, 299; *Function of Law*, 431 ('the sanctity and supremacy which metaphysical theories attach to the State must be rejected from any scientific conception of international law'). For a brilliant analysis of the use of this type of rhetoric as a means to create the impression of a sociologically oriented 'modern' international law, cf. Landauer, 'J.L. Brierly and the Modernization of International Law', 25 *Vanderbilt Journal of International Law* (1993) 881, esp. 884–899.

of the metaphysical State',[48] sovereignty has no real essence. It is only a bundle of rights and powers accorded to the state by the legal order. Therefore, it can also be divided and limited.[49] Nor is territory in any mystical relationship to the state (as part of its identity), but is rather an object of powers analogous to ownership.[50] Furthermore, '[t]reaties are contracts made by human beings acting as representatives of groups of human beings called States'.[51] All law has to do with regulating human behaviour; analogy is really but an aspect of the law's wholeness.[52] Therefore, contrary to the received view, states can also be punished and subjective fault remains an element of their responsibility.[53]

By conducting his study in the form of an examination of practice, Lauterpacht is able to attack voluntarist positivism on its own terrain of scientific factuality without having to resort to the moralizing rhetoric of naturalism or the formalism of the pure theory of law. The same terrain enables him to set up a 'progressive' political programme that places the individual at the centre and views the state as a pure instrumentality. Behind nationalism and diplomacy the world remains a community of individuals and the rule of law is nothing else than the state of peace among them: 'Peace is pre-eminently a legal postulate. Juridically, it is a metaphor for the postulate of the unity of the legal system.'[54] This double programme – scientism and individualism – was as central to inter-war cosmopolitanism as it had been to Victorian morality. It was shared, among others, by the equally reconstructive doctrines of Verdross and Kelsen. Like them, Lauterpacht accepts the postulate of a community of human beings as a necessary consequence of the existence of an international legal order.[55] But unlike Verdross, he refrains from deriving the latter from the former. The equation works the other way: the community is not a condition but the *effect* of the legal order.[56] This sounds very Kelsenian and, in fact, Lauterpacht shares much of Kelsen's neo-Kantian constructivism. But instead of relying on the *Grundnorm*, he emphasizes his independence from his teacher by proving his point through empirical, rather than logical, argument, labelling his a 'critical and realistic monism'.[57]

Analogies set up international law as a complete system on a par with domestic law. *Function of Law* argued that there is no valid reason to challenge this completeness through the division of international disputes into two types – legal and

48 *Analogies*, 299.
49 'General Rules', *supra* note 34, at 367–377.
50 *Ibid*, 367–372.
51 *Ibid*, 361.
52 *Analogies*, 71–79.
53 'General Rules', *supra* note 34, at 391–7, 401–2.
54 *Function of Law*, 438.
55 Cf. e.g. *ibid*, 421.
56 'General Rules', *supra* note 34, at 263. There could hardly be a more express statement of the importance of doctrine's reconstructive task!
57 *Ibid*. Here Lauterpacht expressly formulates his cosmopolitanism: international law as the law of a community of mankind, individuals as its ultimate subjects, states as the instruments of the (overriding) legal order (193–196). His self-portrait is of a challenger to the 'orthodox conception' (197). The positioning in respect of Verdross and Kelsen and the label 'critical and realistic monism' appear at 214.

political – as expressed in the (positivist) doctrines of non-justiciability.[58] Such division 'is, first and foremost, the work of international lawyers anxious to give legal expression to the State's claim to be independent of law'.[59] This is an argument about the slippery slope – as the division between the political and the legal cannot be made by a determinate rule, it is left open for the state to opt out of the law's constraint by insisting on the 'political' nature of the case. Here we meet the problem of self-judgment, Lauterpacht's *mala malaficiorum*, for the first time. Non-justiciability is merely another facet of self-judgment and leads international law beyond the vanishing point of jurisprudence. But Lauterpacht challenges the distinction between the two types of dispute. For him,

> all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules.[60]

Function of Law goes through each non-justiciability doctrine, showing how they become apologies for the unlimited freedom of action of states. As in *Analogies*, Lauterpacht demonstrates that the view that there are 'gaps' in law fails to reflect international practice. Courts and tribunals constantly decide cases by analogy, general principles of law, balancing conflicting claims or having recourse to the needs of the international community or the effectiveness of treaty obligations.[61] The 'political' nature of a dispute has never prevented a tribunal from giving a legal answer to it.[62]

But he goes further, arguing that the completeness of the rule of law 'is an *a priori* assumption of every system of law, not a prescription of positive law'.[63] Though particular laws or particular parts of the law may be insufficiently covered, '[t]here are no gaps in the legal system as a whole'.[64] This is not a result of a formal completeness of the Kelsenian type, meaning that in the absence of law, the plaintiff has no valid right and his claim must be rejected.[65] The very notion of 'law's absence' is suspect as it presumes that law consists of isolated acts of state will. But if law is conceived in terms of general principles, judicial balancing and social purposes, then 'gaps' connote only *primae impressionis* difficulties to decide cases. Legal argument is always eventually able to fill the gap.[66] Even 'spurious gaps' may be filled: an

58 *Function of Law* is structured to refute four versions of the non-justiciability thesis, namely that disputes are political when: i) legal rules are absent; ii) important issues are at stake; iii) judicial involvement would conflict with the requirements of justice or peace; and iv) at issue are conflicts of interest rather than disputes over rights.

59 *Ibid*, 6.

60 *Ibid*, 158.

61 *Ibid*, 110–135.

62 But I am not sure that the *Alabama* (1871), *British Guiana* (1897), *Alaska* (1903) and *North Atlantic Fisheries* (1910) cases suffice as proof of this. See *ibid*, 145–153.

63 *Ibid*, 64.

64 *Ibid.*

65 *Ibid*, 77–78, 85–104.

66 Hence McNair's apt characterization of Lauterpacht's writing as 'constructive idealism', *supra* note 11, at 378.

unsatisfactory single rule may be bypassed to give effect to a major principle of law, the intention of the parties or the purposes of the legal system as a whole. In this way, even legal change is regulated by the law.[67]

That the legal order is unable to recognize the existence of gaps results from its inability to limit their scope. In particular, there is no method to distinguish between 'essentially' important (political) and non-important (legal) issues.[68] Whether a matter touches on the state's 'vital interests' or 'honour' cannot be decided in abstraction from the state's own view of it: 'the non-justiciability of a dispute ... is nothing else than the expression of the wish of a State to substitute its own will for its legal obligations'.[69] Nor is a distinction between 'disputes as to rights' and 'conflicts of interest' any more successful. If the determination is left to the state itself, then it becomes an unlimited right to opt out of third party settlement. If such determination is left to the tribunal, then it is tantamount to calling for a decision on the merits of the claim – and thus fails to serve the original purpose of providing *the* criterion through which the distinction could be made.[70]

Arguments about the clash between law, on the one hand, and justice or peace, on the other, are equally vacuous.[71] Critics mistake complexity for conflict. Problems of the unjust rule may always be tempered by reference to the larger purposes of the law, *rebus sic stantibus*, abuse of rights or equity.[72] The needs of realism are incorporated in the state's undoubted right to determine the conditions of self-defence and in the exception to the vitiating effect of duress in the law of treaties.[73]

The refutations of the distinction between legal and political disputes in *Function of Law* turn on what appears as a sophisticated modern *interpretativism*: no international event is in 'essence' legal or political, its character as such is the result of projection, interpretation from some particular standpoint. If the distinction were to be upheld, it would always allow a state to present its unwillingness to submit to the legal process as a result of the 'application' of this distinction. But, '[a]n obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition of the existence of the duty, does not constitute a legal bond'.[74] That the question of self-judging obligations becomes the central problem of his later doctrinal work follows from Lauterpacht's *nominalism*, the view that the law is always relative to interpretation. In *Function of Law*, this view leads

67 *Function of Law*, 79–87, 254–7 and *passim*. Cf. also 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals', 11 *BYbIL* (1930) 134, 144–154.

68 *Function of Law*, 139–241.

69 *Ibid*, 159.

70 *Ibid*, 353–361.

71 *Ibid*, 245–345.

72 *Ibid*, 270 *et seq.*

73 'It is not sufficiently realized that fundamental rights of States are safe under international judicial settlement, for the reason that they are fundamental legal rights', *ibid*, 173, and generally 177–182, 271.

74 *Ibid*, 189. This is, paradoxically, the very point that E.H. Carr makes against Lauterpacht. Precisely because there can be no distinction between law and politics, the latter will always prevail, see *supra* note 24, at 195.

him to focus on the impartiality of judges and arbitrators and to examine their ability to interpret the law so that everybody's vital interests will be secured.[75] To us, such an inquiry into judicial honesty and competence seems a somewhat facile solution for world peace, naïve and old-fashioned. But Lauterpacht's nominalism is ours, too. Our own pragmatism stands on the revelation that it is the legal profession (and not the rules) that is important:

> There is substance in the view that the existence of a sufficient body of clear rules is not at all essential to the existence of law, and that the decisive test is whether there exists a judge competent to decide upon disputed rights and to command peace.[76]

Function of Law puts forward an image of judges as 'Herculean' gap-fillers by recourse to general principles and the law's moral purposes that is practically identical to today's Anglo-American jurisprudential orthodoxy.[77] Moreover, it heralds the end of jurisprudence and grand theory in the same way that legal hermeneutics does – by focusing on the interpretative practices of judges. This ensures it a measure of 'realism', while its sophisticated interpretative approach avoids the pitfalls of voluntaristic positivism. Simultaneously, however, it remains hostage to, and is limited by, the conventions and ambitions of that profession. In this sense, *Function of Law* is the last book on international theory – the theory of non-theory, the acceptable, sophisticated face of legal pragmatism.

III

Lauterpacht was born in 1897 in the small Jewish village of Zolkiew outside the town of Lwow in Galicia, at the time part of the Austro-Hungarian Empire. While his parents were 'extremely orthodox', he himself was not very devout. However, he received complete instruction in the Torah, spoke Yiddish and Hebrew with ease and could chant the Passover service in the Ashkenazi style.[78] In Lwow he had been active in the Zeire Zion movement (a collection of youth groups that, though not strictly socialist, 'expressed intense social concern and advocated the nationalization of land'[79]) and had worked for the establishment of a Jewish Gymnasium. Anti-Semitism and the *numerus clausus* for Jewish students at the University of Lwow compelled his move to Vienna in 1918, where he became the first president of the newly established World Federation of Jewish Students.[80] According to his son,

75 *Function of Law*, 202–241.
76 *Ibid*, 424.
77 I have argued elsewhere about the essential similarity of Lauterpacht's constructivism and Ronald Dworkin's jurisprudence. See Koskenniemi, *supra* note 26, at 35–38.
78 Note by Eli Lauterpacht. Lauterpacht Archive, Cambridge (hereinafter LA).
79 H.M. Sachar, *A History of Israel. From the Rise of Zionism to Our Time* (1996) 146.
80 Of which Einstein in Berlin was the Honorary President. For some of this biographical data cf. McNair, *supra* note 11, at 371–3. Lauterpacht was one of the Federation's founding members. He had drafted its statute and participated in its establishment Conference on 1–3 September 1922. The Federation had several national societies as members and Lauterpacht's activity seems to have required much diplomatic wrangling between the positions of those societies, particularly in regard

Professor Elihu Lauterpacht, '[h]e was neither "Austrian" nor "Polish". His identification was "Jewish"'.[81]

The rise of Zionism as a political movement in the Habsburg realm at the close of the nineteenth century was closely connected with the pogroms and the unprecedented rise of overt, politically active anti-Semitism. Taking a Zionist position was a natural and common reaction among Jewish intellectuals against Czech and German nationalisms and Christian-socialist politics. It also provided more generally a shield for the Jewish population caught in the middle of the Ukrainian-Polish antagonism in Galicia.[82] Historically, however, this constituted a departure from the traditional Jewish loyalty to the Empire and its close association with Austrian liberalism which had lived its heyday from 1860 to 1895.[83] As liberalism as well as the Empire started their terminal decline and became unable to answer the challenges of nationalism, socialism and anti-Semitism, Zionism must have seemed at least as tempting an alternative to Jewish traditionalism as assimilation had previously been.

During the war, Lauterpacht stayed at his father's timber mill, which had been requisitioned by the Austrian government as part of the war effort. Galicia was several times overrun by foreign – especially Russian – military forces pillaging the countryside, sometimes armed with orders for the 'purification' of Jewish 'subversives'. While anti-Semitism had been far from absent from Galicia before the war, the dire economic difficulties thereafter gave rise to a plague of persecution, resulting in an overall 20 per cent decrease in the religious Jewish population during 1910–1921. In many locations the Jewry was effectively halved. 'Poland was reborn in Galicia in 1918–1919 to pogrom music'.[84]

Although moving to Vienna provided a much-used exit from the persecution surrounding the *shtetl*, even the university was unable to maintain a policy of openness. As Kelsen recalls, Lauterpacht's Jewish background was 'under the circumstances which actually existed in Vienna at the time, a serious handicap' and may have contributed to his receiving no more than a pass grade for his Doctorate in the Faculty of Law.[85]

It may be conjectured that Lauterpacht wrote his Viennese dissertation on the topic of Mandates in the Covenant as an offshoot of his Zionist politics, although Palestine did not – perhaps for reasons of prudence – figure prominently in it. Nonetheless, the general argument of the thesis, namely that the Mandates system

to the question of Zionism. He seems to have advocated as wide a representation of the interests of Jewish students as possible.

81 Note by Elihu Lauterpacht.

82 Cf. C.E. Schorske, *Fin-de-Siècle Vienna. Politics and Culture* (1981) 5–7, 127–133, 163 *et seq.*

83 Apart from the classic by Schorske, *ibid*; cf. S. Almog, *Nationalism & Antisemitism in Modern Europe 1815–1945* (1990) 37–40; S. Beller, *Vienna and the Jews 1867–1938* (1989) 122–143.

84 W. McCagg, *A History of the Habsburg Jews 1670–1918* (1989) 203 and generally 182–187, 202–207.

85 H. Kelsen, *ICLQ* (1961) note 10, at 2 and 3–6; reprinted in this volume at p. 309. The convert Kelsen himself was advised not to take up a university career because of his Jewish background. On this and anti-Semitism in Vienna at the time generally, cf. Beller, *supra* note 83, at 188–206.

did not constitute a camouflaged cession or annexation, clearly supports the wish to develop Palestine into a Jewish homeland – as indeed he expressly argued.[86]

In 1923, Lauterpacht moved to Britain. Not much of his early Zionism is visible in later years. He did give two lectures to the British Society of Jewish Students in 1924 on the character and policy of the World Federation, as there had been a division of opinion about whether membership in the Federation necessitated taking a Zionist political line. Apparently, it did not. Lauterpacht also appealed for a statement against the *numerus clausus* in Polish universities and contemplated action in the League of Nations by the World Federation on this matter.[87] But he soon allowed his Zionism to lapse and fell back on the more traditional Jewish association with liberal rationalism and individualist – hence cosmopolitan – ethics.[88] From now on, he assimilated with post-war liberal internationalism, letting his Jewish background resurface only incidentally – in an article on the persecution of Jews in Germany in 1933,[89] in legal opinions given to the Jewish Agency in Palestine and to the Agency's permanent UN mission in New York in the late 1930s and 1940s[90], and in a small *divertissement* on some biblical problems of the laws of war.[91]

The argument for the completeness and unity of the law must have seemed important to Lauterpacht to enable him to establish himself in Britain and to overcome possible suspicions British lawyers might have harboured against him. Hence, in 1931, still working with *Function of Law*, he sought to refute the widely held British view that a fundamental difference existed between the Anglo-American and Continental schools of legal thought. Lauterpacht finds no such fundamental divide.[92] More impor-

86 'The Mandate under International Law', *supra* note 10, at 84.

87 Texts of two lectures, LA.

88 On the individualist ethics of Austrian and Polish Jewry, cf. Beller, *supra* note 83, at 106–121.

89 Copy of MS available with author. It is not clear where the article was published if indeed it ever was. The manuscript, however, will be published in *CP*, vol. 5. This constituted an appeal for a condemnation by the Council of the League of all racial persecution, arguing that the matter falls under Council jurisdiction as it affects peace and good order among nations (Article 4 of the Covenant) and is connected with the League's humanitarian and legal objectives. Lauterpacht suggested that a draft resolution should avoid expressly mentioning Germany and should be presented by the representatives of neutral countries (e.g. Spain or Norway). It should have an Annex detailing the facts of persecution from original German sources. Lauterpacht's proposed draft recognized that persécution is contrary to the 'public law of Europe' (but apparently not of universal import!) and appealed to League members for a scrupulous non-discrimination in their treatment of minorities.

90 These concerned matters such as the application of differential customs tariffs and the Imperial Preference under Article 18 of the Mandate for Palestine, see *CP*, vol. 3, at 85 and 101.

91 This paper, dated 1932, is a 21-page manuscript dealing with, on the one hand, the apparent conflict between Israeli atrocities during the conquest of the Canaan and the restraints on warfare in the Ten Commandments and, on the other hand, with the influence of Jewish concepts to the distinction between just and unjust wars. The MS bears no indication of whether it was published. LA. Copy on file with author.

92 'The So-Called Anglo-American and Continental Schools of Thought in International Law', *CP*, vol. 2, at 452. To do this, he analyses substantive doctrines of the law of peace or war, rules of procedure (evidence and recourse to *travaux préparatoires*) and legal philosophy. He claims that continental jurists are not so idealistic, philosophical or system-bound as British prejudice believes. In fact, positivism and the rigid separation of law/justice was developed as a continental approach (Ross, Jhering (50–51)). Also, the strongest criticisms of formalism were developed there (Gény against the *école d'exégèse*; Jhering against *Begriffsjurisprudenz*). The law/*Recht* dis-

tantly, to assume its existence would be undesirable from a humanitarian point of view and would 'question that ultimate uniformity of the sense of right and justice which is the foundation of the legal ordering of the relations between states'. It will hinder the (inevitable) development of international law as a 'common law of mankind'.[93]

Lauterpacht's first article, published in 1925, on the contemporary significance of Westlake, the most prominent British international lawyer of the nineteenth century, performed a double feat in this respect. On the one hand, it enabled Lauterpacht to make the point that what was needed was not the rejection of tradition for a full-scale acceptance of either naturalism ('pious wish') or sceptical realism. The best of tradition, as in Westlake's work, combines idealism and political fact in a progressive historical vision that sees contemporary imperfection in terms of progress towards an 'organized government of States'. Because Westlake's teaching on the subjects and sources of international law and state sovereignty carries this (Victorian) vision, the supervening changes in international politics ('greater than anyone could foresee') require only 'alterations of detail' in his work to make it fully applicable in post-war conditions.[94] On the other hand, the argument enabled Lauterpacht to associate 'tradition' with the particular tradition of his new home, Britain. This is an enduring feature of his work.[95] Inasmuch as the challenge to the international order was a challenge to Britain's dominating position in it, Lauterpacht's clear and absolute preference for British international law against German ('Hegelian') jurisprudence aligned his assimilative strategy with the ongoing cultural battle of tradition against revolution.[96]

Lauterpacht's early self-positioning in Britain as a champion of a legal cosmopolitanism can also be understood as an *assimilative strategy*[97] in relation to a British

tinction, too, is illusory. Where British sense adds Equity to law, the continental *Recht* includes equitableness without a need for special jurisdiction (49, note 4).

93 *Ibid*, 62.

94 'Westlake', *supra* note 6, at 385–403, quotes are at 400.

95 It is nicely present not only in Lauterpacht's early and extensive use of Roman law in *Analogies* but in his expressed view that this accords with 'British-American jurisprudence' that has 'never completely discarded the historical connexion of international law and the law of nature [and] regards Roman law as a subsidiary source of international law' (298). Later on, he supports British policy in regard to colonies, the lawfulness of Iran's nationalization of its oil industries, the jurisdiction of British courts in war crimes and immunities cases. For him, humanitarian ideals and especially human rights emerged from a specifically British tradition. *Human Rights*, 127–141.

96 Lauterpacht presented 'positivism' – the principal object of his criticism – as a particularly German tradition. Cf. e.g. *Analogies*, 43–50. On the related German theory of international law as a law of 'coordination', cf. *Function of Law*, 407–416 and 'Spinoza and International Law', *supra* note 19, at 379–383. The only (slight) nostalgia that he seems to have felt for his Central European origins appears in a preference for the wider scope of law studies and especially of the Philosophy of Law as compared to legal studies and 'general jurisprudence' in Britain. Cf. 'The Teaching of Law in Vienna', *Journal of the Society of Public Teachers in Law* (1927) 43–45 (on the other hand, he regards British written exams infinitely better than the Austrian *viva voce* examination). The interpretation of Germany as the modernist challenger to British-dominated traditionalism is presented e.g. in M. Eksteins, *Rites of Spring. The Great War and the Birth of the Modern Age* (1989) 55 *et seq*, 80–94.

97 On the equivocal effects of cosmopolitan distancing as a strategy of assimilation, cf. Z. Bauman, *Modernity and Ambivalence* (1991) 78–90 (discussing its use by Jewish intellectuals in the inter-war period) 102 *et seq.*

academic elite that by 1933 in a famous vote at Oxford had by a large majority declared its unwillingness to 'die for King and Country'.[98] In his writings on statehood and jurisdiction, the constant playing down of the significance of national boundaries works to the same effect, as indeed does his 1928 article on the duties of states in relation to revolutionary activities of private individuals abroad.[99] There being no obligation on states to guarantee each other's legal or political systems, there is no legal justification for curtailing the political activities of émigrés either. The argument creates space for politics on a cosmopolitan scale, particularly important in an era of dictatorships, and supports the widespread inter-war phenomenon of revolutionary politics carried out from abroad.

Lauterpacht's newly found cosmopolitanism as an assimilation strategy is also suggested by the fact that his Viennese dissertation of 1922 had 'reject[ed] private law analogy in any form'.[100] A year before disembarking in Britain he had argued that international law's development towards autonomy is undermined by a positivist jurisprudence that has constant recourse to private law analogy under the guise of 'general law concepts' to fill *lacunae* in positive law – a method that 'endangers the independence of international law and fails to recognize its peculiarity'.[101]

At the time, Lauterpacht argued that the special meaning of the private law concept distorts the inter-state relationship to which it is applied. 'The differences between legal systems are disregarded and the fact forgotten that legal institutions must be construed within the context of their own legal systems.'[102] It is only when, in an exceptional case, '[p]ositive international law itself adopts concepts and institutions which have already specific implications in one or more legal system' that we can speak of analogy – for instance, when Article 22 of the Covenant adopts the term 'Mandate'.[103] The argument is not quite clear, however. At another point, Lauterpacht notes that even if international law appropriates by treaty private law concepts, 'its own special nature transforms these concepts and even robs them of their content. In practical terms, therefore, there is no analogy.'[104]

Three years later, his British dissertation makes precisely the contrary point. 'A critical examination shows that the use of private law analogy exercised, in the great majority of cases, a beneficial influence upon the development of international

98 This is the vote of February 1933 taken among members of the Oxford Union, the university's prestigious debating society.

99 'Revolutionary Activities by Private Persons Against Foreign States', *CP*, vol. 3, at 251–278 (short of armed transboundary excursions, states have no duty to suppress hostile private activity carried out by other states).

100 'The Mandate under International Law', *supra* note 10, at 61 and generally 51–61.

101 *Ibid*, 57. ('Rules governing inter-State relationships, which are in fact laid down by treaty or custom are, for the sake of order and categorization and for easier understanding and interpretation, attributed ex post facto to an already existing and well-developed private law concept.')

102 *Ibid*, 58.

103 *Ibid*, 58–59.

104 *Ibid*, 55. The impression is that Lauterpacht's teachers in Vienna would not have accepted a general argument from analogy and that because he wanted to argue that in the case of Mandates (especially Palestine), no covert annexation was involved, and that as this was in conformity with the private law notion of 'mandate', the argument had to be done by way of exception.

law...'.[105] To be sure, Lauterpacht's argument here is different from the Viennese dissertation to the extent that he now sees in Article 38(3) of the Statute of the Permanent Court of International Justice – 'general principles of law' – the vehicle through which private law concepts may penetrate into international law. That provision had only just been drafted (in 1920 by the Commission of Jurists of the League of Nations) when the previous work was submitted, and is not mentioned in it.[106] Nonetheless, one cannot fail to be struck by the transformation in outlook on international law implied by this change of heart. At this point, the door was opened definitively to let international law emerge from its isolation as a marginal, or a special law, a collection of fragmented pieces of state will, and to argue that it constituted a whole system, a single, unified legal order.

Three practical activities to that same effect were Lauterpacht's editorship of the *Annual Digest of Public International Law* cases (which became *International Law Reports* in 1950) from 1929 to 1956, his editorship of four consecutive editions of Oppenheim's *International Law* from the fifth edition (1937) onwards, and his editorship of the *British Year Book of International Law* between 1944–1954. Taken together, these activities demonstrate not only the external success of Lauterpacht's assimilative pursuit, but also the seriousness with which he took the argument put forward in *Analogies* and *Function of Law*. Here there were now all the materials needed by international lawyers to construct a working system to resemble the domestic legal order: cases, commentary and a doctrinal forum, henceforth available in most major libraries and (in the case of Oppenheim) even on the shelves of Foreign Offices.[107]

IV

By 1927 Lauterpacht had settled in Britain. He was married (in 1923), his son was born, and he had received a lectureship at the London School of Economics (recommended by Harold Laski, Arnold McNair and N.C. Gutteridge). His relations with his early supervisor McNair had developed into a friendship. In 1931 he was naturalized as a British subject. The following year he became Reader in Public International Law at the University of London and was called to the Bar by Gray's Inn in 1936. Lauterpacht was now relatively free to express his views on various aspects of international and British policy. And because, according to the argument in *Function of Law*, every event of international policy was amenable to legal analysis, it seems logical that he should think it important to undertake public analyses of contemporary international events from a legal perspective.

105 *Analogies*, viii.

106 For the drafting history, cf. Verdross, 'Les principes généraux du droit dans la jurisprudence internationale' 52 *Recueil des Cours* (1935, II) 207 *et seq*; G. Herzcegh, *General Principles of Law and the International Legal Order* (1969) 11–33.

107 For these cf. Jenks, 'Hersch Lauterpacht – The Scholar as Prophet', 26 *BYbIL* (1960) 66–68, 99–100.

Consistent with his domestic analogy, Lauterpacht saw the League Covenant as a 'fundamental charter of the international society'.[108] Its character as a constitution was formally expressed in Article 20, which set up 'the absolute primacy of the Covenant over any other treaty engagements of Members of the League *inter se*'.[109] Conflicting posterior treaties between members were null and void as were those with third parties that 'knew or ought to have known' of the member's conflicting prior engagement.[110]

This view led Lauterpacht to deny that the League was merely a coordinative body of diplomatic conciliation and to emphasize the provisions on collective security, the importance of which was often belittled by both contemporary critics and enthusiasts as a consequence of their 'realism' or in their efforts to combat it by focusing on the League's functional activities.[111] For Lauterpacht, however,

> collective security is, upon analysis, nothing else than the expression of the effective reign of law among States, just as its absence is the measure of the deficiency of international law as a system of law.[112]

A series of writings in the 1930s and 1940s defends this view despite the League's successive failures to influence the course of world events and to keep aggression at bay. The problem in the Manchurian or Abyssinian crises concerned neither the basic idea of the Covenant nor its substantive provisions, but rather the procedural framework that allocated to states themselves the competence to interpret it. He was able to maintain faith in a comprehensive order of legal substance by locating the problems of world peace at the level of a jurisdictional difficulty that would be overcome as the intrinsic rationality of federalism was revealed to all.

What, for example, was the significance of the claim made by the principal signatories to the 1928 Briand-Kellogg Pact that they themselves remained the sole judges of the application of the right of self-defence? In a language familiar from *Function of Law* and later from his period at the Court, Lauterpacht wrote:

> An interpretation which leaves to the interested States the right to decide finally and conclusively whether they have observed the Treaty probably deprives the Pact of the essential *vinculum juris* and renders it legally meaningless.[113]

The 'principal weakness' was not one of substance but of interpretative competence. Because lawyers were not entitled to assume that the Pact was meaningless, it had to follow, in the absence of provision for third party determination, that it was the legal profession's collective (if decentralized) duty to do this, for instance by agreeing on a definition of aggression.[114]

108 'Japan and the Covenant', 3 *Political Quarterly* (1932) 175.
109 'The Covenant as the Higher Law' (1936, *CP*, vol. 4) 327.
110 *Ibid*, 332, 335–6.
111 'International Law after the Covenant', *supra* note 9, at 156–7.
112 'Neutrality and Collective Security', *supra* note 17, at 133.
113 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *Transactions of the Grotius Society* (1934) 198.
114 *Ibid*, 199–201.

While opposing realist scepticism about collective security, Lauterpacht was equally opposed to idealist attempts to explain away interpretative problems by accepting as self-evident particular understandings of the contested provisions and by holding states as bound by something they had clearly not accepted. The fact was that the Covenant, the Locarno Treaties, and the Pact of Paris were self-judging. If this might have rendered them legally non-existent under domestic law, in the international society it had to be accepted as a result of the (provisionally) insufficient degree of integration of this latter.[115] The attempt to constitutionalize politics under these instruments did not, then, make politics disappear, but relocated it within the inevitable 'discretion' that was available to interpret the status of actions contested under their broad terms.

Lauterpacht's discussion of the League's inability to take effective action to counter the Japanese aggression in China during January 1931–April 1933 ensues from this understanding. As is well known, member states and the League Assembly refrained from qualifying the Japanese invasion as 'resort to war' under Article 16 of the Covenant, and thus maintained their freedom of action (while a contrary determination would, under the strict terms of that article, have signified the presence of an 'act of war' against all members and triggered the Covenant's automatic response mechanism). Lauterpacht was concerned to avoid reaching the conclusion that members' reluctance to act had been in breach of the Covenant, a view that would only have vindicated the realist perspective by demonstrating the 'illusory value of its fundamental aspect'.[116] Whether a use of armed force constituted 'resort to war' called for interpretation upon which opinion might legitimately be divided:

> [T]he assembly's failure to recognize that the action of Japan constituted 'resort to war' was due to the way in which the members of the League, availing themselves of their discretion, interpreted the Covenant.[117]

The Covenant was not being breached, it was being interpreted. However, the self-judging character of the provision did not preclude lawyers from taking a critical view of the way in which interpretative discretion was being used.[118] Lauterpacht's preference was to reject both of the extreme views – namely that *any* use of armed force constituted 'resort to war' or that only hostilities which the belligerents themselves considered to bring about a 'state of war' qualified as such. Literal and purposive interpretations needed to be balanced against each other. This allowed him to

115 Lauterpacht considered it clearly undesirable 'that the lawyer should endow such instruments with an authority and content which they do not possess and which their signatories never intended them to have ... By doing that he may contribute to the predominance of the atmosphere of befogging unreality and artificiality created by such treaties.' *Ibid*, 196.

116 '"Resort to War" and the Interpretation of the Covenant During the Manchurian Crisis', 28 *AJIL* (1934) 43.

117 *Ibid*, 55. By this means, Lauterpacht candidly observed that 'the matter of securing peace ... was left to a large extent to what is essentially a political decision', *ibid*, 58.

118 Autointerpretation followed the absence of compulsory third party settlement. It did not mean that everybody must accept as final and conclusive the state's own view. A completely self-judging obligation would be no obligation at all. As the principle of effectiveness excluded the interpretation of legal instuments as meaningless, it must be assumed that the state's view may be subjected to critical scrutiny. See 'The Pact of Paris', *supra* note 113, at 187–189.

opt for the *via media* of a 'constructive state of war', dependent on a contextual assessment of the scale and intensity of actual fighting.[119]

With this argument, Lauterpacht was able to maintain the constitutional character of the Covenant and the primacy of law over politics, as the argument in *Analogies* and *Function of Law* required, while at the same time 'realistically' admitting that what the Covenant provided was a matter of interpretation in which politics had a large, though not unlimited, role to play. The legal question focuses away from the substance towards procedure. Discussing the early phase of the Manchurian crisis, Lauterpacht felt that the 'crucial question' was 'of course'[120] the effect of Japan's dissenting vote in the adoption of the resolution by the Council of 24 October 1931, which required Japan to commence troop withdrawal as soon as possible. While normal voting rules called for unanimity, Lauterpacht argued that the votes of the parties were to be discounted in the event that the matter had a 'judicial nature'. In such case, *nemo judex in sua causa* was to applied. As this was applicable to the determination of Japan's duties, Japan's vote was not to be counted and the resolution was legally binding on it.[121]

The tension between collective security and neutrality likewise implicated self-judgment. In principle, a comprehensive collective security system left no room for neutrality.[122] But the Covenant was not such a system, not even if the obligations under the Pact of Paris of 1928 were added to it.[123] This was due to the absence of a League competence to interpret the Covenant authoritatively. Article 16 left it to the members to determine if one of them had resorted to war in breach of its obligations (or whether its actions constituted 'resort to war') and thus triggered the sanctions mechanism. But even if a member made such a determination, this still did not automatically result in a state of war between it and the Covenant-breaker – hence neutrality became applicable.[124] To be sure, members could not consistently charge each other with 'resort to war' and then fail to take economic measures. Non-participation in military action, however, and hence neutrality in a military sense, was always available.[125] 'The vital part of the Covenant was thus made to repose on the edge of a legal dialectics of a limited but destructive sublety'.[126] Though in conflict with the substance of the Covenant, neutrality continued to exist as a function of this self-judging competence, qualified by the duty of non-recognition, 'the ineffective apology of guilty conscience'.[127]

This situation reflected the undeveloped state of the law, which was the jurist's duty to disclose (instead of hiding it under ingenious but unrealistic interpreta-

119 'Resort to War', *supra*, note 116, at 52.
120 'Japan and the Covenant', 3 *Political Quarterly* (1932) 179.
121 *Ibid*, 179–185.
122 'Neutrality and Collective Security, *supra* note 17, at 149.
123 'The Pact of Paris', *supra* note 113, at 191–194.
124 'Neutrality and Collective Security', *supra* note 17, at 140–1.
125 Cf. e.g. 'Japan and the Covenant', *supra* note 120, at 187.
126 'Neutrality and Collective Security', *supra* note 17, at 137.
127 *Ibid*, 149.

tions).[128] The rational solution, however, was to propose 'the conferment of a power of *decision* upon a qualified majority of the Council including all the Great Powers but excluding the disputants'.[129] In fact, Lauterpacht argued, inasmuch as the *nemo judex* principle was accepted as governing the interpretation of the Covenant, no formal amendment was necessary.[130] By means of these arguments, Lauterpacht was able to keep collective security and the constitutional character of the League intact. Neutrality becomes a *de facto* position derived from a temporary procedural difficulty, not a principled right or fundamental feature of the system itself.

Neutrality involves political choice and freedom of action. Hence, the difficulty to find a place for it under a legally based international order. At the outset of the Second World War, Lauterpacht's views were strongly affected by an interest in not interpreting the lend-lease and United States' economic assistance to the allies as a violation of neutrality. After Pearl Harbor, however, he no longer felt so constrained. In a 1942 talk in the United States, Lauterpacht observed that there had been no agreed law on the matter in the inter-war era and that no such law was visible then.[131] The old law on neutrality was 'glaringly archaic',[132] a 'function of the legal admissibility of war'.[133] In a total war, such as world war, neutral trade with the enemy was an 'incongruous anachronism' and any rights of neutrality 'precarious and illusory'.[134] This was not a conflict where a state could remain neutral for it was fought for 'the purpose of vindicating the rule of law among nations'.[135] Nor did there exist any place for neutrality in the Allied-conceived future legal order. To the contrary, there would be a legal duty on 'all mankind' to make war upon the aggressor.[136] The principles of collective security and the indivisibility of peace would form part of the new law.

Lauterpacht understood the problems of the 1930s as a measure of the absence of legal constraint on the conduct of foreign policy. In this, he was not alone. Since the Great War, the British public had been particularly suspicious of diplomacy and the diplomatic establishment.[137] In July 1933, Mr Arthur Henderson, the former Foreign Secretary of the Labour Government and the Chairman of the Disarmament Conference, published a pamphlet on 'Labour's Foreign Policy', in which he proposed the incorporation of Britain's international obligations on the avoidance of

128 'Neutrality and Collective Security', *supra* note 17, at 148 *et seq*; 'The Pact of Paris', *supra* note 113, at 191–197.
129 'Neutrality and Collective Security', *supra* note 17, at 138 (emphasis in original).
130 'Japan and the Covenant', *supra* note 120, at 189–190.
131 'The Future of Neutrality', (unpublished manuscript, LA, copy on file with author). Cf. also the 5th [1935] edition of Oppenheim II.
132 *Ibid*, 3 and 8.
133 *Ibid*, 7; 'Neutrality and Collective Security', *supra* note 17, at 146.
134 'The Future of Neutrality', *supra* note 131, at 4, 5.
135 *Ibid*, 1.
136 *Ibid*, 9.
137 Cf. Craig, 'The British Foreign Office from Grey to Austen Chamberlain', in G. Craig and F. Gilbert, *The Diplomats 1919–1939* (1953 [1994]) 22–25, 47.

war and peaceful settlement into British law.[138] In response to a request to elaborate a proposal to this effect Lauterpacht drafted a *Peace Act*, which provided that the Covenant, the Pact of Paris, the 1928 General Act for the Pacific Settlement of Disputes as well as the British acceptance of the compulsory jurisdiction of the Permanent Court 'shall have the force of law'. Under the Act it was to be unlawful for a British government to terminate any of these undertakings, to threaten or to declare war, resort to force or to 'order the invasion or occupation of any part of the territory of a foreign State'. Any contrary act or Order in Council was to be considered null and void. No defence of superior orders would be applicable for the servants of the Crown implementing such a decision.[139]

Where Henderson's original proposal was motivated by the will to 'make clear to all the world exactly where the Great Britain stands'[140] the Act could, according to Lauterpacht, in fact achieve 'much more'. It could 'secur[e] a substantial measure of unity of international and municipal law in a matter of paramount importance' as well as, more concretely, 'subject ... to the examination by English courts of the hitherto exclusive prerogative of the Crown in the domain of foreign affairs'.[141] The draft aimed at domestic enforcement of international obligations in the absence of adequate international guarantees of observance. It reflects the view of international and domestic affairs as a single normative system and limits political discretion in foreign affairs by judicial *fiat*.

The proposal was, of course, never adopted. Finally, Lauterpacht reacted to the events of the 1930s with the twin defence of the wounded idealist, abstraction and displacement. In a discussion of peaceful change, he observed that the problem was much more significant than a mere revision of the Peace Treaties – the terms in which it was usually discussed. It related to the establishment of a true international legislature with compulsory membership, majority voting and effective enforcement. Whatever setbacks the League had suffered, or might suffer, this objective – federalism – remained intact and would one day be realized due to its intrinsic rational force.[142]

The constitutionalization of politics and the solution to problems of peace by a temporal displacement is given a general form in *Recognition in International Law*,

138 A. Henderson, *Labour's Foreign Policy* (1933). The booklet reaffirmed the traditional Labour view that 'war in any circumstances should be made a crime in international law' (p. 4) and argued that the only way to peace was to agree on compulsory settlement of disputes.

139 *The Peace Act*, a draft. LA, copy on file with author. The act goes further than the instruments as it covers use of force short of 'war' and binds Britain not to withdraw its unilateral declaration of compulsory jurisdiction. The duty to respect foreign territory was, however, limited to the extent that there is 'instant and grave danger to the life and person of British subjects'. Such humanitarian intervention could, however, continue beyond 21 days only by an authorization by the League Council (para. 4).

140 Henderson, *supra* note 138, at 19.

141 'Memorandum on the Draft of the Peace Act', LA, copy on file with author. Lauterpacht explains the basic idea here as an attempt to overcome the 'dualism of moral standards which in modern times has been typical of the conduct of the affairs of nations within and outside their borders'.

142 'Peaceful Change. The Legal Aspect', in C.A.W. Manning, *Peaceful Change* (1938) 143–145 and *passim*.

Lauterpacht's first major work after the War (1947, hereinafter *Recognition*). Ostensibly a book on a relatively minor technical topic, its argument condenses the *problematique* of Lauterpacht's inter-war 'political' period and establishes the priority of law to political will and political fact. In Lauterpacht's own words, the aim was to

> introduce an essential element of order into what is a fundamental aspect of international relations ... [and to] prevent it from being treated as a purely physical phenomenon uncontrolled by legal rule and left entirely within the precarious orbit of politics.[143]

Far from a mere technical rule, recognition is 'a task whose implications and potential consequences are of capital political significance'.[144] It is the vehicle for removing international status from the precarious realm of politics: statehood, governmental authority, belligerency, insurgency. Recognition becomes the master technique for establishing the connection between abstract rule and its concrete manifestation. For example, '[a] lawful acquisition would be meaningless unless it were accompanied by the right to have it acknowledged and respected'.[145] The shift of perspective from the rule to its recognition, from the abstract formulation of status to the duty to give effect to it, is a significant step towards making a reality of the legal order. If the order is a complete whole (as was argued in *Analogies* and *Function of Law*) and if each of its rules is accompanied by the duty to recognize the rights which it establishes (and not to recognize status brought about by violation), then indeed foreign policy can always be redescribed as the administration of the law. Where politics used to be central and law marginal, the relation of the two becomes reversed. Governmental freedom of action is reconceived as limited 'discretion' in the administration of the law. True, such decentralized administration reflects the undeveloped character of international law, which is, in turn, a reflexion itself of the undeveloped integration of international society. Pending the establishment of collective, impartial organs to undertake this task, however, comprehending the process of recognition in terms of legal duty is 'not a source of weakness of international law but a substantial factor in its development to a true system of law'.[146]

Recognition is a consistent and far-reaching attempt to imagine international law as a complete and self-regulating normative system. What first appears as an act of political will is revealed as an exercise of interpretative discretion. Today, however, the constitutivist view expounded in *Recognition* enjoys no greater adherence than it did fifty years ago. It seems too bold in suggesting that legal statehood is dependent on whether the world of diplomacy is prepared to grant it. It seems too weak in failing to explain why rules about statehood could effectively constrain diplomacy in this task. Lauterpacht's redescription relocates policy, but does not diminish its centrality.

143 *Recognition*, *supra* note 16, at 73.
144 *Ibid*, 69.
145 *Ibid*, 409.
146 *Ibid*, 78.

According to Lauterpacht, if the widespread (positivist) view that the recognition of states and governments is a matter of policy, and not of law, were correct, it would constitute as glaring a gap 'in the effective validity of international law' as the admissibility of war did prior to the 1928 Pact of Paris.[147] Such a situation would also be ethically intolerable. It would fail to uphold the right of human communities to constitute themselves as political entities: '...the right of recognition follows from the overriding principles of independence of States and of prohibition of intervention'.[148] Again, Lauterpacht's target is a mistaken doctrinal view. And again, the attack is conducted in terms of scientific factuality:

> the view that that recognition is not a function consisting in the fulfilment of an international duty but an act of national policy ... has the further result of divorcing recognition from the scientific bases of fact on which all law must ultimately rest.[149]

Accordingly, the book is written as an extensive survey of the diplomatic and recognition practice of the most important states (Britain and the United States, in particular). In Lauterpacht's view, states have not regarded recognition as a matter of arbitrary political will, but have consistently argued for granting or withholding it as a matter of duty, relative to the ascertainment of facts. That this method entrenches the statism of an international system, which he elsewhere held as its main defect, remains invisible as factuality is here used to buttress a normativist view against deviating 'realisms'. But it does make it necessary for him to argue in terms of a historical trajectory in which the present is only a temporary stage to be superseded by a collectivization of recognition through the integration of the international community 'which, in the long run, is the absolute condition for the development of the potentialities of man and humanity in general'.[150]

The factual argument is weak. It is easy to believe that states do not argue that when they grant or withhold recognition, they are doing it as a matter of political will. It is in the nature of diplomacy to defend one's position by reference to external 'objective necessities'. If Canning argued that the British recognition of South American colonies in 1823 followed from their actual fulfilment of the conditions of statehood,[151] is this not a typical diplomatic move to justify one's political position in as uncontroversial terms as possible in order to forestall the counter-reaction of one's adversary (Spain in this case)? Surely the same is true of most situations where the grant of status is a matter of political controversy. A 'realist' has no difficulty to interpret Canning's policy as a political manoeuvre against Spanish predominance and as an attempt to extend British influence in the Western hemisphere.[152]

147 *Ibid*, 3–6.
148 *Ibid*, 142, 158–165.
149 *Ibid*, 5, also 91.
150 *Ibid*, 78.
151 *Ibid*, 13–17.
152 Cf. e.g. W. Hinde, *George Canning* (1973 [1989]) 345 *et seq*; 372.

The book's factual claims comply with the expectations of the reading public, but fail to provide a conclusive demonstration of a historical thesis. Much more important are arguments according to which the declarativist view is epistemologically naive while (pure) constitutivism is ethically unacceptable. The modernity and consequence of *Recognition* lies above all in Lauterpacht's successful repudiation of the naive realism that clung to the 'scientific' character of political facts and sought respectability through an entrenchment of power. The epistemological and the ethical are brought together in *Recognition* by insisting on that which lies between – interpretation.

Declarativism is naive as it assumes that the emergence of political entities endowed with legal rights and duties, and in particular of states (or governments, or belligerents), is a question of pure fact. But statehood is not a physical fact that would be able to disclose itself mechanically for all the world to see, or whose presence or absence can be determined by some 'automatic' test, as is shown by the extreme variety of actually existing states.[153] Statehood is a conceptual construct which refers back to the presence (or absence) of a set of criteria for the attainment of the relevant status. What those criteria are and whether they are present depends on acts of human cognition. If that act of cognition is not present, for instance if nobody recognizes an entity as a 'state', then there is little point in insisting that the status still exists. Only through recognition can a fact transform itself into a 'juridical fact'.[154] A state or a government whose existence is acknowledged by nobody cannot successfully claim to be treated as such. Its status has reality only within its own solipsistic universe.[155]

The constitutive view acknowledges the complexity of the social world and the ensuing primacy of the *interpretation* of facts over facts in their 'purity'. Inasmuch as it holds recognition to be an act of 'pure politics', however, it goes too far in the opposite direction. From the existence of a gap between 'facts' and their cognition, it is observed that the two are wholly independent of each other, that recognition is an act of pure, unconstrained political will. But in fact nobody treats it as such. If statehood is a matter of fulfulling some antecedent criteria, then surely recognition must comply with such criteria. That it is regarded in such manner is evident, for instance, in the generally accepted view which holds premature recognition to be a violation of the law [156] and which tests governmental authority by reference to its effectiveness. To hold otherwise would allow intervention in the internal affairs of the state.[157]

153 *Ibid*, 45–51.
154 *Ibid*, 75.
155 This may seem evident as regards statehood. Its significance is highlighted in relation to the frequent assertions by states that they do not recognize foreign governments. In normal cases no express recognition is needed because the matter is clear. Recognition asserts its constitutive significance, however, when there are rival factions: in such case a state wishing to maintain some kind of relations with the state concerned is bound to give some kind of recognition – implicit or *de facto* – to one such faction. *Ibid*, 156–7.
156 *Ibid*, 9–12.
157 *Ibid*, 98 *et seq.*

The only open question that remains is to determine what the legal criteria for attaining the relevant status are, and how they are to be interpreted. Here there is, of course, much debate and discretion. On the one hand, a legal view is incompatible with politically loaded criteria, such as legitimacy of origin, religion, political orientation, or even the willingness to abide by international law.[158] On the other hand, such criteria cannot be purely factual, without violating the principle of *ex injuria non jus oritur*. The effectiveness of government cannot be just a matter of power, but must be accompanied by a degree of legitimacy.[159] Non-recognition of illegally attained title is not the consequence of a specific doctrine to that effect, but of the general principle that no one may profit from his own wrong. To be sure, there is always a 'political element' in appreciating such criteria.[160] But discretion is not free, at least it cannot be exercised for the advancement of one's own interests. In exercising it, states are fulfilling the function of administering international law.

Lauterpacht's modernist, neo-Kantian epistemology combines constitutivism and declarativism. Recognition is 'declaratory of facts and constitutive of rights'.[161] Such a construction takes a strong view on interpretation. Facts do exist as the (absent) referents of the criteria for recognition. But they appear only in interpretation. As facts cannot interpret themselves 'there must be *someone* to perform that task'.[162] That someone is each state. Interpretation is not a political act of will, however. As its ultimate reference is a fact, it must be held as an act of cognition. We notice here the central paradox of modernist epistemology. For although knowledge (unlike will) is universal, it appears (like will) only in partial truths. Lauterpacht accepts relativism, but only as a temporary condition, a consequence of the fragmentary nature of the present world.

The problem is not only that interpretation is difficult (indeed, the complexity of international life is acknowledged in the intermediate doctrine of *de facto* recognition),[163] but also that we cannot be assured that it is always undertaken in good faith. Lauterpacht believes that accepting the legal character of recognition will to some extent diminish the likelihood of divergent findings.[164] In order to dispose finally of self-judgment, however, recognition must be collectivized, allocated to an 'impartial international organ'.[165] This can only be undertaken, however, when international integration jumps into its final form of universal organization with compulsory membership.[166]

Recognition illustrates the problems of modern law. Facts are needed to constrain (arbitrary) political will. However, facts need to be interpreted. At this point, politi-

158 *Ibid*, 31–32, 102–104
159 *Ibid*, 115 et seq.
160 *Ibid*, 26–37.
161 *Ibid*, 75.
162 *Ibid*, 55 (emphasis in original).
163 *Ibid*, 329 *et seq.*
164 *Ibid*, 58.
165 *Ibid*, 55 and generally 67–78, 165–174, 253–255.
166 *Ibid*, 77–78

cal will reasserts itself. 'Criteria' or 'methods' are needed to control interpretation, and thus begins the struggle to find *them* a normative basis and a determinate content. *Recognition*, like post-formalist law in general, seeks an exit from the circle of interpretative problems by turning to process. It shifts its focus away from facts and criteria towards the qualities of (future) procedure. For Lauterpacht, recognition must ultimately become the function of democratic debate: (interpretative) wills must try to find each other in search of a collective consensus. The resolution, however, seems to be undermined by the description of the present: Why would collectivization take place if, in fact, recognition is important and states disagree on the meaning of facts? Why would collectivization of a political decision protect any better the rights of individual entities than its decentralization? Why would adding up more wills succeed in establishing the cognitive correctness of the conclusion?

In *Recognition*, too, Lauterpacht cast his gaze into the nineteenth century as an era when diplomacy was orderly and honoured the consent of the governed,[167] *Imperium et Libertas*.[168] It was his last 'political' work. It offered a redescription of diplomacy as the administration of the law which at the stroke of a pen brushed away the political 'retrogression' of the inter-war years. Its legal utopia relied not only on the willingness of diplomats to understand their job accordingly, but – much more crucially – on their ability to clear the inevitable (interpretative) disagreements through democratic debate, which, if present, would render the redescription unnecessary. Lauterpacht's utopia was not unworkable because diplomats were unwilling to imagine themselves as judges but because, in order to judge wisely, they needed to be good diplomats!

V

Whatever may have been the reaction of Lauterpacht's Cambridge audience in the autumn of 1938 to his plea for the revival of Victorian tradition, international politics took a different course. The absolute powerlessness of law in the face of a political and military logic completely discredited the idea of simply resuscitating the League.[169] Yet despite the infinitely greater horrors of the Second World War compared to those of its predecessor, no great movements of revival or rejection followed in its wake. The establishment of the United Nations took place as a pragmatic necessity, an outcome of technical realism and sense of duty rather than of political inspiration, as though no formal reaction could possibly match the enormity of the suffering caused by the war.

167 *Ibid*, 130–140.

168 Cf. H. Temperley, *The Victorian Age in Politics, War and Diplomacy* (1928) 14–21.

169 This was what Lauterpacht had proposed as late as 1939–1940 in a talk that avoided taking a straightforward federalist stand and that is among those rare writings in which Lauterpacht shows some understanding for statehood as 'an expression of actual diversity of interest, economic and other, and of disparities of wealth, culture and standards of life between States', 'Sovereignty and Federation', *CP*, vol. 3, at 13, 5, 14–25.

Lauterpacht's whole family, his parents, his brother and sister and their children, with the exception of one niece, were murdered in the Holocaust, presumably as early as 1940. It is not clear when he learned of the fate of his family. Nothing of this tragedy is visible in his writings, although it would seem evident that the turn from 'politics' to 'human rights' must have been influenced by it. Lauterpacht himself spent the war years in Britain, teaching in Cambridge as Whewell Professor of International Law from 1938, and making two lecturing trips to the United States, plus providing services to the British government. In 1945–6 he became a member of the British War Crimes Executive, in which capacity he went to Nuremberg and wrote drafts for Britain's Chief Prosecutor, Sir Hartley Shawcross.

Lauterpacht's drafts for the opening and closing speeches of the British Prosecutor are characteristic in their absence of emotion and concentration on doctrinal detail.[170] He keeps in check his Jewish background and writes about the *Shoah* as the killing or extermination of 'civilians' and 'non-combatants'. The closing draft begins with a slightly defensive discussion of the competence of the Tribunal and of the fairness of its procedures, its impartiality and independence. Lauterpacht stressed the Tribunal's function as an administrator of general, not victors' international law. The substantive part of the draft defends the notion of a state's as well as individuals' international responsibility as parts of already existing law and draws upon Lauterpacht's earlier views.[171] The discussion is technical. An analysis of a 1935 arbitration between Canada and the United States is indeed strangely out of place in this connexion. Lauterpacht gets carried away at times with his academic views, directing his attacks not only against German policy, but against statehood as such: '[t]he mystical sanctity of the sovereign State ... is arraigned before the judgment of the law'.

The extreme restraint and formality of Lauterpacht's drafts are understandable. Of all British international lawyers, he was most vulnerable to the charge of special pleading. Only parts of his drafts found their way into the passionate, even angry, speeches of the British Prosecutor. As Shawcross noted, 'the sentiment in Nuremberg' required concentration on the facts rather than on the law.[172] Nonetheless, the full story of Lauterpacht's role in the War Crimes process remains untold (for instance, he is reputed to have been responsible for the drafting of Article 6 of the London Charter, which laid down the material jurisdiction of the Tribunal) and Shawcross expressed his gratitude to Lauterpacht on several occasions, sometimes very generously, noting at the end of the process that:

170 LA, copies of parts of the draft for the closing speech on file with the author. Shawcross had contacted Lauterpacht in May–June 1946 asking for assistance in the preparation of these statements and specifically directing him to concentrate on the legal and historical aspects of the case.

171 These themes – the advocacy for a War Crimes Tribunal, the elaboration of the basis of its jurisdiction as well as the law applicable and a discussion of the duty of a neutral state to extradite suspects – are also dealt with in 'The Law of Nature and the Punishment of War Crimes', 21 *BYbIL* (1944) 58 (an article based on a Memorandum prepared by Lauterpacht for a Committee set up by the Department of Criminal Science at Cambridge University).

172 Shawcross to Lauterpacht, 27 November and 30 November 1945, LA.

> I hope you will always have the satisfaction in having had this leading hand in something that may have a [lasting?] influence on the future conduct of international relations.[173]

Already during the war Lauterpacht had participated in the debates concerning the future of world organization. Inspired by an American debate in 1942–43, he drafted a scheme for an international rule of law that reproduced in ten principles his liberal, cosmopolitan credo.[174] The organization was to be universal, its continuity with the League should be recognized (thus symbolically recognizing continuity with the 'greatest political advance made by the society of nations'[175]) and it should be independent of the peace settlement. There was to be a prohibition of war, a compulsory rule of law, systems of collective security, peaceful change, majority voting, human rights protection and international administration. Courts were to be allocated major tasks, such as the determination of the existence of 'war' and the setting of limits for international legislation.[176] There would also be a system of effective enforcement of judgments.[177]

In 1944, Lauterpacht also participated in a discussion initiated by the American Society of International Law (ASIL) on the future of world organization. He was critical of the text produced for this purpose by Manley Hudson for the relevant ASIL Committee,[178] regarding it as a 'rather timid and uninspired document'.[179] Its rhetoric was too general, giving the 'impression of somewhat pretentious embellishment'. It failed to propose a binding system of international legislation, contained no provision for the protection of human rights, applied the unanimity principle in important matters and maintained the legal/political disputes distinction which, as Lauterpacht had demonstrated in *Function of Law*, allowed states to opt out of legal procedures at will. Writing to his British colleagues, Lauterpacht noted that 'there is room for a parallel and perhaps better effort in this country'.

The proposal led to an exchange of written drafts and comments between members of a British International Law Committee, in which, in addition to Lauterpacht, Hurst, McNair and Brierly, among others, participated.[180] In this correspondence, Lauterpacht consistently took a federalist position, advocating, as in his inter-war writings, universal and compulsory membership in the future organization (with temporary non-admission of former 'Axis Powers and their Allies'), binding international legislation in matters of international concern (and generally, though not

173 Shawcross to Lauterpacht, 11 July 1946, LA.
174 Undated memorandum, 1942–43, *CP*, vol. 3, at 462–503.
175 *Ibid*, 474.
176 *Ibid*, 481, 483.
177 These ideas were not generally shared among the British international law community. Professor Brierly, for instance, took a very critical view of the proposals, especially regarding the implied aim of forcing democracy as the internal form of government. He remarked drily that the 'proposals might be more effective if they were less ambitious'. Brierly to Lauterpacht, 15 December 1943, LA.
178 Cf. 38 *AJIL* (Suppl.) 44–139.
179 Memorandum (undated, presumably spring or early summer 1944). From HL to Sir Cecil Hurst, 'Notes on the Postulates, Principles and Proposals', LA, copy on file with author.
180 The full composition or general activities of the Committee are not known, cf. note by Eli Lauterpacht in *CP*, vol. 3, at 461.

without exception, through majority vote), binding and compulsory settlement of disputes, collectivization of recognition, enforcement jurisdiction endowed to the organization with special (but not sole) responsibility for the four major Powers.[181]

Some of Lauterpacht's proposals that were controversial or absent from other drafts presented to the Committee (such as a unitary budget for the various bodies, the non-use of force principle, the trusteeship system, a provision on the protection of human rights, registration of treaties) ended up in the UN Charter. Nonetheless, in an assessment of the state of international law given at the Hebrew University in Jerusalem in May 1950,[182] Lauterpacht did not hide his dissatisfaction. In his view, the situation had become worse than it had been in 1919. The peace of 1945 had brought no significant relief to the retrogression of the inter-war years. Modernity had failed him. He attributed this to four rather different causes: lawlessness in the conduct of warfare, the suppression of normal conditions by the Allies in occupied Italy and Germany, the prevailing atmosphere of admiration for power and the requirement of unanimity of the permanent members of the Security Council.[183] Even recent progress in some areas (the growth of international organization, the acceptance of the principles of enforcement and human rights) 'has been obscured by the tangible and menacing reality of the division of the world into two opposing groups of States'.[184]

After the sombre assessment of the state of the post-war world, Lauterpacht's writing took a new turn. Instead of trying to develop better doctrines on traditional textbook subjects, Lauterpacht began to focus directly on individual human rights and advocated institutional means of protection at universal and regional levels. He explained that there had been a 'widespread conviction' that the 'major purpose of the war' had been the creation of effective institutions to protect human rights, in particular the establishment of an International Bill of Rights of Man.[185] Much of his late 1940s work is written as a polemic in favour of such an instrument. It is the subject of a pamphlet of 1945, a number of public lectures, and of the main work of his human rights period, *International Law and Human Rights* (1950, hereinafter *Human Rights*).

However, although the focus of Lauterpacht's subject-matter shifted from his pre-war concerns, the traditionalist impulse seemed even more prevalent than before. *Human Rights* assumed a language of grave formality. In this work he speaks of the 'majestic stream of the law of nature'.[186] Words such as 'fundamental', 'inalienable'

181 Cf. International Law Committee: 'The Nature of International Law – Draft by Professor Brierly, Observations by Professor Lauterpacht', 12 June 1944; International Law Committee on the Hudson Document: 'Sir Cecil Hurst's Draft of a Revised Covenant. Observations by Professor Lauterpacht', 15 July 1944, mimeo, LA, copies on file with author.

182 Lauterpacht represented Cambridge University at the 25th anniversary of Hebrew University, giving two lectures – one in English, one in Hebrew.

183 'International Law after World War II', *CP*, vol. 2, at 159–170.

184 *Ibid*, 167. Cf. also 'The Grotian Tradition', *supra* note 18, at 1, note 2.

185 *Human Rights*, 79

186 *Ibid*, 79, note 15.

and 'sanctity' abound, underlining the ahistorical, quasi-religious seriousness of human rights. The book's revivalist argument is that natural rights (that is, individual human rights) are rooted in (Western) legal and political thought, from Greek philosophy to modern Western constitutions.[187] These rights are supported and 'enforced' by natural and international law, the two having developed together from Grotius and Vattel to the doctrine of humanitarian intervention[188] and, finally, to the UN Charter which places human rights 'on the enduring foundations of the law of nature'.[189] To make matters more concrete and to make no mistake about where the tradition is to be found, Lauterpacht identifies it with the 'English sources', the 'powerful tradition of freedom conceived, in the words of the Act of Settlement, as the "birthright of the English people"'.[190]

This revivalist argument shows shades of Walter Benjamin's famous image of the 'Angel of History'. Lauterpacht is propelled forwards, with his gaze fixed firmly in the receding past where history's pile of debris seems always highest when nearest.[191] The invocation of Greek philosophy and Enlightenment thought seemed necessary in order to re-establish the credibility of European liberal political culture – of which many assimilated Jews had good reason to feel they were the real bearers[192] – as well as to explain the immediate past as an externally imposed distortion and not a logical consequence of the tradition.[193] Only an openly philosophical argument could make the traditional project seem credible in the face of increasing popular cynicism about international law and organization, reflected in the academic shift from international law to international relations and in the journalistic predominance of a new, dynamic realism.

Beyond the celebratory recounting of Western intellectual history, *Human Rights* conveys no interpretation of the cultural or political meaning of the inter-war era, or of the causes and vicissitudes of the Second World War. In particular, the book fails to examine the relationship between the optimistic legalism of the League era and the collapse of the political order. The only reference to the Holocaust appears in a footnote that quotes Earl Russell from 1946![194] The book's naturalist part (Section II, Chapters 5–8) remains a separate, historico-moral treatise with little connexion to what preceded it (a description of the erosion of statehood as the organizing principle of the law) or to what comes after it (a discussion of the place of human rights in the Charter and the project for an International Bill of Rights). The isolation of each of the book's three parts suggests that Lauterpacht did not succeed in attaining a satisfactory reconciliation of traditionalist morality with modernist legality. The

187 *Ibid*, 73–93
188 *Ibid*, 114–126.
189 *Ibid*, 145.
190 *Ibid*, 139.
191 W. Benjamin, *Illuminations* (1968) 257–258.
192 Beller, *supra* note 83, at 142–143.
193 '[T]he menacing shape of unbridled sovereignty of the State in the international sphere [created the] urge to find a spiritual counterpart to the growing power of the modern State', *Human Rights*, 112.
194 *Ibid*, 71, note 22.

result is a work that either reproduces the liberal canon and the primacy of individual rights over a potentially hostile public power; or becomes a partisan plea for a particular institutional arrangement (public power!) to support individual rights as effectively as possible.

Human Rights explains itself again as a critique of '[t]he orthodox positivist doctrine ... that only States are subjects of international law'.[195] The curious impression is conveyed that the problems of the world order depend on a mistake about the proper listing of legal subjects. This somewhat absurd feeling is strengthened by the rest of the first part of the book, which counters this (academic) dogma by reference to the emergence of international organizations as legal subjects[196] and the recognition of the position of the individual as protected or rendered responsible by international treaties.[197] The result is an implicit suggestion that the problems of post-war reconstruction do not lie in diplomacy or politics but in the inability of legal doctrine to reflect the (increasingly beneficial) facts of international life. The issue is (only) 'one of not permitting the dead hand of an obsolete theory to continue to lie heavily upon the development of international organisation'.[198] Such doctrinal focus, however, deprives the work of critical force. Who would be interested in adjusting the insights of a marginal theoretical preoccupation if diplomatic facts (as well as the law) have already been transformed to reflect the politically desirable?

The same problem emerges in the discussion of the place of human rights in the UN Charter, the section following the philosophical excursus into Western naturalism. Lauterpacht insists that Articles 1(3) and 55 (c) of the Charter, which deal with 'promoting ... respect for human rights', are not simply programmatory postulates, but create enforceable legal obligations. By recourse to the principle of effectiveness, he interprets the reference to human rights in the Charter in the broadest possible terms, while the scope of 'domestic jurisdiction' in Article 2(7) is given the narrowest feasible understanding.[199] Lauterpacht reads the whole liberal agenda into those provisions. For him, they provide protection for individuals against the government and its subdivisions as well as other intrusions in the private realm.

As in the 'political' writings of the 1930s, it turns out that the substance of the rights is less important than the procedures, the key problem being 'what shall be the international machinery for securing the rights after they have been recognized'.[200] Lauterpacht was disappointed with the early jurisdictional decision by the Commission on Human Rights to not take action on individual petitions. He responded with the argument that human rights were not merely an incidental decoration but an underlying theme of the Charter. It would therefore have been possible for the Commission, in accordance with the principle of effectiveness, to examine individ-

195 *Ibid*, 6.
196 *Ibid*, 12–26.
197 *Ibid*, 27–47.
198 *Ibid*, 19.
199 *Ibid*, 145–154.
200 Talk on the BBC in October 1949, *CP*, vol. 3, at 413.

ual complaints.[201] He urged as the essential part of the future International Bill of Rights – which eventually became the two Covenants in 1966 – the inclusion of a mechanism of individual (and not only state) complaints. To deny such right would be 'tantamount to a withdrawal, to a large extent, of the principal benefit conferred by the Bill'.[202]

The most interesting part of *Human Rights*, however, is the criticism of the 'deceptive' or 'concealing'[203] character of the 1948 Universal Declaration on Human Rights. Already during the drafting of the Declaration, Lauterpacht had warned against rushing ahead so fast as to end up in vacuous generalities.[204] This had been to no avail, however. The provisions of the Declaration became too general and open-ended to be applicable. No institutional safeguards or mechanisms for implementation were attached to it. States were unanimous and emphatic in their denial of the legal character of the Declaration.[205] And they were right. Any attempt to interpret it as a legal instrument was bound to fail. Retreating to formalism Lauterpacht stressed the 'duty resting upon the science of international law to abstain from infusing an artificial legal existence into a document which was never intended to have that character'.[206]

Lauterpacht viewed the Declaration as mere decoration. In his view, it was not only unnecessary but counterproductive, a *substitute* for effective action. Even attempts to endow the Declaration with moral value were futile: What moral value can there be in a commitment that states are openly entitled to disavow? It thus became the task of legal doctrine to create a living sense of the Declaration's insufficiency and to thus quicken the pace of negotiations for an effective bill of human rights.[207]

There is a tension between the invocation of the tradition of natural rights in the second part of the book and the critique of the 1948 Declaration in the third. For if that tradition is sound, Lauterpacht should not be overly concerned about the effects of the Universal Declaration. After all, it seems to have rhetorically incorporated much of its substance. On the other hand, surely the critique of the Declaration as mere 'facade' or 'substitute' is equally applicable to the human rights tradition that Lauterpacht seeks to revive. The absence from Lauterpacht's revivalist argument of a serious account of the relationship between the liberal tradition and diplomatic history makes it just as vulnerable to a criticism of bad faith as the Declaration in its purely rhetorical formulation.

The problem lies in Lauterpacht's unwillingness to pinpoint the politics he finds unacceptable. Instead, the focus of his criticism falls always on the abstract and formal conception of statehood, viewed in the standard liberal fashion as mere

201 'State Sovereignty and Human Rights' (1950, *CP*, vol. 3) 419–421; *Human Rights*, 229–251.
202 'State Sovereignty and Human Rights', *CP*, vol. 3, at 423.
203 *Human Rights*, 421.
204 Letter to the Times, 26 July 1947, *CP*, vol. 3, at 408–9.
205 *Human Rights*, 397–408.
206 *Ibid*, 417.
207 Cf. also Lauterpacht's talk of 1949, *CP*, vol. 3, at 413.

'administrative convenience'[208] that has degenerated into an 'insurmountable barrier between man and the law of mankind'.[209] The critique of statehood is the counterpart of Lauterpacht's cosmopolitan individualism. But whether that critique is the unequivocal consequence of the tradition may be open to doubt. Surely Lauterpacht would have conceded that at least in some cases – perhaps quite a few cases – statehood functions as a protective device over the freedoms that tradition seeks to uphold.[210] In 1947 Lauterpacht participated in the drafting of the Declaration of Independence of the State of Israel. Surely he could not have refused to take part in the creation of the Jewish state because of his principled view about the malignant character of statehood![211]

The point here is that the relationship between the tradition and the institutional proposals is more complex than Lauterpacht is willing to acknowledge. Tradition (natural law) and modernity (institutional experience) refuse to lie comfortably in the same bed. A reliance on the former may sometimes support statehood, at other times federalism, depending entirely on the circumstances. The relevant question becomes less whether to prefer statehood or integration, but *what* states, or integration *on which terms*.[212] But these are issues of substantive politics that Lauterpacht is not willing to face directly.

The tension between ethics and institutions (or tradition and modernity) is visible in post-war internationalism more generally. On the one hand, there is the need to be able to relate contemporary law to a tradition of progressive thought so as to demonstrate its critical distance from an unacceptable political present: 'better times and

208 *Human Rights*, 68 and generally 67–72.

209 *Ibid*, 77.

210 As indeed he does by recognizing 'a certain duality' about statehood: on the one hand its only justification is the protection of individual rights; on the other hand, it appears also as 'the absolute condition of the civilized existence of man [sic]' *Human Rights*, 80. This duality disappears, however, as Lauterpacht moves to prophesy: there is no regret for the loss of these benefits on the route to federalism! Lauterpacht's federalism has strengthened from the more careful, 'realist' discussion of 1939–1940 in 'Sovereignty and Federation', *supra* note 169, at 14–25.

211 In fact, when defending British jurisdiction on the treasonable activities of aliens abroad (through a wide formulation of the 'effects' doctrine) or on the scrutiny of the international lawfulness of acts of other states, Lauterpacht has no difficulty in defending British sovereignty to the extent that it can be used to attain his preferred outcomes. Cf. 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens' (1946, *CP*, vol. 3) especially 234–239 and 'Testing the Legality of Persian Policy' (1952, CP, vol. 3) 242–244.

212 A similar ambiguity is evident also in the idealism/realism discussion of the era. Where historians such as E.H. Carr used existing institutional practices to challenge the 'utopian' views of lawyers such as Lauterpacht, their conclusions were, as Lauterpacht perceptively noted, conditional on a particular interpretation of the character and logic of those institutions. Where the two disagreed was not on whether one should rely on hard 'facts' or the liberal 'tradition', but on how the two were to be interpreted. This is why Carr's self-characterization as a 'Realist' appeared to Lauterpacht as a dishonest conversation strategy. 'On Realism', *CP*, vol. 2, at 57–58. Why should not the view that 'the ultimate interest of States is peace' be equally 'Realist' as any other statement about their interests. There is a distinction here between the short term and the long term.Whichever one chooses, however, is not a consequence of one's 'realism' or 'idealism' but of one's understanding of human nature. For Lauterpacht, the ultimate distinction is between optimism and tragedy: Do we learn from mistakes or do we not? This is much more a distinction of style and culture than of epistemological commitment. In a conclusive refutation of realist naivety, Lauterpacht notes that 'in the realm of human action, ideas are facts', *ibid*, 65.

better peoples'. The rhetorical formulation of the tradition, however, remains indeterminate to the degree that the accusation of facade legitimation is always applicable and can be dealt with only by reference to the effects, actual or expected, of the advocated norms in social reality. This leads to the demand for, and discussion of, institutional proposals that function at the level of empirical sociology: Who is constrained and by what means? Who decides, controls, implements? Are the norms self-judging, or is there a third party to decide on their application? What is its jurisdiction? Who elects its members? And so on.

Once the focus is shifted to these latter issues, however, it becomes increasingly difficult to envisage on what basis the various institutional solutions can be assessed. If the institutions are invoked in order to defend (or criticize) tradition, then the tradition cannot, without circularity, be invoked to defend (or criticize) institutions. The result will be a purely institutional-pragmatic, technical discourse in which an autonomous super-criterion of 'effectiveness' or 'binding force' will determine the acceptability of particular outcomes. Normative politics becomes institutional technique. This is pure modernity.

Lauterpacht's discussion of human rights crystallizes in his critique of the ineffectiveness of the Universal Declaration and in his proposal for a legally binding and enforceable Bill of Rights. The invocation of the tradition of liberal Enlightenment becomes concrete in a bureaucratic structure. Natural law is transformed into twenty-nine draft articles, which define the rights to be protected, oblige states parties to incorporate individual rights into their domestic law 'by appropriate constitutional means', and set up a machinery of international supervision. There would be a nine-member Human Rights Council with broad powers to consider petitions, to set up investigative commissions and conduct inquiries. States would be entitled to appeal against the Council's findings to the International Court of Justice. In cases of non-compliance, the General Assembly could take 'such action as may be appropriate in the circumstances'.[213]

The Bill of Rights is Lauterpacht's response to the ineffective Universal Declaration and foreshadows the 1966 International Covenants. Where Lauterpacht's 'political' writings in the inter-war era crystallized in a proposal for the collectivization of recognition – and thus in an effective constitutionalization of the inter-state system – his 'human rights' writings seek an institutional solution to the moral and political dilemmas of the age. And the teleological framework is constantly present. The function of law is to bring about

> the gradual integration of international society in the direction of a supra-national Federation of the World – a development which must be regarded as the ultimate postulate of the political organisation of man.[214]

213 For the text of Lauterpacht's proposed Bill, cf. *Human Rights*, 313–321 and commentary at 325–393.

214 *Ibid*, 46. Lauterpacht was quite express about federalism. In his 1950 talk in Jerusalem, he urged a vision of world federation 'not as an infinite ideal but as an object of a moral duty of positive action and as a practical standard of human endeavour'. Two features of such federation are impor-

Lauterpacht reacted to the Second World War with an express invocation of the liberal-humanist tradition that had been the target of defeated dictatorships. As he could no longer trust the transparency or immediate plausibility of the tradition, however, the focus of his writings turned to more effective institutions, control and constraint. The theory of liberal humanism and the associated principles of human rights and the Rule of Law were supplemented by and finally submerged in institutional proposals. Political critique was neutralized in a critique of statehood as such. The result is that tradition becomes increasingly abstract, while the problems of peace appear overwhelmingly as issues of institutional competence.

VI

Following the war, the focus of Lauterpacht's doctrinal writings moved from politics to humanitarian ethics. In addition, his interest became increasingly directed towards international law practice. Each acted in such a way as to support the other. The cosmopolitan ethic was concretized in enlightened judicial practice; judicial practice received legitimacy from its progressive cosmopolitanism. The two were brought together in a constructive conception of the legal order as a function of judicial imagination.

Consequently, it no longer sufficed to remain exclusively in the university. Lauterpacht had learned the limits to which academics could imagine into existence an international legal order. In April 1948 he arrived in New York to serve for three months as an adviser to the United Nations Secretariat on the codification of international law. In that function, he prepared a draft programme of work, including suggested topics for codification. The newly established International Law Commission adopted a substantial part of this work as its first programme.[215]

However, laying down a programme for the codification of international law did not satisfy Lauterpacht's desire to enter legal practice. After all, the nucleus of the law lay less in its substance than in its interpretation and application. Having assisted the British government in the *Corfu Channel* case, he wrote a letter in May 1949 to the British Legal Adviser, expressing an interest 'in advising private clients and foreign governments ... mainly for the reason that it brings [one] in touch with

tant: dissolution of international personality of members and the direct relation between individuals and the federation. For that purpose the state of Israel was called to contribute its 'proper and appointed share'. 'State Sovereignty and Human Rights', *CP*, vol. 3, at 430.

215 'Survey of International Law in Relation to the Work of Codification of the International Law Commission', *CP*, vol. 1, at 445–530. Lauterpacht's suggestions included the codification of the recognition of states, jurisdictional immunities, extradition, right of asylum, state succession, the regime of the High Seas and territorial waters, nationality, the law of treaties, diplomatic and consular intercourse, state responsibility and arbitral procedure. Nearly all of these topics were included in the Commission's 1949 work programme. For the adoption of the programme, cf. UNGA Res 373 (IV) of 6 December 1949. Cf. also H.W. Briggs, *The International Law Commission* (1965) 169–176.

the practical side of international law'.[216] He also affirmed his loyalty by declaring his readiness to exclude cases that would interfere with his teaching or which would be 'clearly contrary' to the views of the British government unless, he added with characteristic reservation, he thought it useful that such opinion be given by him instead of somebody else.

Before he retired from the Bar and replaced Brierly in the International Law Commission in 1952, Lauterpacht acted as counsel or adviser in a number of international cases, including *Anglo-Iranian Oil Company* and *Nottebohm*.[217] During 1952–1954 he served as a member of the Commission, where his principal achievement consisted in the preparation of two reports on the law of treaties.[218] What is noteworthy in those reports is, once again, the central role allocated to the judicial function in curtailing the liberty of parties to interpret or apply a treaty. A party – or indeed any state – asserting the invalidity of a treaty on the ground that it was imposed by the use or threat of force or otherwise in violation of the principles of the UN Charter must bring its claim to the International Court of Justice.[219] The same was true also of other grounds of invalidity, a unilateral determination never enabling a state to free itself from a treaty provision.[220]

Lauterpacht returned repeatedly to the problem of the freedom of the state to interpret for itself what the law is. And his omnibus solution remained the transfer of interpretative competence to international bodies, in particular courts. This followed from his nominalism: the law is how it is read and the crucial issue is who is entitled to read it. Already in 1930 he had criticized the broad formulations of the British declaration of acceptance of the compulsory jurisdiction of the Permanent Court under the Optional Clause. For instance, the exclusion of disputes that had arisen before the ratification of the declaration was of 'highly subjective character', for when is a dispute not related to anterior facts, sometimes to facts quite distant in time?[221] During his brief period at the Court (1955–1960), his most memorable statements related to the self-judging reservations made by states to their declarations of acceptance of the Court's jurisdiction that enabled them arbitrarily to foreclose the Court's involvement. Unlike the majority, Lauterpacht felt that an automatic reservation made the whole declaration invalid *ab initio*: no compulsory jurisdiction was in fact at all created.[222]

216 HL to Sir Eric Beckett, K.C. Foreign Office, 16 May 1949, LA.

217 For Lauterpacht's Draft of Legal Submissions to the ICJ in the *Anglo-Iranian Oil Company* case, cf. *CP*, vol. 4, at 23–89. His memoranda for the Government of Liechtenstein in the *Nottebohm* case (1950) as well as for the Swiss Government in the case concerning the proceedings against a Romanian consular officer in Switzerland (*re Solwan Vitianu*, 1949) have been reproduced in *CP*, vol. 4, at 5–19 and *CP*, vol. 3, at 433–457.

218 The two reports supplement each other and have been edited and reprinted in *CP*, vol. 4, at 101–388.

219 Draft Article 12 of the 1953 Report, *CP*, vol. 4, at 273.

220 Cf. e.g. Draft Articles 11 (5) and 15, *ibid*, 257, 296.

221 'British Reservations to the Optional Clause', 10 *Economica* (1930) 137, at 152.

222 Cf. *Norwegian Loans* case, ICJ Reports (1957) 34, 43–59; *Interhandel* case, ICJ Reports (1959) 95–122.

To combat self-judgment, *Function of Law* had presented the law as a limitless repository of argumentative practices through which judges could decide individual cases, even where it first seemed that the matter was 'political' or where there did not seem to be any law at all.[223] Such an anti-metaphysical and practice-oriented approach was in line with Anglo-American pragmatism. It is also sceptical about the ability of the juristic method to 'find' the law. Lauterpacht viewed the discussion about the methods of treaty interpretation as 'sterile'[224] and advocated a 'flexible approach' to the ascertainment of customary law.[225] Everything is geared towards finding the *opinio juris*.[226] His criticism of state responsibility is typical. Standard doctrines had invested it with

> a degree of rigidity which has hindered the development of international law by ... [the] limitation of the sources of State responsibility to a definite category of delicts defined in advance.

Instead, what is needed is a 'reasonable adjustment of conflicting considerations'.[227] Typically, to attain this flexibility Lauterpacht envisions a large scope of application for the equitable doctrine of abuse of rights, closing the system by means of trust in enlightened judges. The inherent dangers in such flexible standard ('the abuse of abuse of rights') is checked by international tribunals themselves.[228] The bottom-line of the argument, never seriously put to question, is the assumption that international jurists are able to check the injustice at the national level and that they do this not through the 'automatic' application of fixed rules but by balancing the various contextual determinants involved.[229]

223 The notes Lauterpacht had prepared during 1958–1960 for the second edition of the book show that his view remained unchanged. There still appeared no reason to make a distinction between justiciable and non-justiciable disputes, although, Lauterpacht now was prepared to concede, the faculty to *decide* every case did not necessarily mean that judges could *settle* every dispute. The political usefulness of the law was a question to which there could be no properly legal answer. This was a matter of faith. Cf. fragments of additions that were to be inserted in a planned second edition of *Function of Law*, MS for a new para. 11a, LA, to be published in *CP*, vol. 5 (Part IX.3). Cf. also 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 24, at 200–201.

224 'General Rules', *supra* note 34, at 364. Cf. also 'The Doctrine of Plain Meaning', *supra* note 14, at 393–446. Thus, in an opinion given in 1939 to the Jewish Agency in Palestine, Lauterpacht rejected a 'purely formal interpretation' of the equality clause in Article 18 of the Mandate for Palestine in order to justify commercial discrimination on the basis of reciprocity inasmuch as it was not the text of the Mandate but 'the well-being of the population [that was] the decisive test', *CP*, vol. 3, at 89, 91.

225 'International Law – The General Part', *CP*, vol. 1, at 66–67. 'Many an act of judicial legislation may in fact be accomplished under the guise of the ascertainment of customary law', *Development*, 368.

226 'General Rules', *supra* note 34, at 239–421.

227 *Ibid*, 383.

228 *Function of Law*, 282–306; 'General Rules', *supra* note 34, at 383–6, *Development*, at 162–165.

229 For example, applying the laws passed by the allied occupation authority in Germany after the war, French courts had restored the German nationality of Jewish stateless persons whose nationality had been illegally deprived by the Nazi regime. This, however, placed them perversely in the position of 'enemy aliens'. To check the manifest injustice involved, Lauterpacht advocated recourse to the International Court of Justice either under a 1938 Convention or under the advisory procedure. There was no question in his mind about enlightenment not residing at the international level. 'The Nationality of Denationalized Persons', *CP*, vol. 3, at 383, 401–404.

Lauterpacht's pragmatic constructivism is nicely manifest in a 1950 article on the law applicable to the continental shelf. Here there was a problem in which a number of states had resorted to unilateral acts to support their legal claims. It might have been argued that this was permissible because no rule had crystallized and the *Lotus* principle – the presumption of liberty of action – would therefore have to be applied. However, consistent with the teaching in *Function of Law*, Lauterpacht discarded the possibility of *non liquet* and, instead, constructed the applicable law by recourse to two opposing legal principles: geographical contiguity and effective occupation. Both were relevant but too extreme. They could not be used to dictate particular solutions. To the contrary:

> the conceptions of effective occupation and contiguity, being relative, are but a starting point. It is within the legitimate province of the judicial function – and of statesmanship – to use them with such discretion as the equities of the case and considerations of stability require.[230]

Everything hinged on the 'decisive test of reasonableness', more particularly on the 'judicial ascertainment of reasonableness'.[231] Where texts (treaties) and facts (custom) remained indeterminate, and auto-interpretation was ruled out as a matter of principle, authority could only reside in courts, those enlightened managers of socially attainable justice.

Lauterpacht's mature views on the constructive tasks of judges are laid down in *The Development of International Law by the International Court*, the second edition of which was published in 1958, only two years before his death. He remains critical of the political system: the 'state of international integration' has not allowed the Court to attain the goals which the drafters of the Statute had set.[232] However, where politics is fixed, law is creative. The book is a celebration of judicial creativity. It is precisely because of the absence of general legislative machinery that it falls upon international courts (i.e. international lawyers) to take on the task of legislation by, for example, stating their views on as many legal points as possible in connexion with individual cases.[233]

For Lauterpacht, judicial legislation exists everywhere, although law finds no clear articulation for it and treats it by recourse to 'the fiction that the enunciation of the new rule is no more than an application of an existing legal principle or an interpretation of an existing text'.[234] But this fiction, like the controversy about whether judges create law or merely reveal nascent rules is 'highly unreal'.[235] That decisions of the Court are not legal sources but only evidence of the law turns on an

230 'Sovereignty over Submarine Areas', *CP*, vol. 3, at 200.
231 *Ibid*, 184, 185, 217.
232 *Development*, 3–5.
233 *Ibid*, 37–47. The suggestion that international courts might be used as legislative avenues by providing non-binding opinions on desirable law was, of course, already made in *Function of Law* and especially in 'The Absence of an International Legislature', *supra* note 67, at 134, 144–154.
234 *Development*, 155.
235 *Ibid*, 21.

equally unreal distinction. For practical purposes, those decisions are authoritative.[236]

The greatest part of *Development*, like its companion article on the prohibition of *non liquet*, is an exposé of the argumentative techniques that have enabled the International Court of Justice to 'legislate' or speak in favour of such activism. Arguments from general principles, such as the *nemo judex in sua causa* or abuse of rights,[237] have not been limited to a technical application of Article 38(3) of its Statute, but have aimed to attain – with frequent reference to estoppel or good faith – what Lauterpacht calls a 'socially realisable morality'.[238] The Court may itself have formulated such principles by reference to parallel developments in adjacent rules or fields of the law.[239] At times it has done this after having expressly excluded the existence of an antecedent law in the matter.[240] A frequent strategy has been to aim at maximal effectiveness of the law, typically to curtail the 'artful devices' of the state burdened by the obligation.[241]

In a thoroughly realist vein, Lauterpacht dismisses the view of judicial practice as the application of rules, for 'those rules are often obscure or controversial'.[242] And yet, shunning realism, he takes care to qualify that this is not to give the Court a license to replace the law, or party intention, or to allow a 'rule of thumb' to replace a 'flexible, critical and discriminating' application of the law.[243] This balancing of freedom and constraint, creation and repetition, is a central part of Lauterpacht's Victorian mindset and constitutes the atmosphere of reasonableness and responsibility that he attributes to international courts. Everything depends ultimately on the practical wisdom of judges that enables them to see how far they can go and at what point deference to diplomacy and state will become necessary.

In fact, Lauterpacht's utopia is a world ruled by lawyers. Each of the three reasons for judicial caution that he discusses is a reason of conjecture, linked to the present, temporary and intrinsically unsatisfactory character of international society. Lauterpacht thinks that judges should not legislate because they would lose the confidence of the governments. There would then be no cases submitted to them, and no guarantee that their decisions would be implemented.[244] Every reason is connected to the statist character of politics, and to self-judgment. None of them would be present in Lauterpacht's federalist utopia. There, national governments would have no sover-

236 *Ibid*, 20–25.
237 *Ibid*, 158–165.
238 *Ibid*, 172. Cf. also 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 24, at 205–208.
239 E.g. by expanding the scope of legal subjects or basing the rule on the vitiating effect of duress on the outlawry of war. *Development*, 173–185.
240 As in the *Anglo-Norwegian Fisheries* and *Reservations* cases, *ibid*, 186–199.
241 *Ibid*, 227–293.
242 *Ibid*, 165.
243 *Ibid*, 283. Indeed, a complete freedom would be unthinkable also from a scientific point of view: 'It is to a large extent this practical aspect of its operation, namely in the ability of the lawyer to attempt to predict the nature of the decision, that law is a science', *ibid*, 21.
244 *Ibid*, 75–76.

eign right of veto, the jurisdiction of courts would be compulsory and the implementation of their decisions would fall upon effective administration. In other words, judges should exercise caution for reasons of prudence, relative to the present nature of the international world, not because of any principled objections to judicial legislation. None of the incidents of judicial caution that Lauterpacht takes up is portrayed in a positive or even less progressive light. Some appear as 'disappointments',[245] others turn out to be, despite appearances, bold attempts to curtail state freedom.[246] If indeed (as Lauterpacht assumes) the international bar is that collection of enlightened cosmopolitan liberals, what reason would there be for thinking otherwise?

The need for an independent legal process arises from the wish to curtail self-judgment. The legal process, however, is not an automatic application of rules. Claims presented by states are never fully right or wrong, but have 'varying degrees of legal merit'.[247] Everything depends on the judge's professional ability and good sense, his skill in finding a reasonable balance. With a subtle shift, the final resting-place of Lauterpacht's argument lies in the enlightened responsibility of judges and lawyers, their ability to manage world order by equitable compromises, by overruling unjust laws and suggesting desirable legislative changes. As Lauterpacht once noted, 'in the sphere of action, ideas may not be more potent than the individual human beings called upon to realize them'.[248] The image of progress is no longer (as in the inter-war 'political' period) that of collective security being realized in Geneva, nor (as it was after the Second World War) of UN bodies administering human rights. Nor is progress fixed in legal rules and principles. Instead, it now resides in the judicial profession, in its ability to construct a world of legal constraint by its daily activity of settling conflicting claims.

VII

Austrian liberalism of the *fin de siècle* was, Carl Schorske has written, a

> garden-variety Victorianism ... secure, righteous and repressive; politically it was concerned for the rule of law, under which both individual rights and social order were subsumed. It was intellectually committed to the rule of the mind over the body and to latter-day Voltairism: to social progress through science, education and hard work.[249]

Its backbone had been the 'legalistic, puritanical culture of both bourgeois and Jew'.[250] As the Empire slowly disintegrated at the turn of the century under the

245 *Ibid*, 100.
246 Thus the discussion of the Court's attempt to limit the application of *rebus sic stantibus* speaks less about judicial caution than about the Court's willingness to affirm the law's binding force in the face of governmental attempts to circumvent it. *Ibid*, 84–87.
247 *Ibid*, 398.
248 'Brierly's Contribution', *supra* note 18, at 451.
249 Schorske, *supra* note 82, at 6.
250 *Ibid*, 7

pressure of nationalist agitation and class conflict, 'the only social group which seemed to represent the state were the jews'.[251] The Habsburg Jewry, in particular, had manifested a 'total dedication to liberalism'.[252] From this perspective, it is possible to understand why the ideals of rationalism and progress became so firmly embedded in Lauterpacht's work, just as it characterized the *oeuvre* of his more famous colleagues Jellinek and Kelsen. Lauterpacht's legal utopia seeks to revive on a cosmopolitan scale the Victorian liberalism that failed to survive the offensives of nationalism and socialism in Central and Eastern Europe.[253]

It might seem curious that an active Zionist during the second decade of this century was transformed into a cosmopolitan individualist during the third. However, (at least part of) Jewish nationalism had been essentially reactive and had arisen to combat German and Austrian anti-Semitism. What Viennese Zionists like Theodor Herzl – or Lauterpacht – wished to create was a secular, liberal-democratic state. In this they were opposed by the rabbis and the religious right.[254] When the protective need for a national Jewish state no longer seemed pressing – after Lauterpacht's arrival in Britain – Zionism could transform itself back into a cosmopolitan ethos that was the natural home of the Jewish enlightenment.[255] It was not until the oppression of the German Jewry began that an extreme protective need arose anew. At that point, notwithstanding his critical posture towards statehood, Lauterpacht was prepared to lend his efforts to support the establishment of the state of Israel.

Where late nineteenth century Viennese culture moved from the ideal of the man of reason to a search for the psychological, feeling man, Lauterpacht never followed suit. His utopianism remained grounded in the idea of the rational man, convinced that peace and social order through law were inescapable rational necessities and political passion an external distortion. Still in 1946, almost absurdly, Lauterpacht's Victorian faith remained unshaken:

> The modern state is not a disorderly crowd given to uncontrollable eruptions of passion oblivious of moral scruples. It is, as a rule, governed by individuals of experience and ability who reach decisions after full deliberation and who are capable of forming a judgment on the ethical merits of the issues confronting them.[256]

It was the legal profession's task to protect the powers of reason – universal by definition – against a modernist *Gefühlskultur*, the 'collective passion',[257] the politics of the crowd, short-sighted positivism, national interest and in particular the 'crime', the 'ruthless egotism' and the 'ideology' of the *raison d'état*.[258] This rationalism was the driving force behind 'progressive' proposals, such as those to do away with

251 H. Arendt, *The Origins of Totalitarianism* (2nd edition, 1958) 25 and generally 11 *et seq.*
252 Beller, *supra* note 83, at 123.
253 For the utopia of a united humanity as part of the Jewish enlightenment, cf. *ibid.* 141–143.
254 Aside from the above work by Schorske, cf. McCagg, *supra* note 84, at 98–199.
255 Beller, *supra* note 83, at 140–143.
256 'The Grotian Tradition', *supra* note 18, at 338.
257 'Spinoza and International Law', *supra* note 19, at 9.
258 'The Grotian Tradition', *supra* note 18, at 344, 345, 346.

state immunity,[259] to establish the criminal responsibility of states and a collective system of humanitarian intervention.[260] It was indissociable from a liberalism that sought to guarantee maximum political freedom for the individual in the economic and political realms and to limit respectively the legitimate field of public authority.[261]

Internationally, sovereignty was often manifested in the faculty of self-judgment, and the problem of world order for Lauterpacht became how to control self-judgment. This was a question of institutional competence and jurisdiction, the exercise of constraint over states. Paradoxically, the liberal argument that had in the nineteenth century been used to buttress the state against the forces that had threatened it was in the twentieth century turned against the state that had succumbed to those forces. That argument received force and direction from, and was limited by, a strong background morality that forms the key to the specifically Victorian outlook of Lauterpacht's liberalism.

Contemporary assessments often highlight the importance of *morality* for Lauterpacht. Jenks, for instance, speaks about the 'essentially moral foundation' of Lauterpacht's work, but extends that attribute even deeper with the observation that '[t]he outstanding quality of the man was his moral stature'.[262] Of course, Lauterpacht himself insisted that a conception of international law as derived from state will was insufficient and that there was a constant need 'for judging its adequacy in the light of ethics and reason'.[263] Among the many virtues of Grotius, Lauterpacht admired his 'atmosphere of strong conviction, or reforming zeal, of moral fervour'.[264] Where law might be lacking, unclear, contradictory, or unjust – and it was often precisely that – morality came to the rescue, ensuring the law's completeness and acceptability, sometimes in the guise of general principles, sometimes as domestic law analogy, always through the constructive mediation of judicial practice. This was the Grotian tradition, to satisfy 'the craving, in the jurist and layman alike, for a moral content of the law'.[265] The question, however, is: What does 'morality' in this connexion mean?

259 In 1950, Lauterpacht wrote a memorandum to a British Interdepartmental Committee on State Immunity which ended with a proposal to do away with a substantial part of immunity and to place the foreign sovereign in a situation analogous to that of the domestic sovereign. 'The Problem of the Jurisdictional Immunities of Foreign States (1951, *CP*, vol. 3) 315–373. Here, as elsewhere, progress seemed to reside in a submission of states to the legal process.

260 Cf. e.g. 'General Rules', *supra* note 34, at 302–4; 'Book Review. Karl Lowenstein, Political...', 23 *BYbIL* (1946) 510–511.

261 Cf. 'Revolutionary Actitivies', *supra* note 99, at 251–278 (an argument against state involvement in peaceful transboundary political subversion); 'Boycott in International Relations' (1933, *CP*, vol. 3) 297–311 (an argument in favour of the freedom of non-public entities to engage in collective commercial countermeasures). Cf. also 'Revolutionary Propaganda by Governments' (1928, *CP*, vol. 3) 279–296 ('revolutionary propaganda, when originating from the Government itself, constitutes a clear international delinquency', p. 281).

262 Jenks, *supra* note 107, at 101, 102. Cf. also Sir Gerald Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge', 37 *BYbIL* (1961) 7–10.

263 Jenks, *supra* note 107, at 330.

264 'The Grotian Tradition', *supra* note 18, at 361.

265 *Ibid*, 364.

It is possible to examine Lauterpacht's moral rationalism by contrasting it to the post-Victorian modernisms of Kelsen and E.H. Carr. In his otherwise positive assessment of the *Reine Rechtslehre*, Lauterpacht swept aside Kelsen's rejection of a natural law basis for his system, a rejection Lauterpacht saw as a 'theory superadded to the main structure of his doctrine – principally for the sake of argumentative advantage, but ultimately to the disadvantage of the whole system'.[266] The almost *ad hominem* character of this view reveals Lauterpacht's inability to appreciate the critical force of Kelsen's moral agnosticism. Lauterpacht doubts whether Kelsen in fact succeeded in keeping his theory uncontaminated by morality and suggests that the success of his work lies in that he did not.[267] Kelsen would not have disagreed with Lauterpacht's point that morality enters the law through its application and interpretation, but would only have insisted that how they do it is not a properly legal question – though not less important for that reason. Kelsen did not deny the place of values in law (and for legal study), but insisted on the need for openness in 'value-choices' – for instance, the choice between dualism and monism.[268] Such relativism was not part of Lauterpacht's world. The Eternal Verities could not be subjected to 'choice', but were embedded in the teleological framework of history and expressed in the best works of the liberal philosophical tradition.

Where Lauterpacht found in Kelsen too little morality, in Carr he found too much. Building upon the primacy of states and state power, realism accepted a double morality – one morality for individuals, another for states – in which the reason of the state always found a justification to override the individual, but universal, cosmopolitan ethic. From the perspective of methodological individualism,[269] state morality, as expressed, for instance, in the Hoare-Laval pact,[270] was a vicious distortion, a metaphysical mistake. It blinded realists from grasping that the world was united in the search for a single human good that could only be understood as the good of individuals, similar in their nature as social animals.

In Lauterpacht's work, the (realist) tragedy of irreducible conflict, of incompatible goods, is defined away. Morality and enlightened self-interest always point in the same direction. The general good is 'identical with' national interest, conceived as the interest of the individuals forming the nation.[271] The optimistic belief in the parallel interests of the rich and poor, the weak and powerful, seeks to restore a pre-Dickensian world of justice and harmony – the 'tradition of idealism and prog-

266 'Kelsen's Pure Science of Law', *supra* note 12, at 424, 428–9.
267 *Ibid*, 428–9.
268 Cf. e.g. H. Kelsen, *Introduction to Problems of Legal Theory* (Translated by Bonnie and Stanley Paulson, 1992) 113–117.
269 'The analogy – nay, the essential identity – of rules concerning the conduct of states and of individuals ... is due to the fact that states are composed of individual human beings; it is due to the fact that behind the mythical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are actual subjects of rights and duties, namely individual human beings.' 'The Grotian Tradition', *supra* note 18, at 336.
270 'Professor Carr on International Morality', *CP*, vol. 2, at 67–73. See also 'The Grotian Tradition', *supra* note 18, at 333–346.
271 'Professor Carr', *supra* note 270, at 90.

ress'[272] – in which man's essential nature is social and where the deepest truths are the simplest ones, the Grotian 'law of love, the law of charity, of Christian duty, of honour and of goodness'.[273]

The starting point of the realist critique had been 'the collapse of the whole structure of utopianism based on the concept of the harmony of interests'.[274] Lauterpacht responded by repeating the axiom of the harmony of interests that is precisely what the realists had put to question. He can only remain puzzled by the incomprehensibility of somebody not taking for granted the Truth, for which 'man' is by nature endowed with 'an ample measure of goodness, altruism, and morality'.[275] Between tragedy and optimism no rational argument could take place. Only the way of indignant rejection remained open.[276]

Lauterpacht's reactions towards Kelsen and Carr reveal the nature of his Victorianism. It relies on the interlocutor's willingness to take for granted the intrinsic rationality of a morality of sweet reasonableness, the non-metaphysical doctrine of the golden middle. It relies not on general principles or logical deductions, as would a Thomistic, religious morality. It is a morality of attitude – of seriousness – at least as much as of substance, a morality of putting one's foot down when everybody's arguments have been given a fair hearing. It is a morality of tolerance and of personal and professional virtue. It is a morality of scales, controlled by the attempt to balance right with duty and freedom with reason.[277] It is a morality of control and self-control, for which the greatest desire is the end of desire, a morality which accepts Spinoza's *dictum*:

> [t]he man is free who lives, not according to the right of nature but according to reason. And it is liberty achieved through obedience to reason which is the ultimate object of the state.[278]

VIII

I have interpreted Lauterpacht's work in terms of a movement that started as a theoretical-doctrinal effort to envisage an international legal order resembling the structures of the liberal state and ended up celebrating the virtues of a legal pragmatism that was alien to theory and doctrine. For me, Lauterpacht's *oeuvre* and career constitute a striking illustration of an international legal consciousness that sought to resuscitate the rationalism of the nineteenth century in the aftermath of the Great

272 'The Grotian Tradition', *supra* note 18, at 359–363.
273 *Ibid*, 334.
274 Carr, *supra* note 24, at 62.
275 'The Grotian Tradition', *supra* note 18, at 24.
276 Lauterpacht's response to E.H. Carr remains unpolished and it was not published prior to inclusion in the *Collected Papers*.
277 For the former point, cf. Lauterpacht's argument in favour of the criminal jurisdiction of British courts against 'Lord Haw-Haw', or William Joyce, American citizen domiciled in Britain at the service of Germany's propaganda during the war. 'Allegiance' *supra* note 211, at 221–241.
278 'Spinoza and International Law', *supra* note 19, at 374.

War but used up its emancipatory potential in the doctrinal struggles of the 1930s, became eclectic after the Second World War, and was institutionalized as the normal discourse of law and diplomacy in the 1960s.

Lauterpacht's main theoretical work, *The Function of Law in the International Community* (1933), set up the doctrine of a comprehensive international legal order to defend in legal terms the unity of a world that seemed to be heading from fragmentation to catastrophe, from the League of Nations to the Holocaust. It was compatible with the ideas of the nineteenth century Jewish enlightenment and prevailing pacifist sentiments. It also helped Lauterpacht to assimilate within a cosmopolitan elite that constructed its identity from rationalist, anti-nationalist sentiments and an individualist cultural outlook.

During his career, Lauterpacht applied this projected legal order to politics, ethics and professional practice. I see these moves as corresponding to three orientations in twentieth century liberal jurisprudence. The attempt in the 1930s and 1940s to construe international law as a scientifically based constraint on the conduct of foreign policy ended with the collapse of the inter-war peace system and the establishment of the United Nations on 'realist' principles. The central thesis in *Recognition in International Law* (1947) (namely that nationalism can be tempered by a rational legal order) was the most ambitious outcome of this effort. The subsequent effort to articulate in ethical terms the political unity that seemed lost as the juggernaut of modernity crashed into Auschwitz culminated in the publication of *Human Rights in International Law* (1950), a celebration of rationalist naturalism that turned on a practical proposal. Lauterpacht's final move was to emphasize the significance of enlightened judicial practice – that is, legal pragmatism – as an instrument for peace, and is presented in the 1958 edition of *The Development of International Law by the International Court*. Where *Function of Law* completed the work of theoretical reimagination, *Recognition* hoped to bridge the gap between that theory and practice, *Human Rights* instituted an abstract justification for the legal project and, finally, *Development* inaugurated pragmatism as the culture of future generations of international lawyers.

My interest in this narrative lies in what it tells us about what happened to international law as political commitment during the twists and turns of a particularly tragic half-century that came to rest in a pragmatism of the 1960s, a pragmatism which by now may have spent whatever creative force it once had.[279] I have stressed the biographical and historical aspects of Lauterpacht's *oeuvre* to expel the sense that his doctrine was merely a free-floating academic play or at best a move in a sealed-off utopian discourse. I see it as a consistent attempt to maintain, through projection, the wholeness of a social world and personal identity when none of the competing projects (of science, politics or economy) had been up to the task. Lauterpacht was a Victorian liberal in a time when the dialectic of the Enlightenment

279 Cf. my 'International Law in a Post-Realist Era', 16 *Australian Yearbook of International Law* (1995) 1–19.

was only slowly asserting itself. That he had no doubts about the universal and intrinsically beneficent character of legal reason defines him as a historical agent whose defence of international law through an underlying federalist *Weltanschauung* maps out for us a large field of our shared professional past. For me, Lauterpacht's main contribution is to have articulated with admirable clarity the theoretical and historical assumptions on which the practice of international law is based. If we now continue those practices, but feel embarrassed when trying to express their premises in the language of historical optimism, I see only two ways out. Either the practice must be changed (so as to reflect our modern/post-modern theory), or we have to readdress the premises. In the latter case, we must ask ourselves whether it is possible to continue the project of a global federalism that should be managed by the last remaining group of Victorian gentlemen, international lawyers.