

# The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function

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## An Introduction

For British international lawyers, Hersch Lauterpacht is still a dominant presence. His work is a benchmark, an intellectual paradigm encapsulating an approach to international law which has been profoundly influential and which continues to exert a sway in British institutions. The thesis of this paper is that Lauterpacht's discharge of the judicial function constituted the implementation of his theory of international law.<sup>1</sup> Unlike some others, I do not adhere to the view that Lauterpacht contributed to the homicide of international law theory in Britain.<sup>2</sup> My core position is rather to the contrary. Lauterpacht was essentially a theorist who found himself in the happy position of being able to practise his theory as a judge of the International Court of Justice. His writings attest that he was acutely aware that theoretical predisposition inevitably affects the practice of international law.<sup>3</sup>

Following Lauterpacht's death in 1960, a number of assessments of his work have appeared.<sup>4</sup> In dealing with his judicial career, these tend to focus on the substance of

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1 In constructing Lauterpacht's theoretical position, I have ignored the views expressed in the successive editions of Oppenheim's *International Law*, edited by Lauterpacht. On this point, I follow Jenks' argument that in *Oppenheim* Lauterpacht preserved Oppenheim's positivist theoretical position rather than state his own. See Jenks, 'Hersch Lauterpacht - The Scholar as Prophet', 36 *BYbIL* 1 (1960) 67.

2 See Carty, 'Why Theory? - The Implications for International Law Teaching', in P. Allott *et al*, *Theory and International Law: An Introduction* (1991) 75, at 77.

3 See, for instance, H. Lauterpacht, *The Function of Law in the International Community* (1933) 57 (hereinafter *Function of Law*).

4 For instance, Fitzmaurice, 'Hersch Lauterpacht - The Scholar as Judge. Parts I-III', originally published in *BYbIL*, (vols. 37-39, 1962-64), reprinted in G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (1986) 634, 705 and 788, and *Idem*, 'Hersch Lauterpacht and his Attitude to the Judicial Function', 50 *BYbIL* (1979) 1; I. Hussain, *Dissenting and Separate Opinions at the World Court* (1984) Ch. 4; Jenks, *supra* note 1; Jessup and Baxter, 'The Contribution of Sir Hersch Lauterpacht to the Development of International Law', 55 *AJIL* (1961) 97; Kelsen *et al* in 10 *ICLQ* (1961) 1; McNair, 'Hersch Lauterpacht 1897-1960', 47 *Pro-*

## The Theorist as Judge

his judicial performance and generally only make passing reference to his more abstract concept of the international judicial role. I do not propose to rehear these skilful analyses, preferring to examine the conceptual foundations of Lauterpacht's judicial role-performance in which his idea of international law, and of the proper function of the international judge, played a crucial influence. Apparently paradoxically, given his 'condemnation as a legal doctrine' of positivism because of its 'futility as a legal theory'<sup>5</sup> and his ultimate adoption of natural law, Lauterpacht's theoretical construction of international law is rooted in Kelsenite legal epistemology. This is evident in the role and function that Lauterpacht attributed to general principles in international law, and more generally in his concept of the judicial function.

## Another Introduction

I was raised in the Lauterpacht tradition of international law. Iain MacGibbon, who first taught me public international law at Edinburgh, had been a graduate student of Lauterpacht and had fallen under his spell. MacGibbon's admiration for Lauterpacht was manifest. My graduate studies at Cambridge continued in this vein. In particular, there I was fortunate to be taught by Elihu Lauterpacht, whose lectures raised issues I subsequently pursued in my doctoral dissertation. He also partly supervised this work, and in doing so afforded me the opportunity to break with the tradition. His advice that I should read all International Court cases, combined with the more theoretical work I was pursuing in tandem, led me to disagree with Lauterpacht's view of the judicial function which attempts to impose a normative objectivity<sup>6</sup> on an essentially argumentative enterprise.

I remain indebted to Eli, even within the specific confines of this paper. Going beyond kindness, when I was unable to visit him in Cambridge, as I had planned, in order to consult his father's unpublished papers, Eli sent the most important one<sup>7</sup> to

*ceedings of the British Academy* (1961) 371; and Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', 55 *AJIL* (1961) 825, reprinted in S. Rosenne, *An International Law Miscellany* (1993) 781 (subsequent references are to the reprint).

5 See *Function of Law*, 65: it should be emphasized that Lauterpacht was clear that the positivist doctrine of international law which he attacked 'resembles only in name the corresponding tendencies in other branches of law'. *Ibid.*, 67, see 67-69.

6 Although Lauterpacht recognizes that there is a subjective aspect to the discharge of the judicial role, he is equally clear that this should not be exaggerated: see *Function of Law*, 102-103; see also M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 35-36, and 424-425.

7 This was Lauterpacht's 'Provisional Report on the Revision of the Statute of the Court', dated 1 September 1955. This was prepared for consideration within the International Court and comprises a 104-page typescript, double-spaced, with some manuscript annotations. This document has been previously mentioned by Jenks, *supra* note 1, at 97-98; and by E. Lauterpacht, *Aspects of the Administration of International Justice* (1991) 4-5.

It appears from internal evidence (3, para. 4) that the report was motivated by the possibility of a General Conference for the Revision of the Charter being held after the Tenth Annual Session of the General Assembly. In the event, GA Res. 992 (X) of 21 November 1955 decided, in principle,

Glasgow. It is perhaps as well that these personal and intellectual debts know no currency for repayment, otherwise I would be bankrupt before I managed to pay off even a fraction of my reckoning with Eli. While I am confessing these liabilities, it would be unfair if I did not also particularly thank Philip Allott, Rosalyn Higgins, Neil MacCormick and Iain MacGibbon for their stimulus, help and encouragement.

## I. Lauterpacht, Grotius and Kelsen

Some commentaries on Lauterpacht<sup>8</sup> refer to his neo-Grotian concerns<sup>9</sup> with the position of the individual in international law<sup>10</sup> and the demands of morality in tempering a strict positivist approach to international law. This general aspect of Lauterpacht's legal philosophy was evident very early in his published work. A natural law thesis,<sup>11</sup> albeit initially inarticulate, is the thread which runs through and unifies Lauterpacht's work. Only this can give him the ontological position necessary for his quest for objectivity in the international judicial function, and is thus indispensable in any consideration of the interlocking issues which are central in understanding Lauterpacht the judge – his concern with the Rule of Law in international relations, the substantive role of general principles, and the prohibition of *non liquet*.

Although Lauterpacht emphasized the importance of the 'Grotian Tradition' as encapsulating his philosophy of international law, this article must be placed in both perspective and context. Its skilful invocation of Grotius is essentially a conceit upon which Lauterpacht hangs his own argument, which in turn stems from a more exten-

that a Review Conference should be held, and established a Preparatory Committee to make the necessary arrangements. This Committee met regularly, invariably to postpone the Review Conference, until the General Assembly's Twenty-Second Annual Session in 1967 and then ceased to function. See B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995) 1184.

8 For instance Hussain, *supra* note 4, at 126 *et seq*; and Rosenne, *supra* note 4, at 786–787.

9 See 'The Grotian Tradition in International Law', 23 *BYbIL* (1946) 23, reprinted in H. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*, systematically arranged and edited by E. Lauterpacht (hereinafter *CP*) vol. 2, at 307.

In his editorial note to this paper, Eli Lauterpacht notes, 'From conversations which my father had with me, I know that he regarded this article as probably the most important that he ever wrote' (*ibid*). Lord McNair was of the same opinion – 'he told me (in these or similar words) that it contained more of his essential thinking and faith than anything else that he had written', McNair, *supra* note 4, at 379.

10 Concern with the individual was an early feature of Lauterpacht's work, greatly predating the express emergence of his neo-Grotian theme. See, for instance, his analysis of the *Jurisdiction of the Danzig Courts* advisory opinion, PCIJ Ser.B, No.15 (1928), in *The Development of International Law by the Permanent Court of International Justice* (1934) 50–52 (hereinafter *Development I*) and cf. *The Development of International Law by the International Court* (1958) 173–176 (hereinafter *Development II*).

11 Although natural law theory takes centre stage in Lauterpacht's *International Law and Human Rights* (1950, hereinafter *Human Rights*), this exposition is weak and unconvincing. It lacks the synthesis and integration found in the 'The Grotian Tradition', *supra* note 9, and the *Function of Law*, and is more diffuse, presenting a narrative history of the doctrine without a clear focus on Grotius.

## The Theorist as Judge

sive argument presented in the *Function of Law*. In essence, the 'Grotian Tradition' can be seen to develop a suggestion made in the *Function of Law* regarding the basic norm, or fundamental presupposition, of the international legal order. In a brief passage, which is key to an understanding of Lauterpacht's concept of law, he states:

the question of the *vis obligandi* of the common will of States is a problem which cannot be solved by purely empirical considerations, but requires a juristic foundation. That foundation Anzilotti, following Kelsen, finds in the rule *pacta sunt servanda* conceived as a necessary *a priori* assumption of the international legal system which, although capable of explanation by reference to political or moral considerations, cannot itself be proved juridically, just as the legal force of the highest constitutional rule within the State cannot be proved as a juridical proposition. Within the State the rule *pacta sunt servanda* is one of the rules of law sanctioned by the legal order; in international society it constitutes the highest, irreducible, final criterion. The basis of international law is thus finally divorced from the will of States as its ultimate formal source.<sup>12</sup>

Lauterpacht indicated that, to some extent, he found *pacta sunt servanda* inadequate as a fundamental presupposition because it refers solely to agreements between states and accordingly does not directly explain the binding force of custom or of general principles of law.<sup>13</sup> He suggests an alternative:

There is no reason why the original hypothesis in international law should not be that the will of the international community must be obeyed.... An initial hypothesis expressed in the terms of *voluntas civitatis maximae est servanda* would point, as the source of law, to the will of the international society expressing itself in contractual agreements between its constituent members, in their customs, and in the general principles of law which no civilized community can afford to ignore; ... a hypothesis which, by courageously breaking with the traditions of a past period, incorporates the rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions. The view that such a community exists is not confined to the modern critics of State sovereignty ... It was stated on the very threshold of international law by Grotius: '*haec vero ... societatis custodia, humano intellectui conveniens, fons est ejus juris, quod proprie tali nomine appellatur*' .... If it is true that the initial hypothesis ought to be not a maxim with a purely formal content, but an approximation to a social value, then, indeed, the first postulated legal cause can fittingly be formulated by reference to the international community as such, and not to the will of States.<sup>14</sup>

This tentative attempt at a reformulation of an initial hypothesis was abandoned in the 'Grotian Tradition'. However, the underlying idea was given additional emphasis as Lauterpacht argued that much of international law follows the precepts of natural law. Moreover, he argued: 'In a wider sense, the binding force of even that

12 *Function of Law*, 418.

13 *Ibid.*, 420-421.

14 *Ibid.*, 421-423: notes omitted and paragraph breaks suppressed.

The quotation from Grotius is from *De jure belli ac pacis. Libri tres. Prolegomena*, para. 8, and reads in full, '*Hæc vero, quam rudi modo jam expressimus, societatis custodia, humano intellectui conveniens, fons est ejus juris, quod proprie tali nomine appellatur.*' In the *Classics of International Law* translation (1925), this is rendered as 'This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called' (note omitted).

part of it that originates in consent is based on the law of nature as expressive of the social nature of man.<sup>15</sup> This shift from 'the will of the international community' to 'the social nature of man' is consonant with Lauterpacht's identification of the individual as 'the ultimate unit of all law'<sup>16</sup> and with his inclusion of natural law doctrine as an inherent part of international law.<sup>17</sup> Lauterpacht's concept of natural law is unavowedly liberal in orientation, as may be seen in his argument that 'the State ... has no justification and no valid claim to obedience except as an instrument for securing the welfare of the individual human being'.<sup>18</sup> This spills into his discussion of the history of natural rights, particularly that of the Middle Ages,<sup>19</sup> onto which Lauterpacht simply transcribes the modern concept of the individual as autonomous from his social/family group and as possessed of a self-reflecting identity. The idea of the individual is neither immutable nor universal, but rather historically and culturally contingent.<sup>20</sup> Lauterpacht's interpretation of classical natural law theory is thus one solely from the standpoint of a mid-twentieth-century Western European liberal intellectual.

Lauterpacht denies that natural law is necessarily arbitrary,<sup>21</sup> and claims that it can be a progressive force. In particular, he argues that in the Grotian incorporation of natural law into international law, the substantive merits and demerits of natural law are not at issue:

Undoubtedly the law of nature has often been resorted to in support of causes dubious and retrogressive. But this ambivalence of the ideology of natural law is only slightly relevant in the field of international law. There, by and large, it has acted as a lever of progress. The law of nature has been rightly exposed to the charge of vagueness and arbitrariness. But the uncertainty of the 'higher' law is preferable to the arbitrariness and insolence of naked force.<sup>22</sup>

15 'The Grotian Tradition', *supra* note 9, at 330; cf. *Human Rights*, at 74 where he argues that natural law doctrine constitutes 'that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international'; and also 'Kelsen's Pure Science of Law' (1933, *CP*, vol. 2) 404, at 425–426 and 429.

16 'The Grotian Tradition', *supra* note 9, at 336, see 333–339 generally. Not surprisingly, concentration on the individual is a key feature of *Human Rights*, see especially 73 *et seq.*: at 72 Lauterpacht states that the recognition of the individual as a subject of international law 'lends to the law obtaining between sovereign States the beneficent complexion of a law of nations conceived as the universal law of mankind'.

17 See especially 'The Grotian Tradition', *supra* note 9, at 329–333.

18 *Human Rights*, 80; see also Lauterpacht's previously unpublished 1941 paper, 'The Reality of the Law of Nations', *CP*, vol. 2, at 50.

19 See *Human Rights*, 84 *et seq.*

20 Darnton captures this point succinctly:

other people are other. They do not think the way we do.... [N]othing is easier than to slip into the comfortable assumption that Europeans thought and felt two centuries ago just as we do today – allowing for wigs and wooden shoes.

R. Darnton, *The Great Cat Massacre* (1984) 4. See also C. Taylor, *Sources of the Self: The Making of Modern Identity* (1989).

21 *Human Rights*, 100 *et seq.*

22 'The Grotian Tradition', *supra* note 9, at 332–333; see also *Human Rights*, 103 *et seq.*, and 'Kelsen's Pure Science of Law', *supra* note 15, at 428–429. In this brief article, Lauterpacht reserves his criticism solely for Kelsen's rejection of natural law doctrine, which he sees as 'superadded to the main structure of his doctrine – principally for the sake of argumentative advantages, but ultimately to the disadvantage of the whole system' (at 424).

### The Theorist as Judge

Lauterpacht's concern with natural law conditions his discussion of the fundamental presupposition of international law. He notes that positivists, in particular Kelsen, despite his rejection of natural law theory, shared with Grotius the same basis of international law, namely *pacta sunt servanda*. Although this was a precept of natural law for Grotius, for Kelsen it was simply the meta-legal initial hypothesis of the legal order. Lauterpacht adopted the Grotian position, ultimately concluding that 'the rule *pacta sunt servanda* is the initial hypothesis of the Law of Nations',<sup>23</sup> basing this in natural law<sup>24</sup> and the social nature of man:

Some prefer to consider it as being in itself of an extra legal character for the reason that the validity of the ultimate source of legal obligation cannot, logically, be explained in terms of law; Grotius grounded its binding force in the law of nature ... the difference is perhaps not so profound as may appear at first sight.<sup>25</sup>

Lauterpacht saw this simply as a 'methodological difference' of which 'we cannot be sure of its practical relevance'.<sup>26</sup>

By presenting these alternatives in this way, Lauterpacht demonstrates not only his debt to Grotius, but also to his teacher Kelsen. Kelsen's theory has often been misrepresented as self-defeating. The claim has been made that the pure theory's attempt to eliminate value from law itself presupposes value or lapses into sterility.<sup>27</sup> This is to misconceive Kelsen's enterprise, which was essentially epistemic rather than substantive. Accordingly, there is no contradiction in arguing that Lauterpacht, while adhering fundamentally to a natural law position, understood law within a Kelsenite framework.

This influence is particularly clear in Lauterpacht's explanation of the role played by general principles of law in international legal argumentation where he wraps a substantive natural law approach within Kelsenite legal epistemology. The importance of general principles in Lauterpacht's construction of the international judicial function cannot be underestimated. Not simply do they constitute a method by which an international judge can avoid delivering a *non liquet*, but general principles play a central role in Lauterpacht's conception of the Rule of Law in international society. Moreover, the latter is perceived in a manner closely associated with Kelsenite doctrine, which Lauterpacht emphasized in his brief commentary on Kelsen<sup>28</sup> – namely, the gradual concretization of law.

23 In contrast to the opinion expressed in *Function of Law*, Lauterpacht argues in 'The Grotian Tradition' that *pacta sunt servanda* gives a basis for the 'volitional Law of Nations', that is international law which is based on agreement, 'whether expressed in a treaty or implied by custom' (*supra* note 9, at 354).

24 Lauterpacht also saw substantive general principles of law as expressive of natural law, see *infra*.

25 'The Grotian Tradition', *supra* note 9, at 354, see 353–354. On *pacta sunt servanda* and natural law, see also Fitzmaurice, *supra* note 4, vol. II, at 597–598, and his 'Some Problems Regarding the Formal Sources of International Law', in F.M.van Asbeck (ed.), *Symbolae Verzijl* (1958) 153, at 162 *et seq.*

26 'The Grotian Tradition', *supra* note 9, at 331; see also *Function of Law*, 418–420.

27 On this see, for instance, Tur and Twining, 'Introduction', in R. Tur and W. Twining (eds.), *Essays on Kelsen* (1986) 1, at 18 *et seq.*; and Raz, 'The Purity of the Pure Theory', *ibid.*, 79, at 80–81.

28 'Kelsen's Pure Science of Law', *supra* note 15, at 410–411.

## II. Law and the Rule of Law

Lauterpacht located the International Court at the centre of the international legal order, arguing that the Court's

original and primary purpose was to decide disputes between States and, by fostering the rule of law among them, to contribute to international peace. That purpose has not wholly materialized owing to the political conditions prevailing after the Second World War and to the reluctance of Governments to confer upon the Court the requisite jurisdiction. These conditions are not necessarily of a permanent character ... [I]t is that purpose which, notwithstanding temporary setbacks, must remain the abiding purpose of the judicial organization of the community of nations under the rule of law.<sup>29</sup>

Within this structure, legal officials, such as judges, play an indispensable role in securing the Rule of Law as when they apply 'the necessary abstract rule of law to the concrete case, they create the legal rule for the individual case before them':<sup>30</sup>

The object of law to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of dispute ... it is essential for the rule of law that there should exist agencies bearing evidence, and giving effect, to the imperative nature of the law. The law's external nature may express itself either in the fact that it is a precept created independently of the will of the subjects of the law, or that it is valid and continues to exist in respect of the subjects of the law independently of their will.<sup>31</sup>

The importance of the judicial function permeates Lauterpacht's concept of law. This is expressed in his argument for obligatory jurisdiction that is itself a consequence of the emphasis which Lauterpacht gives to the gradual concretization of law. Apart from the search for a basic norm, this is the most prominent aspect of Lauterpacht's concept of law which is primarily associated with Kelsen.<sup>32</sup> Norms are relatively indeterminate as they cannot specify all the conditions for their application:

The actual operation of the law in society is a process of gradual crystallization of the abstract legal rule, beginning with the constitution of the State, as the most fundamental and abstract body of rules, and ending with the concrete shaping of the individual legal relation by a judgement of a court, or by an adjudication or decision of an administrative authority, or by an agreement of the interested parties.<sup>33</sup>

Accordingly,

judicial activity is essentially the last link in the chain of the crystallization of the rule of law ... it is the bridge between the necessarily abstract legal rule and the necessarily individual nature of the particular case. Every case is in a sense *primae impressionis*, inasmuch as every case is individual and every rule abstract.<sup>34</sup>

29 'Provisional Report', *supra* note 7, at 4, para.6.

30 *Function of Law*, 255.

31 *Ibid.*, 425-426, note omitted.

32 Lauterpacht acknowledges that this doctrine was first conceived by other theorists, but argues that Kelsen developed it. See 'Kelsen's Pure Science of Law', *supra* note 15, at 411.

33 *Function of Law*, 255-256.

34 *Ibid.*, 102.

### The Theorist as Judge

This doctrine obliterates any distinction between law and obligation or, more precisely, legal relationships. The latter constitute only the specific application of the former. This assimilation of legal material has a peculiar consequence for the presentation of international law:

The actual content of international law is even more meagre than may appear from its presentation in text-books, when we consider that most rules of international law are concerned with a definition of subjective rights established by particular or general treaty. Rights of this nature would hardly appear in a presentation of a system of municipal law which is composed of abstract rules of an objective nature.<sup>35</sup>

There is thus an apparent tension at the heart of Lauterpacht's concept of law. On the one hand, law lies in the legal relationships established by the parties *inter se*, while yet equally on the other hand, law comprises precepts which exist independently of the parties' will.<sup>36</sup>

Further, Lauterpacht sees law as an imperative system, that is as a series of commands directed at the subjects of the legal system to regulate their behaviour. Given his adhesion to *pacta sunt servanda* as the fundamental presupposition underpinning the system, once a state's agreement is given, whether tacitly or expressly, to a norm then the resulting rule binds the state independently of its will. Regardless of whether *pacta sunt servanda* is a customary norm or initial hypothesis, it

constitutes a command, i.e. a rule existing independently of the will of the parties. It is of no consequence that in the international sphere the command does not issue from a political superior. Law may be a command without being the command of an organized political community ... law may be a command merely by virtue of its external nature.<sup>37</sup>

Moreover, Lauterpacht's deontic array appears to be conditioned by that of Kelsen, for whom 'the legal duty is the central and only essential element of the legal system'.<sup>38</sup> It must be conceded that, albeit in the context of a discussion of the Permanent Court's *ex aequo et bono* competence, Lauterpacht stated that '[l]ike the bulk of the rules of private law, the rules of international law are primarily of a permissive character'.<sup>39</sup> However, this must be interpreted in the light of the overarching imperative structure which Lauterpacht imposes on law:

Law, like the State, does not embrace the totality of human relations. It cannot do it, seeing that such social ends as it is capable of achieving can be achieved only through the regulation of the external conduct of men. Law can regulate such conduct only as is suitable for universal and uniform regulation, and as is enforceable by external sanction.<sup>40</sup>

35 *Ibid*, 70, note 2.

36 See, for instance, *ibid*, 425–426; this issue is further considered *infra*.

37 *Ibid*, 419–420. This is in accordance with the Kelsenite rejection of the Austinian view that law is the command of the sovereign, and the consequent replacement in the definition of law of political superiority with that of subordination to the law. Systemic coherence (or legal system membership) thus becomes dependent on derivation from the basic norm (or fundamental presupposition) rather than on promulgation by an identified sovereign (or political superior).

38 'Kelsen's Pure Science of Law', *supra* note 15, at 409, see 409–410.

39 *Function of Law*, 318.

40 *Ibid*, 390.



This statement should not be taken at literal face value, as one of the tenets of Lauterpacht's theory is that international law is complete and offers a solution for any problem which might arise. This is a position which Lauterpacht must necessarily adopt in order that he can sustain his vision of an international Rule of Law. This requires that all disputes are justiciable and thus can be solved by the application of law:

The completeness of the rule of law – as distinguished from the completeness of individual branches of statutory or customary law – is an *a priori* assumption of every system of law, not a prescription of positive law. It is impossible, as a matter of *a priori* assumption, to conceive that it is the will of the law that its rule should break down as the result of the refusal to pronounce upon claims.... There are no gaps in the legal system taken as a whole. The first function of the legal organization of the community is the preservation of peace.... But this primordial duty of the law is abandoned and the reign of force is sanctioned as soon as it is admitted that the law may decline to function by refusing to adjudicate upon a particular claim.... Under the normal rule of law it is inconceivable that a court should pronounce a *non liquet* because of the absence of law.<sup>41</sup>

Lauterpacht's assumption of the completeness of the legal order does not entail that law positively regulates all conceivable activity: 'There is always open to the Tribunal the possibility of rejecting the claim on the ground of the absence of an agreed rule of law supporting the demand.'<sup>42</sup> He argues that the material completeness of the legal system should not be assessed by reference to the possible range of objects which it might regulate, but only by the scope of those which are deemed capable of legal regulation at any given time:

The absence of direct legal regulation of a particular matter is the result of the determination, or at any rate the acquiescence, of the community in the view that, in the particular case, the needs of society and the cause of justice are best served by freedom from interference. To that extent it may correctly be said that the absence of explicit legal regulation is tantamount to an implied recognition of legally protected freedom of action. From this point of view the law, in the fulfilment of its basic function, namely, to ascertain through its organs whether any particular claim is entitled to legal protection or not, is unlimited and faultlessly perfect.<sup>43</sup>

Lauterpacht concedes that the doctrine of the formal completeness of the law guarantees only the formal justiciability of disputes. Residual rules, such as the *Lotus* presumption, operate to prevent the possibility of a *non liquet* simply by providing a method for the formal foreclosure of claims, but this should not mask the existence of material gaps in the law. To fill these gaps, the judge must have regard to the

41 *Ibid*, 64, notes omitted; see also *Development II*, 4–5; and 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law', *Symbolae Verzijl* (1958) reprinted in *CP*, *supra* note 9, 213 at 217. All subsequent references are to the reprint.

42 *Function of Law*, 85. This strategy effectively employs the *Lotus* presumption as a residual closing rule of the international legal system. Lauterpacht constantly criticized this presumption, arguing that it was an unnecessary ruling whose substance was anomalous in the jurisprudence of the International Court. See *ibid*, 94–96; *Development I*, 102–104; *Development II*, 359 *et seq*; and 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 41, at 224 where he stated that the presumption 'is of controversial doctrinal value and of limited practical utility. It often degenerates into a contest as to the distribution of the burden of proof.'

43 *Function of Law*, 392, note omitted.

spirit and purpose of the law<sup>44</sup> because the identification of a material gap is teleological and

amounts in fact to a statement that a result reached by the application of law as it stands is unsatisfactory, and that a different solution is indicated by considerations of the purpose and unity of the law as a whole. In this sense it may be said that to assume that there is a gap is tantamount to suggesting how the *lacuna* should be filled.<sup>45</sup>

In short, the judicial identification of material gaps constitutes the line of development for the law: 'How could law have developed if the assumed absence of gaps expressive of its formal completeness were to be identified with the absence of gaps pointing to material perfection?'<sup>46</sup> In this process, recourse to general principles of law plays a predominant role.

### III. The Nature and Function of General Principles

General principles – and in particular, analogies drawn from municipal law – are important in Lauterpacht's concept of the international legal order.<sup>47</sup> Structurally, they function to ensure the completeness of international law. Substantively, Lauterpacht identifies them with natural law:

With the Statute of the Permanent Court of International Justice, which declared 'general principles of law as recognised by civilised States' – in some ways a modern version of the law of nature – to be one of the primary sources of international law, what was of the essence of the law of nature, namely, its conformity with the actual legal experience of mankind, came once more into its own.<sup>48</sup>

Although the substantive aspect of Lauterpacht's thesis is based in natural law, his explanation of its operation is firmly rooted in Kelsen's legal epistemology and, in particular, the relative indeterminacy of law as this is expressed in the doctrine of gradual concretization.

Broadly, Lauterpacht's doctrine of relative indeterminacy must be reconciled with his concept of the Rule of Law. He argues that the decisive test for the existence of law is the existence of obligatory judicial settlement because 'only through final ascertainment by agencies other than the parties to the dispute can the law be rendered certain'.<sup>49</sup> Relative indeterminacy necessarily entails normative uncertainty and thus, within Lauterpacht's scheme, the need for obligatory jurisdiction. *A fortiori*, by their nature, general principles are indeterminate because they characteristi-

44 *Ibid.*, 85 *et seq.*

45 *Ibid.*, 68, see also 86–87.

46 *Ibid.*, 87.

47 Lauterpacht's major substantive analysis of general principles is, of course, *Private Law Sources and Analogies of International Law with Special Reference to Arbitration* (1927), but this aspect of his work was apparent as early as the dissertation on mandates which he submitted to the University of Vienna in 1922 for the degree of Doctor of Political Science. See *CP*, vol. 3, 29 at 51 *et seq.*

48 *Human Rights*, 115, note omitted; see also *ibid.* 100; *Function of Law*, 53–54; and 'The Grotian Tradition', *supra* note 9, at 329–332.

49 *Function of Law*, 424–425, quotation at 425.

cally operate in disputes where 'there exist no specific rules of international law, but which can be decided by the application of a more general principle of the law of nations'.<sup>50</sup> Thus, for Lauterpacht, the international judge is the typical Kelsenite legal official whose function is to make particular the indeterminate law by shaping it to the instant dispute and issuing directives to the parties detailing their duties.

However, general principles play a more fundamental role in Lauterpacht's construction of the judicial role because general principles, in the last analysis, are available to the judge to prevent the declaration of a *non liquet*. Lauterpacht formulates this as 'the prohibition of *non liquet* ... only means that a court, otherwise endowed with jurisdiction, must not refuse to give a decision on the ground that the law is non-existent, or controversial, or uncertain and lacking in clarity'.<sup>51</sup>

When treaties and custom are neither available nor offer any ground for decision, general principles are the residual legal category upon which a decision can be based:

Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice, which authorizes the judges to apply, in the absence of conventional or customary rules of international law, 'general principles of law recognised by civilised nations' ... is in essential harmony with the attitude which the law of every legal community (in so far as it refuses to sanction the use of force as a means of settling disputes between its members) must expect from its judiciary. It has definitely removed the last vestige of the possibility of gaps conceived as a deadlock in the way of the settlement of a dispute.... [T]he terms of Article 38 of the Statute, and in particular of its third paragraph, are broad enough to allow a legal answer to every dispute. The prohibition of *non liquet* is one of the 'general principles of law recognised by civilised nations'.<sup>52</sup>

#### IV. Lauterpacht's Doctrine of *Non Liquet*

The prohibition of a declaration of *non liquet* is a fundamental component of Lauterpacht's concept of law because this is the necessary corollary of the Rule of Law and the justiciability of disputes – 'the insufficiency of the existing law was originally accepted as a reason for the limitations of the judicial functions, on the ground that the law was not complete'.<sup>53</sup> Legal system closure – that is, the completeness of the legal system whether material or formal – is ensured by recourse to general principles or the use of formal residual rules (such as the *Lotus* presumption).<sup>54</sup> Lauterpacht claimed that no international tribunal had ever declared a *non liquet*<sup>55</sup> and that

50 *Ibid*, 57, note omitted.

51 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 41, at 216.

52 *Function of Law*, 66–67; see also *Development I*, 82; *Development II*, 166; *CP*, vol. 1, at 68 *et seq*; and 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 41, at 221–223.

53 *Function of Law*, 17; see also 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 41, at 224–226.

54 See, e.g., *Function of Law*, 53–54, especially at 53 note 2, and also 85 *et seq*; and also *supra* note 42.

55 See *Function of Law*, 127 *et seq*; *Development II*, 145–148; and 'Some Observations on the Prohibition of "Non Liquet"', *supra* note 41, at 219.

### The Theorist as Judge

the prohibition extended beyond contentious cases to advisory opinions.<sup>56</sup> For Lauterpacht, the prohibition was initially seen as an *a priori* self-evident proposition.<sup>57</sup> He subsequently argued that because the substantive and ethical inadequacies of international law could easily have been a strong inducement in favour of a *non liquet* declaration in given cases,<sup>58</sup> the prohibition is itself expressive of a principle of positive international law.<sup>59</sup>

Lauterpacht notes that the question of *non liquet* has been associated with the problem of stability and change in international relations. More broadly, it has been associated with the relationship between law and justice. It has been argued that a prohibition on *non liquet* might make it impossible for a tribunal to avoid rendering a decision which, owing to the absence of an international legislature or some other effective law-making process, would result in injustice. Accordingly, it would be better if international tribunals could pronounce a *non liquet*, especially if the law is uncertain or controversial. Lauterpacht rejects this view, arguing that a rational solution does not lie in denying the principle that disputes should be settled on the basis of law.<sup>60</sup> Moreover, as disputes once submitted to a tribunal are justiciable and must be settled on the basis of law, he argues that this simply excludes a finding of *non liquet*.<sup>61</sup> A tribunal cannot be concerned with any ethical, political or economic shortcomings of the law,<sup>62</sup> but it is a legitimate aspect of the international judicial function if, while having no doubt as to the law as it is declared in its judgment, the tribunal draws attention to its shortcomings and makes a non-binding recommendation to the successful party for the voluntary modification of its rights.<sup>63</sup> Lauterpacht saw this facility as applicable in both contentious and advisory procedure:

56 'Some Observations on the Prohibition of "Non Liqueur"', *supra* note 41, at 216, note 2; see also *CP*, vol. 1, at 94–95.

57 See *Function of Law*, 64. Although here the point is primarily addressed in terms of the completeness of the legal order, see text to note 41 *supra*. Other theorists, such as MacCormick, appear to see the prohibition of *non liquet* (albeit in municipal systems) as a self-evident and necessary presupposition of judicial activity: "Non liquet" is not an available judgment; the Court must rule on the law and decide for one party or the other, and all concerned must live with the result.' D.N. MacCormick, *Legal Reasoning and Legal Theory* (1978) 249.

58 'Some Observations on the Prohibition of "Non Liqueur"', *supra* note 41, at 223.

59 See *ibid.*, 221–223; and *CP*, vol. 1, at 96–97. In *Function of Law* (at 67), Lauterpacht stated that the prohibition was 'one of the "general principles of law recognised by civilised nations".'

60 See 'Some Observations on the Prohibition of "Non Liqueur"', *supra* note 41, at 226–228, and *CP*, vol. 1, at 97, note 2.

Julius Stone was one of the most prominent theorists associated with the view Lauterpacht rejected. This is considered *infra*. Although Lauterpacht died before the publication of Stone's response to 'Some Observations on the Prohibition of "Non Liqueur"', he was aware of Stone's thesis as this was expressed in *Legal Controls of Armed Conflict* (1954): see *supra* note 41, at 214–215. They had also corresponded on the subject before the publication of Lauterpacht's article. See L. Star, *Julius Stone: An Intellectual Life* (1992) 149, and at 148–151 generally.

61 For instance, *Function of Law*, 130; 'Some Observations on the Prohibition of "Non Liqueur"', *supra* note 41, at 227; and *CP*, vol. 1, at 94.

62 See 'Some Observations on the Prohibition of "Non Liqueur"', *supra* note 41, at 217, 226 *et seq.*; *CP*, vol. 1, at 97; and also *Function of Law*, 245 *et seq.*, and 307.

63 See *Function of Law*, 310 *et seq.*; *Development II*, 217 *et seq.*; 'Some Observations on the Prohibition of "Non Liqueur"', *supra* note 41, at 228 *et seq.*; and 'Provisional Report', *supra* note 7, at 55 *et seq.*, para. 62 *et seq.*

The parties to the dispute or the body requesting the Advisory Opinion may attach importance to knowing what, in the view of the Court which has had the opportunity of a full examination – in all its aspects – of the question put before it, are the desirable modifications of the existing legal position having regard to equitable considerations and to the necessities of friendly and neighbourly relations. The parties are entitled to expect from the Court a purely legal decision and it is in accordance with the primary function of the Court that it should, in the first instance, render a decision of that character.... Moreover, the Court itself may find that the faculty of making recommendations of this nature may on occasions obviate the inducements to, and the reproach and dangers of, judicial legislation departing from the existing law. Faced with the necessity of giving a decision which is fully in accordance with the law but unsatisfactory from many other points of view, the Court may not always find it easy to avoid the substance or appearance of judicial legislation unless it is given the opportunity of expressing its opinion, which would not be binding, as to what – from the point of view of equity and reasonableness – are the desirable changes in the law which the parties or the organ requesting the Advisory Opinion ought to take into consideration.<sup>64</sup>

However, judicial recommendations can only accompany, but not substitute for, a decision. The completeness of the international legal order has as its necessary corollary the prohibition of *non liquet*. The Rule of Law and the possibility of a *non liquet* are simply incompatible. This is not weakened by a possible inconsistency with a rational solution of a given dispute ‘in conformity with moral justice’, as the overall moral justice of a particular law is not necessarily determined by its consonance with moral justice in an individual case.<sup>65</sup>

The systemic necessities – in particular, the maintenance of the Rule of Law – which preclude the possibility of a *non liquet* are buttressed by practical considerations:

the function of the judge to pronounce in each case *quid est juris* is pre-eminently a practical one. He is neither compelled nor permitted to resign himself to the *ignoramus* which besets the perennial quest of the philosopher and the investigator in the domain of natural science.... [L]aw conceived as a means of ordering human life – unlike theoretical sciences including the science of law itself – cannot without abdicating its function concede that there are situations admitting of no answer.<sup>66</sup>

The requirement of a decision is inherent in the judicial process. The whole point of submission to jurisdiction is to gain a final and authoritative disposition of a dispute which is not dependent on the parties’ attitudes but on the application of law. Indeed, parties’ claims are necessarily grounded in law: to argue *non liquet* would be to invite rejection of the claim either on the basis that the other party’s claim prevailed on the merits or on the basis of the *Lotus* presumption. In short, although the parties’ claims may be finely balanced, ‘[t]here must be a legal *finis litis*’.<sup>67</sup>

64 ‘Provisional Report’, *supra* note 7, at 57–58, para. 64; see also *Development II*, 218–219.

65 ‘Some Observations on the Prohibition of “Non Liqueur”’, *supra* note 41, at 237; see also *Development II*, 80 and 218–219.

66 *Function of Law*, 64–65, notes omitted; see also Fitzmaurice (1979) *supra* note 4, at 2.

67 *Development II*, 146; see also *Function of Law*, 78–79 and 363–364; and ‘Some Observations on the Prohibition of “Non Liqueur”’, *supra* note 41, at 218, 220 and 235. Lauterpacht also linked the need for finality with the doctrine that the International Court should interpret legal relationships in such a way that they are effective. See *Development I*, 78–79 and *Development II*, 231 *et seq.*

## V. The Task of the International Judge

Lauterpacht argues that in avoiding a declaration of *non liquet* by filling material gaps in the law the judge is necessarily creative:

The rejection of the admissibility of *non liquet* implies the necessity for creative activity on the part of international judges. Legal philosophy in the domain of municipal jurisprudence has shown the possibilities and, indeed, the inevitability of the law-creating function, within defined limits, of the judge within the State.<sup>68</sup>

The development of international law by the International Court, its secondary function,<sup>69</sup> is, for Lauterpacht, clearly and expressly connected with the doctrine of gradual concretization.<sup>70</sup> In exercising this function, the Court is not bound to base its decision simply on the arguments and considerations raised in the parties' pleadings<sup>71</sup> as

in interpreting and applying concrete legal rules the Court does not act as an automatic slot-machine, totally divorced from the social and political realities of the international community. It exercises in each case a creative activity, having as its background the entirety of international law and the necessities of the international community. The distinction between the making of law by judges and by the legislature is upon analysis one of degree ... judicial activity is nothing else than legislation *in concreto* ...<sup>72</sup>

But this is legislation within limits. The creativity of international judges must stop short of interference with established rights. If these are a cause of friction, then they might be a fit object for legislative change, but '[l]egislation cannot be let in by a backdoor by transforming the nature of the judicial function'.<sup>73</sup> Moreover, even where the judiciary is creative, its rulings are themselves relatively indeterminate:

Judicial legislation is not – and ought not to be – like legislative codification by statute. It cannot attempt to lay down all the details of the application of the principle on which it is based. It lays down the broad principle and applies it to the case before it. Its elaboration must be left, in addition to any doctrinal elucidation of the law by writers, to ordinary legislative processes or to future judicial decisions disposing of the problems as they arise.<sup>74</sup>

The clear conclusion to be drawn is that Lauterpacht views the international judicial function as one which is law creative, rather than as merely the elucidation of the specific legal relationships which obtain between the parties.

68 *Function of Law*, 100, note omitted. On the inevitability of judicial creativity, see also 75–76, 85 *et seq.*, 100–104, 255–256; *Development I*, 45; and *Development II*, 155 *et seq.*

69 See *Development I*, 2–3; and *Development II*, 5–6.

70 See *Function of Law*, especially 254–256.

71 *Development I*, 9–10, 90 (but cf. 18); *Development II*, 21, 46, and see 206 *et seq.*; and *Function of Law*, 132.

72 *Function of Law*, 319–320, note omitted.

73 Lauterpacht, 'The Legal Aspect', in C.A.W. Manning (ed.), *Peaceful Change: An International Problem* (1937) 135, at 145. Lauterpacht consistently argued that the absence of an international legislature as the outcome of a deliberate policy of states, as well as consensual jurisdiction, were reasons why international tribunals should exercise caution in developing the law. See *Development I*, 25–26; and *Development II*, 75–77.

74 *Development II*, 189–190, see also 83 and 89–90.

However, Lauterpacht also argues that international judges must give effect to the parties' intentions in reaching judgments. This is encapsulated in his doctrine of effectiveness:<sup>75</sup>

one of the principal features in the application of the law by the Court [is] its determination to secure a full degree of effectiveness of international law, in particular of the obligations undertaken by parties to treaties – unless intended absence of effectiveness can be proved by reference to the practice of States or the terms of the treaty in question.... The activity of the International Court has shown that alongside the fundamental principle of interpretation, that is to say, that effect is to be given to the intention of the parties, beneficent use can be made of another hardly less important principle, namely, that the treaty must remain effective rather than ineffective.... [T]he maximum of effectiveness should be given to [an instrument] consistently with the intention – the common intention – of the parties.<sup>76</sup>

The doctrine of effectiveness is simply a requirement of good faith.<sup>77</sup> It also reflects Lauterpacht's fundamental position that the 'will of the parties is law',<sup>78</sup> even though the Court has made an 'occasional express insistence that in performing its duty it is not circumscribed by the assistance received from the parties'.<sup>79</sup>

Finally, Lauterpacht argues that the international judiciary must offer exhaustive reasons for their decisions.<sup>80</sup> This is not simply to convince the parties that their arguments have been fully considered, or only to guard against the appearance of judicial partiality or arbitrariness, but is necessary to ensure that the court fulfils its function of developing international law: 'a decision which is not based on adequate reasoning does not constitute a precedent of general application'.<sup>81</sup>

Exhaustiveness of reasoning could thus be seen as yet another manifestation of gradual concretization through the specification of the conditions of application of norms. On occasion, this could involve the novel application of an existing principle which, but for that basis, would otherwise amount to judicial legislation.<sup>82</sup> Further, by the application of the doctrine of effectiveness, often ostensible judicial legislation amounts not to a change in the law but to the fulfilment of its purpose, 'a consideration which suggests that the border-line between judicial legislation and the application of the existing law may be less rigid than appears at first sight'.<sup>83</sup>

75 On this doctrine, see *Development I*, 50, 69 *et seq.* and *Development II*, 161, 225 *et seq.*

76 *Development II*, 227–229, paragraph breaks suppressed; see also *Development I*, 69–70.

77 *Development II*, 292.

78 *Function of Law*, 317.

79 *Development II*, 46.

80 See generally *Development I*, 16–24; and *Development II*, 37–47, and 83.

81 *Development II*, 42.

82 *Ibid.*, 158.

83 *Ibid.*, 161.

## VI. Lauterpacht as an International Judge

In concluding his analysis of the international judicial function, Lauterpacht stated:

no single trend or principle of judicial process as analysed in the successive chapters of this book can be accurately relied upon as determining automatically the content of any future decision of the Court, its activity is nevertheless determined by these trends and principles.<sup>84</sup>

Although, as we shall see in due course, the International Court has departed from some of the fundamental tenets of Lauterpacht's theoretical construction of the task of the international judge, Lauterpacht himself remained faithful to his vision. Others have undertaken extensive analyses of Lauterpacht's judicial performance,<sup>85</sup> which would be redundant to repeat. On the other hand, it is useful to use a restricted illustrative sample to demonstrate Lauterpacht's judicial implementation of the principal elements of his theory.

The fundamental precept of Lauterpacht's concept of the international legal order is the maxim *pacta sunt servanda*. This doctrinal position ultimately lay at the root of his judicial rejection of automatic reservations in the *Norwegian Loans*<sup>86</sup> and *Interhandel*<sup>87</sup> cases. In the former, the French declaration under Article 36.2 of the Statute provided *inter alia*:

*Cette déclaration ne s'applique pas aux différends relatifs à des affaires qui relèvent essentiellement de la compétence nationale telle qu'elle est entendue par la Gouvernement de la République française.*<sup>88</sup>

In *Interhandel*, the automatic reservation contained in the United States' 36.2 declaration provided:

this declaration shall not apply to ...

(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America ...<sup>89</sup>

The inseparable converse of *pacta sunt servanda* is the principle of effectiveness which

84 *Ibid*, 400.

85 The best are undoubtedly those of Fitzmaurice and Rosenne, cited *supra* note 4.

86 *Case of Certain Norwegian Loans*, ICJ Reports (1957) 9, see Lauterpacht's separate opinion at 34 *et seq.*

87 *Interhandel Case (Preliminary Objections)*, ICJ Reports (1959) 6, see Lauterpacht's dissenting opinion at 95 *et seq.*

As Lauterpacht argued in *Interhandel*, the US automatic reservation was the template used by other states to introduce similar provisions into their 36.2 declarations. Nevertheless, his *Norwegian Loans* analysis contains his principal judicial examination of this question, aspects of which were simply incorporated by reference into his *Interhandel* opinion (see, for instance, *ibid* 106, 113 and 117). To a substantial extent, the *Interhandel* opinion examines the automatic reservation as a characteristic expression of US attitudes to international judicial settlement. See *ibid*, 102 *et seq.*

88 Quoted ICJ Reports (1957) 9, at 21.

89 Quoted ICJ Reports (1956) 6, at 15.



requires no more than that effect be given, in a fair and reasonable manner, to the intention of the parties. This means that on occasions, if such was the intention of the parties, good faith may require that the effectiveness of the instrument should fall short of its apparent and desirable scope. The principle of effectiveness cannot transform a mere declaration of lofty purpose – such as the Universal Declaration of Human Rights – into a source of legal rights and obligations.... It cannot impart legal vitality and efficacy to a formula which, in the view of some, amounts in fact to a denial of legal obligation – such as those declarations of acceptance of the Optional Clause of the Statute of the Court which reserve for the State accepting the compulsory jurisdiction of the Court the right to determine the extent of the jurisdiction thus accepted.<sup>90</sup>

The essence of this argument was apparent as early as the *Function of Law*. In discussing vital interests reservations in arbitral *compromis*, Lauterpacht stated that

an element essential to any legal obligation [is] its independence of the discretion of a party under an obligation ... it means stretching judicial activity to the breaking-point to entrust it with the determination of the question whether a dispute is political in the meaning that it involves the independence, or the vital interests, or the honour of the State. It is therefore doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests.... [T]he interests involved are of a nature so subjective as to exclude the possibility of applying an objective standard.... An obligation whose scope is left to the free application of the obligee, so that his will constitutes a legally recognised condition of the existence of the duty, does not constitute a legal bond.... There is here no right *ab initio*.... There is, in the vital aspect of the stipulation, no legal right vested in one party to determine the action of the other, because that other party has reserved for itself freedom of action.<sup>91</sup>

Lauterpacht then proceeded to reject the argument that such reservations were subject to a good faith requirement in the state party's determination of their application. He bluntly argued that there was simply no obligation which could be interpreted in good faith.<sup>92</sup> Not surprisingly, he maintained this view in both *Norwegian Loans* and *Interhandel*.<sup>93</sup>

90 *Development II*, 292–293. It should be recalled that in the preface to this monograph Lauterpacht stated that the manuscript was 'almost complete' when he was elected to the International Court in 1954 and that he thought it proper not to comment or refer to the jurisprudence of the Court delivered after his election.

91 *Function of Law*, 188–189, paragraph break suppressed; see also 354. It is arguable that Lauterpacht's judicial attitude to automatic reservations was foreshadowed in his separate opinion in the *South West Africa – Voting Procedure* advisory opinion, ICJ Reports (1955) 67, separate opinion at 90; see also 99 and 104–105; see also the 'Provisional Report', *supra* note 7, at paras. 51–52.

92 *Ibid*, 191–194.

93 See ICJ Reports (1957), at 50 and 52–54; and ICJ Reports (1959), at 111–114. In *Norwegian Loans*, Norway had claimed that an automatic reservation should only be invoked in good faith as otherwise it would amount to an *abus de droit*. See Pleadings, Vol. I, 131. Subsequently, in its written observations on the Bulgarian preliminary objections, the United States argued, in an attempt to negate Bulgarian reliance on its automatic reservation, that a state invoking an automatic reservation was not entitled to 'nullify the jurisdiction of this Court through arbitrary determination that a particular subject matter of dispute is essentially domestic'. See *Aerial Incident of 27 July 1955 (USA v. Bulgaria)* case, Pleadings, 324, see 322–325. A single volume of pleadings covers all three cases which arose out of this incident. After the judgment rejecting jurisdiction in the *Israel v. Bulgaria* case (ICJ Reports (1959) 127), the United States discontinued its case against Bulgaria, see *Order of 30 May 1960*, ICJ Reports (1960) 146. In its letter of 13 May 1960 requesting discontinuance, the United States abandoned the view stated in its written observations to adopt the position that invocation of an automatic reservation, regardless of its propriety or arbitrariness, constituted an absolute bar to jurisdiction: see Pleadings, 676, at 677.

## The Theorist as Judge

These aspects of Lauterpacht's denial that automatic reservations constituted legal obligations do not exhaust his use of characteristic elements of his construction of the judicial role. The other principal aspects are equally evident. For instance, in considering whether an automatic reservation could be severable from a 36.2 declaration, Lauterpacht made express recourse to general principles of law because:

International practice on the subject is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law.<sup>94</sup>

The use of this technique was even more predominant in Lauterpacht's separate opinion in the *Guardianship of Infants*<sup>95</sup> case in his interpretation of the doctrine of *ordre public*.<sup>96</sup> This opinion also clearly demonstrates Lauterpacht's debt to Kelsen and the doctrine of gradual concretization because it is predicated on the rejection of the distinction between private and public law.<sup>97</sup>

A feature of all the individual opinions delivered by Lauterpacht, which has been noted by commentators,<sup>98</sup> is their length and exhaustiveness of reasoning. This was undoubtedly in pursuit of his opinion that to fulfil 'the very essence of the judicial function ... to render Judgments and Opinions which carry conviction and clarify the law',<sup>99</sup> the Court need not select the most economical or direct line of decision.<sup>100</sup> Rather, the role of developing the law requires a detailed analysis of the legal issues in play. In doing so:

The Court is not rigidly bound to give judgment by exclusive reference to the legal propositions as formulated by the Parties in their Conclusions. However, I consider I ought not to disregard the Conclusions of the Parties formulating exhaustively the legal issue between them.... It is only when it is abundantly clear that the formulation, adopted by the Parties, of the legal issue cannot provide a basis for the decision and that there is another legal solution at hand of unimpeachable cogency, that I would feel myself free to disregard the Conclusions of the Parties.<sup>101</sup>

Axiomatically Lauterpacht implemented this view in his judicial analysis of automatic reservations whose validity had not been contested by the parties.<sup>102</sup> This illustrates the fundamental aspect of Lauterpacht's construction of the judicial func-

94 *Norwegian Loans*, *supra* note 86, at 56, *see* from 55 generally; and also *Interhandel*, *supra* note 87, at 116-117.

95 *Netherlands v. Sweden*, ICJ Reports (1958) 55.

96 *Ibid.*, 79, at 92.

97 *Ibid.*, 80 *et seq.*, at 83-84, 'an essentially doctrinal classification and distinction provides a doubtful basis for judging the question of the proper observance of treaties'. *See* also 'Kelsen's Pure Science of Law', *supra* note 15, at 412-414.

98 *See*, for instance, Rosenne, *supra* note 4, at 784; and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. IV: *International Judicial Law* (1986) 506.

99 *South West Africa*, *supra* note 91, at 67, Lauterpacht's separate opinion, 90 at 92-93.

100 *Norwegian Loans*, *supra* note 86, at 36.

101 *Guardianship of Infants*, ICJ Reports (1958) 89; *cf.* Lauterpacht's separate opinion in *South West Africa*, *supra* note 91, at 67, 90 at 91.

102 *Cf.*, for instance, the view of the Court in *Norwegian Loans*, *supra* note 86, at 27: 'The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognise it.'

tion, which arises directly from his adherence to the doctrine of gradual concretization. The function of the International Court is, ultimately, to declare the law rather than the parties' own understanding of their legal relationships *inter se*.

## VII. Lauterpacht's Assimilation of Law and Obligation

For our present purposes, it is unnecessary to determine whether Lauterpacht's rejection of the legal validity of automatic reservations was well founded.<sup>103</sup> More important in this context is the tension which Lauterpacht's concept of the judicial role introduces between law and obligation.<sup>104</sup> He acknowledges this distinction in his recognition that most rules of international law deal with subjective rights established by treaties rather than 'abstract rules of an objective nature'.<sup>105</sup> In contrast to the objectivity of law, an obligation is understood here as a legal relationship of restricted application which is peculiar to the parties to a case or to a given treaty.

In an early discussion of *ex aequo et bono* competence, and in particular of agreements by parties authorizing the Court to apply Article 38.2 of the Statute, Lauterpacht stated:

It is of no juridical importance that they contain an authorization to depart from the law as it existed before the *ex aequo et bono* agreement was made. The will of the parties is law.... The 'international conventions, whether general or particular, establishing rules expressly recognised by the contesting States', are rules of law, and will be applied by the Court, even if they are in derogation of the customary rules of international law.... An international court will give effect to such provisions unless they are of an immoral character, or run counter to universally recognised principles of international law of an absolutely binding character.... It cannot be doubted that in deciding according to these rules of conduct specifically agreed to by the parties, the judges would be performing a strictly judicial function.<sup>106</sup>

Lauterpacht's apparent assimilation of law and obligation in his eventual construction of the judicial function fails to acknowledge this precise point, that parties can modify their legal relationships *inter se*.

A clear example of this arose in the *Chinn* case.<sup>107</sup> The special agreement which submitted this case to the Court was broad, asking whether the measures impugned were 'in conflict with the international obligations'<sup>108</sup> owed by Belgium to Great Britain. Both parties based their arguments on the 1919 St Germaine Convention on the International Régime regarding the Congo Basin: *inter partes*, this treaty had

103 For an analysis of this issue which focuses on Lauterpacht's treatment and reaches a contrary conclusion on the validity of the reservation, see Crawford, 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court', 50 *BYbIL* (1979) 63.

104 In this discussion, 'obligation' is used in an extended sense to refer to any permutation of the fundamental legal conceptions identified by W.N. Hohfeld: see 23 *Yale Law Journal* (1913) 16, and 26 *Yale Law Journal* (1917) 710.

105 See *Function of Law*, 70, note 2.

106 *Ibid.*, 317-318.

107 (Belgium and Great Britain) PCIJ Ser.A/B, No. 63 (1934).

108 *Ibid.*, 66-67.

### The Theorist as Judge

abrogated the 1885 General Act of Berlin and the 1890 Brussels General Act and Declaration. The Court ruled that, regardless of the interest attaching to the Berlin and Brussels instruments, as both parties had relied on the St Germaine Convention, this was the determinative instrument that the Court had to apply.<sup>109</sup> The adoption of this as the basis of the case was attacked by Judges van Eysinga and Schücking, both of whom argued in their individual opinions that the St Germaine Convention was invalid because it had been concluded in breach of the parties' obligations under the General Act of Berlin. They further argued that the Court should have examined this issue *ex officio*.<sup>110</sup> Verzijl agreed with this minority view, arguing that the case presented 'a textbook case of international nullity' but that the Court had

kept scrupulously to the special agreement between the parties and did not judge the validity of the concession from a general international legal point of view, but solely from an angle indicated by the parties, from which, however, a false light was cast on the problem.<sup>111</sup>

Given his construction of the judicial role, it is possible, if not probable, that Lauterpacht would have inclined towards the method expressed by van Eysinga and Schücking. This serves only to expose the tension at the heart of Lauterpacht's thesis.

In his discussion of the Court's *ex aequo et bono* competence, Lauterpacht was willing to concede that in treaties states can modify their substantive legal entitlements under international law. That this admits of generalization is commonplace, reflected in the doctrinal distinction between *ius dispositivum* and *ius cogens*. Lauterpacht's adherence to the doctrine of gradual concretization appears to eliminate any conceptual distinction between law and obligation. Agreements between subjects of the legal system are simply seen as the final substantive specification of the law, the 'abstract rules of an objective nature'. This cannot be reconciled with the existence of states' 'subjective rights' established in derogation of, or supplementary to, background international law. The assimilation of law and obligation also impacts upon the doctrine of effectiveness, as well as Lauterpacht's more general position that treaties must be interpreted according to the parties' intentions. Reference to the parties' intentions appears to be characteristic more of an obligation assumed by the parties *inter se* than of some objective externally imposing law. Moreover, this assimilation might conflict with the judicial interposition of arguments which are independent of the parties' submissions. It seems difficult to reconcile this with the view that the 'will of the parties is law'. If, as Lauterpacht argues, the exercise of the international judicial function takes place against the backdrop of the entirety of international law,<sup>112</sup> then this must take account of the parties' agreements and

109 *Ibid.*, 79–80.

110 *Ibid.*, 134–136 (van Eysinga) and 148–150 (Schücking); and also Lauterpacht's commentary in 'The Chinn Case', 16 *BYIL* (1935) 164, at 164–166.

111 See J.H.W. Verzijl, *The Jurisprudence of the World Court: A Case by Case Commentary* (1965) vol. I, at 527–528, quotations from 528, see also 383 *et seq.*

112 *Function of Law*, 320.

understandings. In the absence of a countervailing *ius cogens* norm, the parties' determination of their substantive legal relationships *inter se* must take precedence over general international law in accordance with the principle *lex specialis derogat generali*.

These considerations spill over into an evaluation of Lauterpacht's construction of the law creative aspect of the jurisprudence of the International Court. He argues that the Court thoroughly examines the parties' pleadings and transcends the issue at hand. Accordingly, cases can be examined for the wider legal principles which lie behind the rules 'authoritatively laid down' by the Court:

Undoubtedly, so long as the Court itself has not overruled its former pronouncement or so long as States have not, by a treaty of a general character, adopted a different formulation of the law, the ruling formally given by the Court on any question of international law must be considered as having settled, for the time being, the particular question at issue.<sup>113</sup>

Thus the proper function of the Court is to expound the general law, while deciding the individual case. The distortion introduced by Lauterpacht's assimilation of law and obligation here is manifest. Unless a case turns solely on general customary law or upon a treaty of general application, then subjective legal relationships will be a factor in the decision. If the case implicates the parties' obligations *inter se* which substantively modify, supplement or derogate from general international law, then only by virtue of the doctrine of gradual concretization can the resultant judicial determination be deemed to declare objective and general law. It is apparent that this is paradoxical as it involves the illegitimate aggrandizement of particular relationships beyond the parties to have normative effect for the international community as a whole. This is not to say that judicial decisions are devoid of interest for non-parties, but it does indicate that Lauterpacht's belief in their objectivity must be attenuated. The better view would appear to approximate to that indicated by Fitzmaurice, namely that decisions of the International Court can be seen '[a]s "authority", but not necessarily as authoritative'.<sup>114</sup>

Gradual concretization is an emanation of an imperative theory of law. For Kelsen and Lauterpacht the doctrine forges the chain of legal validity between the fundamental hypothesis of the legal system and the particular agreements made by individual subjects of the system, preserving the hierarchical and imperative line of command. Ultimately, all imperative theories reduce to that of duties – 'the central and only essential element of the legal system'.<sup>115</sup> Yet it cannot be doubted that specific agreements can modify the general duties which would otherwise obtain between the parties. This at least connotes that the legal power to amend the substantive background law is as important as the general duties it establishes. In turn, if this is correct, then it indicates that ultimate reduction of deontic operators to duties

113 *Development II*, 61–62, quotations at 62.

114 Fitzmaurice (1986), *supra* note 4, vol. I at xxxii, note 22.

115 'Kelsen's Pure Science of Law', *supra* note 15, at 409.

### The Theorist as Judge

results in the adoption of an inadequate normative array. This manifests itself in the assimilation of law and obligation in Lauterpacht's concept of law.

This has a current theoretical relevance. The influence of gradual concretization entails not only that treaties are a source of law, but also that they must be interpreted in accordance with the parties' intentions. This appears to set up the opposition which Koskenniemi has labelled 'apology' and 'utopia':

To sustain the distinction between international law and politics doctrine assumed the former to be more objective than the latter. It assumed that legal norms could be both *concrete* and *normative*. The requirement of concreteness related to the need to verify the law's content not against some political principles but by reference to the concrete behaviour, will and interest of States. The requirement of normativity related to the capacity of the law to be opposable to State policy. But these requirements tended to overrule each other. A doctrine with much concreteness seemed to lose its normative value and end up in descriptive apology. A truly normative doctrine created a gap between itself and State practice in a manner which made doubtful the objectivity of the method of verifying its norms. It ended up in undemonstrable utopias.<sup>116</sup>

This extent of opposition is surely eroded or reduced if the normative structure of a legal system is seen to include the distinction between general law and particular obligations. The latter are concrete, particularly if understood within the framework of Lauterpacht's doctrine of effectiveness. If states conclude an agreement, then surely it is by reference to their intentions and understandings that the extent of that legal relationship is determined. In this light, the essence of obligations is that the substantive relationships they create are not objective, albeit that their binding force or normativity is dependent on the general rules which authorize their creation. In short, the objective normative code does not override, but facilitates, the legal expression of individual states' will or interest.<sup>117</sup> Indeed, simply to conceive of international law as an overriding normative code is to reduce its normative array to that of duties. This indicates that, like Lauterpacht's doctrine of gradual concretization, the apology/utopia opposition appears to fail to give enough weight to the law/obligation dichotomy. The issue of whether the apology/utopia opposition collapses further – for instance, if custom formation is seen as the incremental generalization of specific legal relationships by virtue of the doctrines of preclusion and acquiescence and thus as a normative outcome of concrete behaviour – goes beyond the bounds of this paper. The point here is that the pervasiveness of this opposition is exaggerated through a failure to distinguish between law and obligation.

### VIII. *Non Lique* Revisited

Leaving to one side the continuing jurisprudential relevance of Lauterpacht's work, recent events at the International Court of Justice call for a reconsideration of his

<sup>116</sup> Koskenniemi, *supra* note 6, at 40, emphasis in original.

<sup>117</sup> Cf. *ibid.*, 41, see 40 *et seq* generally.

views on *non liquet*. It is possible to argue that in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, requested by the General Assembly, the Court reached such a finding.<sup>118</sup> In this connection, it must be emphasized that Lauterpacht was wedded to the view that the prohibition of *non liquet* arose as the result of the material completeness of the international legal order, rather than a reliance on formal closure arising from the application of the *Lotus* presumption.<sup>119</sup> To place the *Nuclear Weapons* advisory opinion in context, it is necessary to consider the opposing view, namely that the International Court can legitimately deliver a *non liquet*.

The question of *non liquet* has attracted the interest of a number of publicists,<sup>120</sup> but the theory expounded by Julius Stone is perhaps the best known.<sup>121</sup> Further, as Stone's principal article was written expressly as a rigorous criticism of Lauterpacht's views,<sup>122</sup> it is appropriate to regard it as the paradigmatic counter-thesis. It is rooted in the view that Lauterpacht's argument was based in assumptions which dealt with the nature of law and legal institutions, in particular the law-creative rather than the law-applying competence of international courts. Stone sees the crucial issue as:

How much *law-creating* responsibility can we sensibly place on international courts in a world as changeful as ours, and in the absence of any organ for correction of judicial errors? At what point does the maxim that it is more important that a case be *settled* than that it be *settled right* defeat itself?<sup>123</sup>

Consequently, he argues that the question of *non liquet* is one which transcends positive law, but also that any alleged prohibition must be based in po-

118 Opinion delivered 8 July 1996. I am indebted to Thomas Skouteris of the T.M.C. Asser Institute for supplying me with a copy of the typescript of the opinion. All subsequent references are to the typescript.

119 See *supra* note 42. On this basis, Koskeniemi argues that Lauterpacht foreshadowed the jurisprudential views of Ronald Dworkin: see *supra* note 6, at 33 *et seq.*

120 See, for instance, Fitzmaurice, 'The Problem of Non Lique: Prolegomena to a Restatement', in R. Ago *et al* (ed.), *Mélanges offerts à Charles Rousseau* (1974) 89; Tammelo, 'Logical Aspects of the Non Lique Controversy in International Law', 5 *Rechtstheorie* (1974) 1; J.H.W. Verzijl, *International Law in Historical Perspective: Vol. I General Subjects* (1968) 47 *et seq.*, especially at 55-57 and 69 *et seq.*; and see generally C. Perelman (ed.), *La probléme des lacunes en droit* (1968).

121 The ensuing account of Stone's thesis has been drawn from the following works: *Legal Controls of International Conflict* (1959, 2nd ed.) at 153 *et seq.* (hereinafter *Legal Controls*); 'Non Lique and the Function of Law in the International Community', 35 *BYBIL* (1959) 124 (hereinafter 'Non Lique and the Function of Law'); *Legal Systems and Lawyers' Reasonings* (1964) at 185 *et seq.* (hereinafter *Legal Systems*); 'Non Lique and the International Judicial Function', in Perelman, *supra* note 121, at 305 (hereinafter 'International Judicial Function'); and 'Non Lique and the Function of Law in the International Community', in *Of Law and Nations* (1974) 71 (hereinafter 'Non Lique and the Function of Law in the International Community'). This last essay is a revised version of his 1959 essay. Apart from a slight rearrangement of the text and the insertion of some immaterial footnotes, the only substantive difference is the addition of a small final section (at 114 *et seq.*).

122 Initially too rigorous, see Star, *supra* note 60, at 149.

123 'Non Lique and the Function of Law', 152; see also 'International Judicial Function', 310-311. The view that a prohibition of *non liquet* entails judicial creativity is indeed the main thrust of Stone's 'Non Lique and the Function of Law'. This article also addresses Lauterpacht's recommendations thesis at length, an aspect of Stone's argument which need not be considered for the purposes of this paper.

### The Theorist as Judge

sitive law as otherwise it could only be a statement of desired, but not of existing, law.<sup>124</sup>

Stone rejects both aspects of Lauterpacht's argument that the *non liquet* prohibition is based in positive law: namely, that this arises from the function of general principles or it arises from a customary norm which is both evidenced and constituted by international judicial and arbitral practice. For Lauterpacht, this uniform arbitral practice is more active than simple reliance on the *Lotus* presumption. Stone agrees that the status and utility of the presumption is doubtful.<sup>125</sup> Although he concedes that there are few cases in which a *non liquet* was either clearly sought by a party or declared by the tribunal, he claims that this does not conclude the issue.<sup>126</sup>

Stone argues that arbitral practice cannot establish a prohibition of *non liquet* because it cannot explain why disputant states have never resorted to *non liquet* in their arguments. He claims that this lies in a number of factors, most of which are extra-legal. For instance, the lawyers involved in the presentation and determination of a claim have been trained in municipal systems which abhor *non liquet* and this attitude is simply carried over to international proceedings, or that the invocation of *non liquet* amounts to a confession or the assertion that a state cannot maintain its claim on the basis of positive international law.<sup>127</sup> Indeed, Stone appears once to have counselled the Australian Government along these lines. In a pearl fisheries dispute with Japan, which occurred before the conventional regulation of the continental shelf, Stone is said to have advised Australia that, if the case came before the International Court and Japan based its claim on either high seas freedoms or the *Lotus* presumption, Australia should counter these arguments with the assertion that the law was unsettled and should request a declaration of *non liquet*.<sup>128</sup>

124 See *Legal Controls*, 153–154; and 'Non Liquet and the Function of Law', 125–127.

125 See, e.g., *ibid.*, 129, see also 135–136.

126 *Ibid.*, 129–130, 135, 138 *et seq.*

127 See *Legal Controls*, 153, 162–163; and 'Non Liquet and the Function of Law', 138–139.

In the *North Sea Continental Shelf* cases (ICJ Reports (1969) 3), Denmark and the Netherlands alleged that one of the German submissions appeared to invite the Court to pronounce a *non liquet*: see Pleadings, Vol. I, 456, 468. Germany denied this in subsequent oral argument: see Pleadings Vol. II, 9–10. In 'Non Liquet and the Function of Law in the International Community', at 115–116, Stone argued that these cases provided disguised examples of a disguised *non liquet*.

128 See Tammelo, *supra* note 121, at 3. Tammelo further argues that a *non liquet* effectively happened because, without resort to litigation, Australia and Japan concluded a *modus vivendi* and thus regulated the situation by agreement as would have occurred had the Court declared a *non liquet*. Stone does not advert to this in his writings, but support for Tammelo's claim can be drawn from Australia's modification to its 36.2 declaration in 1954 – see reservation (v).c, 1953–54 *YbICJ* 210–21 – and from the *modus vivendi*, entitled 'Agreement between Australia and Japan on a Provisional Regime to Regulate Pearlery by Japanese Nationals Pending the Final Decision of the International Court of Justice in the Dispute concerning the Application to Japanese Nationals of the Australian Pearl Fisheries Act 1952–53', 191 *UNTS* 136 (No. 2580). See also Goldie, 'Australia's Continental Shelf: Legislation and Proclamations', 3 *ICLQ* (1954) 535, at 571; Rousseau, 'Crise de la justice internationale?', in G. Vedel *et al.* (eds.), *Mélanges offerts à Marcel Waline: le juge et le droit public* (1974) vol. I, 259 at 261; and Star, *supra* note 60, at 150–151. This dispute has been claimed to have caused the inclusion of sedentary fisheries within the continental shelf in the 1958 Geneva Convention: see Scott, 'The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine', 41 *ICLQ* (1992) 788.



Having rejected this customary basis for the prohibition, Stone concludes that if it forms part of positive law it must arise from general principles.<sup>129</sup> This he also rejects. In municipal systems, *non liquet* is prohibited by express enactment or by custom. Thus, for Lauterpacht, the prohibition was a general principle to be applied by international tribunals. Stone concedes that the municipal prohibition is so general that it is often deemed to arise from the necessary completeness of legal systems or from the inherent nature of the judicial function. However, he holds this recourse to municipal analogy to be unwarranted and dangerous, given the differences in the exercise of international judicial powers.<sup>130</sup> Stone also rejects the other aspect of Lauterpacht's argument, that general principles may be used to meet new situations. He claims that even if general principles are an inexhaustible source of legal material, this does not free the judge from making law-creative choices in areas where a declaration of *non liquet* would be a conceptual possibility. Principles simply do not direct the court to a final decision with the compulsion of a legal command.<sup>131</sup>

Stone's own view stems from the proposition that, logically, legal systems can be either open or closed. A legal system is closed if it contains either a residual principle which covers unprovided for cases, or a norm which forbids the judge to refuse to decide a case on the basis of the absence or the obscurity of law. The latter thus enjoins the judge to create rules where no pre-existing applicable law can be found. Regardless of which alternative is employed, the legal system is closed and thus excludes the possibility of *non liquet*.<sup>132</sup> However, there is no *a priori* basis for claiming that a closing rule exists in any particular legal order, and thus no rule regarding *non liquet* imposes itself as a matter of logic. Consequently, a rule which permits or requires a declaration of *non liquet* is, in principle, conceivable. On this basis, Stone asserts that a legal prohibition of *non liquet* must be based on positive law.<sup>133</sup>

Stone underpins his claim that *non liquet* is a judicial possibility by employing propositional deontic logic.<sup>134</sup> Stone identifies three principal deontic modalities – the obligatory, the prohibitory, and the permissive – and also the modality of legal neutrality. The last refers to the situation where the legal system contains no rule bearing on a given act or omission which is conceivable as legally regulated behaviour. The system is simply silent on the matter. This entails that not all conduct which is legally permissible is so by virtue of a rule specifically permitting that behaviour. It might be permitted merely because of the absence of any pertinent rule. For Stone, conduct which is legally neutral must not be confused with that which is specifically permitted by a rule.<sup>135</sup> To use only the three deontic modalities

129 'Non Liqueur and the Function of Law', 145–147.

130 *Legal Controls*, 154–155, 161–162; 'International Judicial Function', 306–307.

131 'Non Liqueur and the Function of Law', 133–135, see also 145–147.

132 *Legal Systems*, 189; 'International Judicial Function', 308.

133 'Non Liqueur and the Function of Law', 158; see also Tammelo, 'On the Logical Openness of Legal Orders', 8 *American Journal of Comparative Law* (1959) 187.

134 His most extensive discussion of deontic logic is in *Legal Systems*, at 185 *et seq.*

135 *Ibid.*, 187; 'Non Liqueur and the Function of Law', 136–137; 'International Judicial Function', 308–309.

## The Theorist as Judge

of prohibited, obligated and permitted without the legally neutral category assumes that the legal order in question is normatively closed.<sup>136</sup> On the other hand, normatively open systems require the recognition of the legally neutral category because this ensures that non-norm-governed conduct is possible, and thus declarations of *non liquet* are possible.<sup>137</sup>

Applying this to international law, Stone argues that the rejection of the negative residual closing principle – everything not forbidden is permitted, *viz* the *Lotus* presumption – requires, if *non liquet* is to be prohibited, the recognition that international tribunals have a law-creative power. The only other alternative would be the adoption of the positive residual closing principle – what is not expressly permitted is forbidden – but this Stone rejects as unworkable. As both he and Lauterpacht thought that the *Lotus* presumption was discredited, any prohibition on *non liquet* therefore resolved to the recognition that international judges possessed a law-creative power. As he thought this debatable, if nothing else no international legislature existed which could grant such a power to judges, Stone concluded that no prohibition existed in international law.<sup>138</sup>

### IX. The *Nuclear Weapons* Advisory Opinion

In the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the International Court apparently inclined more towards Stone's view that no prohibition on *non liquet* exists in international law and that such a declaration can amount to a proper discharge of the judicial function.<sup>139</sup> The Court was faced with a bald question, posed by the General Assembly:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?<sup>140</sup>

The Court, composed of fourteen judges due to the death of Judge Mawdsley six days before hearings opened, concluded in paragraph 105.2:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three;

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such; ...

136 'Non Liqueur and the Function of Law', 144, note 4.

137 *Ibid*, 136–137; 'International Judicial Function', 309.

138 'Non Liqueur and the Function of Law', 127, 159; *Legal Systems*, 189–190; 'International Judicial Function', 310–311.

139 For instance, Stone was expressly cited by Judge Vereshchetin in his declaration.

It must be stressed that the ensuing discussion of this opinion is not intended to be a substantive analysis which goes to the merits of the issues involved. Rather it is solely intended to examine the analytical issues of legal system structure which a *non liquet* declaration raises.

140 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, para 1.

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51 is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstance of self-defence, in which the very survival of a State would be at stake; ...

It is apparent that the second sentence of para.105.2.E [hereinafter 105.2.E.ii] can be interpreted as a finding of *non liquet*. In the reasoning supporting 105.2.E,<sup>141</sup> the Court made clear that its indeterminacy arose from both the factual and legal issues at stake:

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the 'clean' use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict... [M]eans and methods of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake ...

97. Accordingly, in view of the present state of international law viewed as a whole ... and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in the extreme circumstance of self-defence, in which its very survival would be at stake.

There is a possible 'precedent' for this ruling. Verzijl argues that the International Court reached a finding of *non liquet* in the *Reparations for Injuries* advisory opin-

141 *Ibid*, paras. 90-97.

### The Theorist as Judge

ion.<sup>142</sup> This arose in relation to the second question posed by the General Assembly: namely, if the United Nations has the capacity to bring an international claim to obtain reparation for injuries done to one of its agents, how should this be reconciled with the rights possessed by the agent's national state? The Court noted that no rule existed which gave priority to one or other of the claims, and that potential conflict could only be addressed by particular or general agreement.<sup>143</sup> In the *dispositif*, the Court declared that, as the UN could only assert protection on the basis of obligations due to it, this would usually obviate such a conflict, although this depended on the circumstances of the case and any agreements to which both the UN and the national state were party.<sup>144</sup> However, the Court was equally clear that the defendant state was not liable to pay any reparation due twice, and that international tribunals were familiar with claims involving two or more claimant national states and knew how to protect defendants in such cases.<sup>145</sup> Although, *ex facie*, there appears to be a degree of *non liquet* in the Court's treatment of this issue, it is also possible that the Court thought this matter to be determined by the circumstances of a given case. There is a clear implication that the right to present a claim ultimately devolved on the party whose obligations had been breached. In short, it could be argued that the Court was simply refusing to rule, in the abstract, on a contingent and hypothetical issue.

Internal evidence indicates that the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion should not be interpreted in this way. Indeed, the collegiate opinion<sup>146</sup> expressly rejected the view that the question posed was too abstract or involved it making 'hypothetical or speculative declarations'. On the contrary:

The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.<sup>147</sup>

Further, individual judges expressly stated that a *non liquet* had arisen or that the Court had found the law insufficient to make a determination.<sup>148</sup> Finally, both individual judges and the opinion itself discussed the import of the *Lotus* case.

142 *Supra* note 121, at 69. Verzijl also argued that a finding of *non liquet* was made in the *Haya de la Torre* case. Lauterpacht addresses, and rejects, the possibility of a *non liquet* in *Haya de la Torre*, (*Development II*, 145–148) but he does not consider the possible example drawn from the *Reparations* advisory opinion.

143 ICJ Reports (1949) 174, at 185–186.

144 *Ibid*, 188.

145 *Ibid*, 186.

146 It is difficult to speak of 'the Court' in relation to this opinion, as every judge delivered either a declaration or a separate or dissenting opinion.

147 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, para.15. In her dissenting opinion, Judge Higgins argued that this is precisely what the Court failed to do: see paras. 9 *et seq.*

148 See, for instance, the declaration by Judge Vereshchetin; the separate opinion by Judge Guillaume, para. 9; and the dissenting opinions of Judges Schwebel (typescript pages 9–10), Shahabuddeen (typescript page 2, but cf. pages 10–11), Koroma (typescript pages 2–3, 13, 14 and 19); and Higgins (paras. 2, 7, 29–32 and 36, at para.30, 'That the formula chosen is a *non liquet* cannot be doubted').

## X. Nuclear Weapons and the *Lotus*

The scope of the *Lotus* appears to have arisen during the proceedings in arguments dealing with the interpretation of the question posed by the General Assembly. Some states argued that the use of the word 'permitted' implied, contrary to the *Lotus*, that the threat or use of nuclear weapons would only be permissible if express authorization could be found in either treaty or customary law. Other states challenged the status and applicability of the case in contemporary international law. The Court ruled that as the nuclear weapon states which had participated in the proceedings did not dispute that their freedom of action was restricted by international law, particularly by the rules and principles of international humanitarian law, the relevance of the *Lotus* was 'without particular significance for the disposition of the issues before the Court'.<sup>149</sup>

The import of the *Lotus* presumption, the proposition that what is not prohibited is allowed, was more closely examined in President Bedjaoui's declaration and in the dissenting opinion of Judge Shahabuddeen. Both rejected the continuing relevance of the *Lotus*. On the other hand, Judge Guillaume simply rested content with a strong affirmation of the case.<sup>150</sup>

The President argued that the *Lotus* was predicated on an anachronistic structure of international law, '[à] l'approche résolument positiviste, volontariste du droit international qui prévalait encore au début du siècle', rather than the more integrated and communitarian contemporary concept. Moreover, the issue involved in the instant opinion distinguished the *Lotus*, which had only involved a much more modest question. Finally, the Court had been much more cautious in its drafting than the Permanent Court when it affirmed that what was not expressly prohibited was not consequently allowed.<sup>151</sup>

In a characteristically stimulating dissenting opinion, Judge Shahabuddeen was more expansive. He excluded the possibility of a *non liquet*:

If, as it is said, international law has nothing to say on the subject of the legality of the use of nuclear weapons, this necessarily means that international law does not include a rule prohibiting such use. On the received view of the '*Lotus*' decision, absent such a prohibitory rule, States have a right to use nuclear weapons.

On the other hand, if that view of '*Lotus*' is incorrect or inadequate in the light of subsequent changes in the international legal structure, then the position is that States have no right to use such weapons unless international law authorises such use. If international law has nothing to say on the subject of the use of nuclear weapons, this necessarily means that international law does not include a rule authorising such use. Absent such authorisation, States do not have a right to use nuclear weapons.

It follows that, so far as this case at any rate is concerned, the principle on which the Court acts, be it one of prohibition or one of authorization, leaves no room unoccupied by law and consequently no space available to be filled by the *non liquet* doctrine or by ar-

149 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, paras. 21–22, quotation from para. 22.

150 Separate opinion para.10.

151 Declaration by President Bedjaoui, paras.12–16, quotation at para.13.

## The Theorist as Judge

guments traceable to it. The fact that these are advisory proceedings and not contentious ones makes no difference; the law to be applied is the same in both cases.<sup>152</sup>

Judge Shahabuddeen manifestly sees the legal system as closed, and concedes that if 105.2.E.ii was read in the light of the *Lotus* as it was traditionally understood, then the inference could arise that the Court had indicated that the use of nuclear weapons could be lawful in certain circumstances.<sup>153</sup> The General Assembly's question thus placed the Court in a dilemma as

to hold that states have a right to use nuclear weapons is to affirm that they have a right to embark on a course of conduct which could result in the extinction of civilization ... [but] to deny the existence of that right may seem to contradict the '*Lotus*' principle ... it being said that there is no principle of international law which prohibits the use of such weapons.<sup>154</sup>

He argued that there were four ways in which the Court could have escaped from this dilemma. The first two solutions offered need not detain us. These gave weight to the *Lotus*, but held that a use of nuclear weapons which resulted in the destruction of neutral states was prohibited.<sup>155</sup>

Judge Shahabuddeen's third solution also endorsed the *Lotus*, but drew an exception to the operation of the presumption. Although the absence of a prohibition might indicate the existence of a residual right, the latter could not encompass 'the doing of things which, by reason of their essential nature, cannot form the subject of a right', such as destroying the planet through the use of nuclear weapons:

The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. These limits define an objective structural framework within which sovereignty must necessarily exist.

Rights conferred by sovereignty cannot extend beyond this framework and, in particular, cannot violate this framework. As the use of nuclear weapons would do so by annihilating mankind, no such right could exist in the first place.<sup>156</sup>

However, Judge Shahabuddeen places most weight on his fourth solution, which simply distinguishes *Lotus* and argues that there could be no right to do 'any act which could bring civilization to an end and annihilate mankind ... unless the act is one which is authorised under international law'.<sup>157</sup> The underpinning reason is similar to that offered by President Bedajoui:

152 Dissenting opinion of Judge Shahabuddeen, typescript pages 10–11, Part I.6. Stone argued that advisory proceedings posed particular problems for any prohibition of *non liquet*: see 'Non Liqueur and the Function of Law', 128, note 7 – a point with which Judge Vereshchetin seemed to concur in his declaration (typescript page 1).

153 *Ibid.*, typescript pages 2 and 34–35.

154 *Ibid.*, typescript page 12, Part II. It should be recalled that para.105.2.B of the opinion denied that there was a conventional or customary comprehensive prohibition of the threat or use of nuclear weapons. Judge Shahabuddeen voted against this proposition.

155 *Ibid.*, typescript page 12, Part II.

156 *Ibid.*, typescript pages 12–13, Part II.

157 *Ibid.*, typescript page 13, Part II.

Iain G.M. Scobbie

the previous stress on the individual sovereignty of each State considered as *hortus conclusus* has been inclining before a new awareness of the responsibility of each State as a member of a more cohesive and comprehensive system based on cooperation and interdependence.... The Charter did not, of course, establish anything like world government; but it did organise international relations on the basis of an 'international system'; and fundamental to that system was an assumption that the human species and its civilization would continue.<sup>158</sup>

Quite simply, in the *Lotus* the Court did not have in mind acts which could destroy the planet and to that extent it was distinguishable.<sup>159</sup>

Judge Shahabuddeen's views have been canvassed at length because only he really explores the implications of the *Lotus* presumption. Similarly, only he and President Bedajoui argue that it can be distinguished on the ground that the structure of international law has changed in a way which invalidates the conceptual foundations of the presumption. This is perhaps surprising, given the apparent relationship which exists between *Lotus* and *non liquet*.

## XI. Refloating the *Lotus*

Doctrinally, apart from Lauterpacht and Stone, Fitzmaurice also casts doubt on the *Lotus* presumption. He notes that the *compromis* had employed the phrase 'not in conflict with the principles of international law' in setting out the standard by which Turkish conduct should be assessed. This, he argues, precludes the presumption from being considered as

an *abstract* and independent rule of law. The Court can be regarded as applying the criterion of non-conflict with the principles of international law because the *Compromis* directed it to do so, rather than because this criterion had any abstract validity.... Had the Court been asked to determine whether the Turkish action was in conformity with international law, the decision would almost certainly have been the other way.<sup>160</sup>

Judicial and doctrinal opinion therefore inclines towards the position that the *Lotus* presumption is discredited. The view that changes in the structure of the international legal order have undermined the cogency of the *Lotus* may be appealing, but it is nevertheless the case that the presumption expresses an analytical axiom. This is a matter of legal system structure rather than one of the weight to be accorded to an aging precedent or of the existence of a substantive rule of positive law.

To understand the true import of the axiom, a clear distinction must be drawn between a (Hohfeldian) right and a privilege. To hold that someone has a right entails that someone else has a duty to bring about or maintain the state of affairs en-

158 *Ibid*, typescript page 14, Part II: paragraph break suppressed.

159 *Ibid*, typescript page 15, Part II.

160 Fitzmaurice, *supra* note 4, vol. 1, at 146, note 2.

### The Theorist as Judge

visaged by that right.<sup>161</sup> For instance, someone's right to free speech entails that someone else (paradigmatically the state) has the duty to ensure that conditions which foster free speech exist; or my right to my watch entails that no one should deprive me of it. To use Holmström-Hintikka's example, if someone has the right to die (by way of euthanasia or assisted suicide), then this entails that someone else has the duty to ensure that death occurs. Hohfeldian privileges (or liberties) do not impose duties on others. The essence of a Hohfeldian privilege is the absence of both a right with the same substantive content and of a contrary duty.

This can best be illustrated by example, one which I hope is less morally contentious than the use of nuclear weapons or assisted death. I like drinking whisky but, strictly, I have no right to do so (even if this can be seen as a cultural 'right' which attaches to Scotsmen). I only have the liberty or privilege to drink whisky. No one else is under a legal duty to ensure that I can drink whisky. For instance, I cannot demand that a distillery makes whisky for me or even that someone sells it to me. I am under no duty to drink whisky but nor am I, in principle, prohibited from doing so.

However, as it stands, this privilege to drink whisky is atomized and isolated. There are situations when other considerations have a countervailing force and in which my liberty to drink whisky is excluded. For example, in some Scottish cities it is unlawful to drink alcohol in parks or other public places. This prohibition imposes a duty on me not to drink whisky in parks, thus displacing my privilege. This is surely a trivial example, but it lays the basis both to dispose of Stone's foundation for his claim that no prohibition of *non liquet* exists, and also to demonstrate the enduring vitality of the *Lotus* presumption.

Stone's argument is ultimately predicated on propositional deontic logic. However, it is clear that deontic modalities can be assigned to propositions only within the context of a momentary legal system:

A momentary legal system contains all the laws of a system valid at a certain moment. These are not usually all the laws of a system. An English law enacted in 1906 and repealed in 1927 and an English law enacted in 1948 belong to the same legal system. Yet there is no momentary legal system to which both belong, because they were never valid at one and the same moment.<sup>162</sup>

Metaphorically, the momentary system is a snapshot of a legal system frozen at some instant.

Within a momentary system, Stone could easily assign deontic value to legal propositions. He could determine that a given act is obligatory or permitted or pro-

<sup>161</sup> See, for instance, Holmström-Hintikka, 'Could the Right to Die be a Human Right', in U. Kangas (ed.), *Enlightenment, Rights, Revolution: A Collection of Finnish Papers Edited for the 14th World Congress of the I.V.R.* (1989) 171.

<sup>162</sup> J. Raz, *The Concept of a Legal System* (1980, 2nd ed.) 34, see also 189 *et seq.* Raz also concludes that the proposition that what is not prohibited is permitted is generally the closure rule employed by legal systems and that 'closure rules ... are analytical truths rather than positive legal rules': see 'Legal Reasons, Sources, and Gaps', in his *The Authority of Law* (1979) 53, at 77.



hibited, or even that it is not clear whether a given act is permitted or prohibited because, for instance, it raises an interpretative problem or presents a novel issue. However, Stone's deontic logic can neither transcend the boundaries of a momentary system nor take account of the legal value of principles.

Legal principles – whether principles of international law as such or analogies drawn from municipal systems – have a variable legal force that is context dependent. Principles may or may not be applicable, or the operation of one may negate the operation of another, in a given situation. As Stone states, the operation of legal principles does not have 'the compulsion of a legal command'.<sup>163</sup> Accordingly, even within a momentary system, Stone cannot assign deontic value to principles. His analysis is therefore only concerned with rules, but this cannot give a full account of a legal system. His normative array is simply inadequate.

Further, his analysis results in logical atomization, as deontic value can only be assigned to specific propositions detached from their systemic context. To return to my example, Stone would have to affirm both that I was permitted to drink whisky and prohibited from drinking whisky in parks, with each being seen as an isolated and unrelated proposition. This means that, even within a momentary system, Stone cannot take account of internal relations between norms, that is the way in which a rule (or principle) can affect the interpretation or application of another.<sup>164</sup> His analysis cannot account for the fact that the deontic value of a given proposition can be amended when it is relocated within the overall context of the legal system.

Nor can Stone's argument transcend momentary systems. By *inter alia* denying judicial creativity, he denies that the deontic value of propositions in one momentary system can be changed to create another momentary system. Every act of judicial interpretation involves a degree of judicial creativity – the judge adds something which was not there before. Lauterpacht, of course, would argue that this is the inevitable result of the gradual concretization of law. Through his inability to recognize internal relations between norms and the force of legal principles, Stone cannot account for the temporal unity of the international legal system and condemns the international judge to paralysis. In essence, Stone's concept of the international legal order is one of an atomized set, and not an integrated system, of rules.<sup>165</sup> Despite his protestations, Stone's logic entails his commitment to what might be termed an unreconstructed *Lotus* position, where voluntarist state consent is required for each specific norm.

On the other hand, systemic location preserves the analytical importance of the *Lotus* presumption, but dislocates it from a positivist and voluntarist context. It allows the scope of specific norms to be determined within their systemic context. If applied in an atomized manner, as adherence to Stone's thesis would require, then

163 'Non Liqueur and the Function of Law', 135.

164 See Raz (1980), *supra* note 162, at 24–25.

165 In this, Stone's view is akin to that of H.L.A. Hart: see *The Concept of Law* (1961) Ch.10.

*Lotus* is simply a formal residual closing rule.<sup>166</sup> However, if propositions are located within the legal system of which they form part where the possibilities of internal relations are exhausted – in other words, if a full determination of how a given legal proposition is affected by others, including principles, is undertaken – then *Lotus* provides material closure by finding that states neither have a right nor a duty in relation to a given matter. It only records the outcome of substantive analysis rather than intervening to determine that outcome. Seen in this light, the *Lotus* presumption is perfectly compatible with the changed international order identified by President Bedjaoui and Judge Shahabuddeen.

This analytical approach might also serve to reject Judge Shahabuddeen's alluring proposal that rights should not be recognized that are destructive of the framework of right. Let us assume that I have a liberty to commit suicide – a liberty and not a right because no one is under a duty to assist me to commit suicide. This does not mean that I am free to commit suicide using a bomb on a crowded train because I am under a countervailing legal duty not to harm others. This systemic location of my liberty to commit suicide at least appears to indicate that Judge Shahabuddeen's argument falls under Occam's Razor.

## And Finally

Each temporal legal community, perhaps particularly the academic legal community, has its own concerns and fixations that it addresses and, once addressed, the focus of concern moves on to other issues. Some concerns, however, are constant, although they may reappear in different guises at different times. Although methods – and particularly the terminology – of analysis have changed, Lauterpacht's analysis of the international judicial function, and thus ultimately the nature of international law, is still instructive and worth consideration. It retains a contemporary resonance. Modern international lawyers might wish to pursue this enterprise within the framework of tendencies towards apology and utopia but, in any event, Lauterpacht had already anticipated this argument by adverting to the

perennial problem with which the science of international law has been confronted almost from the start. It has been exposed to the inducement to supply a rationalization of

<sup>166</sup> The Presidential casting vote, provided for in Article 55.2 of the Statute, can also be seen as a formal procedural method to exclude a *non liquet*. If the Court is evenly divided, the casting vote intervenes to preclude a failure to reach a decision because it determines the outcome one way or the other. On the casting vote, see Rosenne, 'The President of the International Court of Justice', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 406, at 410–411. In the *Nuclear Weapons* advisory opinion, it would appear that President Bedjaoui preferred to follow the French, rather than the English, version of Article 55.2.

However, in the *Nuclear Weapons* advisory opinion, the casting vote could not function as a formal method of closure because the *non liquet* was inherent in the drafting of 105.2.E, arising from the paragraph 97 finding. This raises questions about the Court's deliberative procedure which go well beyond the bounds of this paper.

Iain G.M. Scobbie

inferior and irrational practices; to confuse in the name of realism, the function of chronicling events with that of a critical exposition of rules of conduct worthy of the name of law; to furnish a philosophy of second best; and to represent the transient manifestations of immaturity and anarchy in international relations as resulting necessarily and permanently from the nature of States the mutual relations of which, it is said, may be regulated by voluntary co-operation but not by a rule of law imposed and enforced from above.<sup>167</sup>

167 'The Grotian Tradition', *supra* note 9, at 362-363.