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SIR HERSCH LAUTERPACHT AS A PROTOTYPE OF POST-WAR
MODERN INTERNATIONAL LEGAL THOUGHT: ANALYSIS OF
INTERNATIONAL LEGALISM IN THE UNIVERSALISATION
PROCESS OF THE EUROPEAN LAW OF NATIONS

KITA, YASUO

LL.B. (WASEDA), M.A. (KYOTO)

DOCTOR OF PHILOSOPHY



LAW DEPARTMENT

UNIVERSITY OF DURHAM

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2003

1 2 MAR 2004

To My Parents, Toshiaki and Takako

Name: KITA, Yasuo

Title: *Sir Hersch Lauterpacht as a Prototype of Post-War Modern International Legal Thought: Analysis of International Legalism in the Universalisation Process of the European Law of Nations*

Degree: Doctor of Philosophy

The Year of Submission: 2003

Abstract

This thesis explains how Sir Hersch Lauterpacht constructed his international legal theory in the universalisation process of the European law of nations. Introduction presents the general background of the universalisation process of the European law of nations. Chapter 1 discusses the situationality of Lauterpacht, which affected his life as an international lawyer, namely his Jewish background, the influence of Kelsen and the English tradition of international law. Lauterpacht's normative conception of the international community in the inter-war period is explicated in Chapter 2. In Chapter 3, I examine how Lauterpacht dealt with legal problems in the outlawry of war from the inter-war period to the end of the Second World War. Chapter 4 holds Lauterpacht's attempts to reconstruct the international community after World War II. Being opposed to political realism, Lauterpacht employed the Grotian Tradition in order to prove the historical value of his idealism. He moulded the function of states into the framework of his normative conception of the international community as *civitas maxima* with regard to recognition, collective security and the international protection of human rights. I demonstrate how Lauterpacht contributed to the work of the International Law Commission in Chapter 5 from 1952 to 1954. Chapter 6 examined the problems of the responsibility of international judges, namely their neutrality, legal reasoning, and the compatibility of 'automatic' reservation with the ICJ Statute. The conclusion is an appreciation of legalism within the framework of the universalisation of international law in the era of decolonisation

DECLARATION

No part of this thesis has previously been submitted for the award of a degree in the University of Durham or any other university. This thesis is based solely upon the author's research.

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Y. K.

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- Aerial Incident of 27th July 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment* [1959] ICJ Reports 127.
- Anglo-Iranian Oil Co., Preliminary Objection, Judgment* [1952] ICJ Reports 93.
- Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion* [1988] ICJ Reports 12.
- Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment* [1958] ICJ Reports 55.
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order* [1993] ICJ Reports 325.
- Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment* [1985] ICJ Reports 192.
- Azazh Kebbede Tesema and Others v. Italian Government* [1938-1940] 9 ADR 93.
- Bank of Ethiopia v. National Bank of Egypt and Liguori* [1935-1937] 8 ADR 119.
- Certain Norwegian Loans, Judgment* [1957] ICJ Reports 9.
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- Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Reports 18.
- Desgranges v. International Labour Organization* [1953] 20 ILR 523.
- Dover Castle* [1923-1924] 2 Annual Digest 429.
- Eastern Extension, Australasia and China Telegraph Company* 6 RIAA 112.
- Factory at Chorzów, Claim for Indemnity, Merits, PCIJ Series A, No.17.*
- Fisheries, Judgment* [1951] ICJ Reports 116.
- Fisheries Jurisdiction, Merits, (the United Kingdom v. Iceland)* [1973] ICJ Reports 3.
- Free Zones of Upper Savoy and the District of Gex (Second Phase), PCIJ Series A, No.24.*
- Frontier Dispute, Judgment* [1986] ICJ Reports 554.
- Goering and Others* [1946] 13 ADR 203.
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- International Status of South-West Africa, Advisory Opinion* [1950] ICJ Reports 128.
- Interhandel, Interim Measures of Protection, Order* [1957] ICJ Reports 105.
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Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment [1984] ICJ Reports 392.

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South West Africa, Preliminary Objections, Judgment [1962] ICJ Reports 319.

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SS "Lotus", PCIJ Series A, No.10.

SS "Wimbledon," PCIJ Series A, No.1.

Sovereignty over certain Frontier Land, Judgment [1959] ICJ Reports 209.

Texaco v. Libyan Government 53 ILR 422.

United States Diplomatic and Consular Staff in Tehran, Judgment [1980] ICJ Reports 3.

Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa, Advisory Opinion [1955] ICJ Reports 67.

Western Sahara, Advisory Opinion [1975] ICJ Reports 12.

LIST OF ABBREVIATIONS

AJIL	<i>American Journal of International Law</i>
AD	<i>Annual Digest of Public International Law Cases,</i>
ADR	<i>Annual Digest and Reports of Public International Law Cases</i>
Analogies	H. Lauterpacht, <i>Private Law Sources and Analogies of International Law: With Special Reference to Arbitration</i> (London: 1927).
Annuaire	<i>Annuaire de l'Institut de droit international</i>
APSR	<i>American Political Science Review</i>
BYIL	<i>British Year Book of International Law</i>
CJTL	<i>Columbia Journal of Transnational Law</i>
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Legal Problems</i>
CLR	<i>Columbia Law Review</i>
Commons	<i>Parliamentary Debates (Hansard), House of Commons Official Report</i>
CP-I	E. Lauterpacht (ed.), <i>Collected Papers of Sir Hersch Lauterpacht</i> , vol.1 (Cambridge: 1970)
CP-II	E. Lauterpacht (ed.), <i>Collected Papers of Sir Hersch Lauterpacht</i> , vol.2 (Cambridge: 1975)
CP-III	E. Lauterpacht (ed.), <i>Collected Papers of Sir Hersch Lauterpacht</i> , vol.3 (Cambridge: 1977)
CP-IV	E. Lauterpacht (ed.), <i>Collected Papers of Sir Hersch Lauterpacht</i> , vol.4 (Cambridge: 1978)
CYIL	<i>Canadian Yearbook of International Law</i>
DBFP	<i>Documents of British Foreign Policy</i>
Development-I	H. Lauterpacht, <i>The Development of International Law by the Permanent Court of International Justice</i> (London: 1934).
Development-II	H. Lauterpacht, <i>The Development of International Law by the International Courts</i> (London: 1958).
DIA	<i>Documents on International Affairs</i>

EJIL	<i>European Journal of International Law</i>
Function	H. Lauterpacht, <i>The Function of Law in the International Community</i> (Oxford: 1933).
Grotius Society	<i>Transactions of Grotius Society</i>
GYIL	<i>German Yearbook of International Law</i>
HAC	G. G. Wilson (ed.) <i>The Hague Arbitration Cases</i> (Boston: 1915).
HJIL	<i>Harvard Journal of International Law</i>
HLR	<i>Harvard Law Review</i>
IBORM	H. Lauterpacht, <i>An International Bill of the Rights of Man</i> (New York: 1945).
ICJPLEads	<i>International Court of Justice: Pleadings, Oral Arguments, Documents</i>
ICJReps	<i>Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ILHR	H. Lauterpacht, <i>International Law and Human Rights</i> (New York: 1950).
ILM	<i>International Legal Material</i>
ILR	<i>International Law Reports</i>
JHIL	<i>Journal of the History of International Law</i>
LJIL	<i>Leiden Journal of International Law</i>
Lords	<i>Parliamentary Debates (Hansard), House of Lords Official Report</i>
LPICT	<i>The Law and Practice of International Courts and Tribunals: A Practitioners' Journal</i>
LQR	<i>Law Quarterly Review</i>
MLR	<i>Modern Law Review</i>
OJLS	<i>Oxford Journal of Legal Studies</i>
PCIJ	<i>Publications of the Permanent Court of International Justice</i> Series A: Judgments Series B: Advisory Opinions Series A/B: Cumulative Collection of Judgments and Advisory Opinions given since 1931
PASIL	<i>Proceedings of the American Society of International Law</i>

Procès-Verbaux	Advisory Committee of Jurists, <i>Procès-Verbaux of the Proceedings of the Committee.</i>
RdC	<i>Recueil des Cours de l'Académie de Droit International</i>
Recognition	H. Lauterpacht, <i>Recognition in International Law</i> (Cambridge: 1947).
RIAA	<i>Reports of International Arbitral Awards</i>
RILA	<i>Report of the Conference of the International Law Association</i>
Sixth-Committee	<i>Official Records of the General Assembly, Sixth Committee</i>
TGMWC	The Trial of German Major War Criminals
UNWCC	The United Nations War Crimes Commission, <i>History of the United Nations War Crimes Commission and the Development of the Laws of War</i> (London: 1948)
Whitman	Whitman (ed.), <i>Digest of International Law</i>
YBILC	<i>The Yearbook of the International Law Commission</i>
YLJ	<i>Yale Law Journal</i>

NOTE ON FOOTNOTES

1. In order to save the number of words, I use oblique between words in citations in footnotes. They usually are: the surname of author/the year of publication/page. For example, when I mention 'the Lauterpacht doctrine' in the case of Akehurst's text book *A Modern Introduction to International Law*, 6th ed., p.63, I summarise the source information as follows: Akehurst/1987/63.

2. Insofar as the authors are identifiable by surname, I only mention their surnames in footnotes. However, if two authors have the same surname, I write their first names or its initials as well. For example, W/Beckett and J/A/Beckett. However, in the case of Sir Hersch Lauterpacht, I just refer to his surname only. Sir Elihu Lauterpacht is cited as Elihu/Lauterpacht.

3. In the case of collaboration, I use hyphen in order to show the co-authorship. For example, in the case of K. Alderson and A. Hurrell's article, I just say: Alderson-Hurrell. However, an exceptional case is *Oppenheim's International Law*. In order to show the different editions shortly, I also linkage surnames by hyphen. For example, Oppenheim-Roxburgh, Oppenheim-McNair, Oppenheim-Lauterpacht, and Oppenheim-Jennings-Watts.

4. The titles of articles and books are omitted in footnotes in order to save the numbers of word. However, the year of publication, which only is mentioned, enables us to identify the cited articles or books by reference to Bibliography. If one author writes more than two articles or books in the same year, I employ alphabet in order to distinguish between two articles. For example, Akehurst published two articles in the volume 47 of *British Yearbook of International Law 1974-1975*, namely *Custom as a Source of International Law* and *The Hierarchy of the Sources of International Law*. The former is cited as Akehurst/1974-1975a, and the latter as Akehurst/1974-1975b.

5. 'BR' implies Lauterpacht's book review. It is possible to identify his book review by reference to the number attached to BR which is seen in Bibliography. Thus, for example, 'Lauterpacht/BR73/1947' means his book review of '*A Modern Law of Nations* by P. C. Jessup' (1947) 24 *BYIL* 502. 'R' means the professional reports which Lauterpacht submitted to governments or international organisations. 'F' denotes 'Forward' which he wrote for others' books.

Introduction

A.1. GENERAL

It is scarcely necessary to point out that international law developed in Europe. William Hall, for example, declared that international law is ‘a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised.’¹ It is true that normative phenomena similar to international law were seen in such regions outside Europe as ancient China² or the Far East.³ However, such normative phenomena among political entities in Asia did not affect international law as we understand it. It is the normative system called *jus publicum europaeum* (public law of Europe) or the European law of nations which developed into the international law universally used in our era. The history of international law shows how the European law of nations became universal beyond its geographical limits.⁴ Geographically, it extended to other parts of the world with the era of colonialism. During the era of colonialism, European nations claimed the universality of European civilisation symbolised by international law.

The encounter between Japan and the European powers in the late 19th century is a good example of how European nations claimed the universality of their civilisation.⁵ Japan had been closed to European nations under the Tokugawa shogunate régime for nearly 250 years. However, it was forced in 1858 by the United States, which recognised itself as a successor of European civilisation, to conclude the unequal treaty which recognised consular jurisdiction, and denied the sovereign right of Japan to decide customs duties, even though the Tokugawa shogunate government had less knowledge of the law of nations. In other words, Japan was compelled to

¹ Hall/1924/47.

² Iriye/1967-I.

³ Onuma/2000.

⁴ Schmitt/2003; Schwarzenberger/1951/25-39.

⁵ Kozai/1994/75.



accept the universal applicability of the European law of nations by concluding these unequal treaties. Other European powers, including the United Kingdom, also demanded that Japan conclude these unequal treaties. It is not surprising, therefore, that the main purpose of the foreign policy of Japan after the Meiji Restoration in 1868 was to revise these unequal treaties. In order to accomplish its foreign policy, Japan had to modernise. Unless Japan embraced what is known as westernisation, European powers would not recognise it as a civilised nation, which meant that they would not treat Japan as an equal. Only after Japan showed its military power and its compliance with the laws of war in the Sino-Japanese War of 1894 to 1895 was it regarded by the European states as a civilised nation, and then succeeded in the revision of those unequal treaties.⁶ Thus, European civilisation, including international law, claimed its universality. It was after former colonies became newly independent states in the late 1950s that the European character of international law began seriously to be disputed.⁷

The geographical extension of the European law of nations, however, could not help but affect the substance of the law itself. The notion of occupation which Grotius introduced into international law by the analogy with Roman law in *Mare Liberum*, for example, cannot be explained in the absence of the conflicts among European nations with regard to the acquisition of their colonies.⁸ It is also proven that the concept of territorial sovereignty was established in the scramble for Africa.⁹ With regard to membership of the international community, Christianity had been the standard of any state entitled to become the subject of the European law of nations. This meant that non-Christian countries were not the subject of law. However, the notion of civilization supplanted Christianity as the standard of the membership of the family of nations, because European nations had to recognise the legal capacity, though limited, of non-Christian nations such as Turkey, China or Japan, for the sake of security and trade. Thus, the universalisation of the European law of

⁶ Hall/1924/49; Holland/1898/112-129.

⁷ Wilfred/Jenks/1958/63-172; Röling/1960; Abi-Saab/1960; Abi-Saab/1962; Carlston/1962; Anand/1962; Anand/1966; Prakash/Sinha/1965; McWhinnney/1987.

⁸ Taijyudou/1955.

⁹ Anghie/1999.

nations is the process by which it gradually lost its European character in exchange for acquiring its universality.

The universalisation process of the European law of nations, thus, has two meanings: (1) the geographical extension of the sphere of the application of the European law of nations, and (2) the transformation of the European law of nations to universal international law. It is no coincidence that legal writers started to use the term 'international law,' coined by Bentham, instead of the term 'European law of nations' in the 19th century.¹⁰ The geographical extension of the European law of nations was over by the time European powers had almost completed the division of the world at the beginning of the 20th century. However, the European law of nations changed into the universal law of nations after it became applicable to civilised nations, irrespective of their non-European origin. This change of the substance of the European law of nations started from the end of the Concert of Europe to the establishment of the League of Nations.

In the 19th century, the balance of power was indispensable to the existence of the European law of nations. In the second edition of his famous treatise, Lassa Oppenheim drew the first lesson from the history of international law:

'The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent.'¹¹

'The second moral is,' he continued, 'that International Law can develop progressively only when

¹⁰ Grewe/2000/462-463.

¹¹ Oppenheim/1912a/80.

international politics, especially intervention, are made on the basis of real State interests'¹² In the view of Oppenheim, international law in the 19th century was based on power politics, of which the two elements are the balance of power and the quest for national interest.

However, the First World War was the result of the collapse of the balance of power. The causes of the First World War are too complex to mention in detail here. Suffice it to note that the Great War forced people to think the balance of power inappropriate as the basis of international relations. Oppenheim also thought so. Just before the end of the war, he predicted that the development of international law would follow it after the First World War.

'[T]he outbreak of the present war is epoch-making, because it has become apparent that, whatever may be the war aims of the belligerents, at bottom this World War is a fight between the ideal of democracy and constitutional government on the one hand, and autocratic government and militarism on the other. Everywhere the conviction has become prevalent that things cannot remain as they were before the outbreak of the present war, and therefore the demand for a League of Nations, or – I had better say – for a new League of Nations to take the place of that which has been in existence for about 400 years, has arisen.'¹³

The League of Nations, thus, appeared as 'the triumph of liberalism on the international scene.'¹⁴ If the League of Nations was thought to introduce liberalism to the international plane, it would not be surprising that international legal studies after the First World War were considerably affected by 'the Spirit of Geneva' which 'comprises a desire for liberty and universality, a confidence in man, provided he submit to rules, an inexhaustible curiosity as to ideas and people, a compassion for all miseries combined with an urge to invent, to ameliorate, to administer with method.'¹⁵ How did international legal studies change in the inter-war era? In order to ponder this question, it is noteworthy that Oppenheim expected a change in international legal studies in the second edition

¹² *Ibid.*/80-81.

¹³ Oppenheim/1919/11.

¹⁴ Morgenthau/1946/41.

of his textbook: 'The fifth moral is that the progress of International Law depends to a great extent upon whether the legal school of International Jurists prevails over the diplomatic school.' This remark is a key to the above question, because 'the legal school of International Jurist' is another expression of liberalism in international legal studies. It presupposes the domestic analogy which expects 'International Law to develop more or less on the lines of Municipal Law, aiming at the codification of firm, decisive, and unequivocal rules of International Law, and working for the establishment of international Courts for the purpose of the administration of international justice.' Thus, Oppenheim was opposed to the diplomatic school which 'considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules.' There was no doubt for him 'that international Courts are urgently needed, and that the rules of International Law require now such an authoritative interpretation and administration as only an international Court can supply.'¹⁶

When the Permanent Court of International Justice was established within the scheme of the League, as Oppenheim predicted, it is no wonder that the legal school became influential in international legal studies in the era of the League. However, it is improper to group international lawyers without explicating the ethos of the legal school of international lawyers. It is legalism or the belief in legality. It is convenient to describe the detailed characteristics of legalism as the ethos of the legal school of international lawyers.

Legalism is the common belief of lawyers that the ideal of the Rule of Law is politically legitimate. The crux of legalism is expressed by Max Weber that 'today the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.'¹⁷ Neil MacCormick also defines legalism as 'the stance in legal politics according to which matters of legal regulation and controversy ought so far as possible to be conducted in accordance with predetermined rules of considerable generality

¹⁵ De/Traz/1935/30.

¹⁶ Oppenheim/1912a/80.

¹⁷ Weber/1968/37. Emphasis original.

and clarity, in which legal relations comprise primarily rights, duties, and in which acts of government however teleologically must be subordinated to respect for rules and rights.’¹⁸ In other words, legalism or the belief in legality is one of the answers to the question as to how a political authority legitimates its governance. Insofar as the authority complies with legal rules and principles, the exercise of its power is entitled to be recognised as legitimate. If the Rule of Law means that ‘the government shall be ruled by the law and subject to it,’¹⁹ legalism is nothing but the general attitude of lawyers to respect for the Rule of Law.²⁰

It cannot be denied, thus, that legalism is one of the political ideologies or preferences.²¹ Some lawyers may be opposed to the term ‘ideology’ because law is different from politics. However, the respect for the ideal of the Rule of Law is one of the answers to the question, what kind of governance is politically appropriate. This point is shown by the general attitude of lawyers to politics; lawyers tend to think that law prevails over politics. Judith Shklar pointed out this tendency of lawyers.

‘Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other.’²²

This attitude of lawyers is just one example of how lawyers make their value-judgments with regard to politics. The belief in the superiority of law over politics itself is the matter of political morality.

The legal school of international lawyers essentially accepts this premise as the Rule of Law in

¹⁸ MacCormick/1994/500.

¹⁹ Raz/1979/212.

²⁰ MacCormick/1990/541.

²¹ Shklar/1964/1-28.

²² *Ibid.*/111.

international relations. It is true that Weber and MacCormick discussed the political legitimacy of domestic governance, not the legitimacy of international governance. However, the legal school of international lawyers believes that the Rule of Law is also the legitimate form of governance in the international community. Martti Koskenniemi made the following point:

‘Though international lawyers have received much of their professional vocabulary from ancient sources – Roman law and Christian ethics – in a relevant sense their profession is based on distinctly modernist ideas about social organization and political legitimacy. Central to these ideas is the belief that human society is an artificial creation and that its only legitimate organizing principle is the Rule of Law – “the principle that the health of the political realm is only maintained by conscientious objection to the political”.’²³

Goldstein also says,

‘Some actors favour law not only because it serves their interests but also because they believe decisions taken according to legal precepts are superior to other forms of governance. Belief in law as “good” is not evenly distributed in the population or across regions. Certainly lawyers more often believe in the use of law than other occupational groups, though it is hard to separate the normative from the material basis of their support.’²⁴

This belief is very common to the legal school of international lawyers, whether positivist or naturalist. Oppenheim said,

‘I name these schools “diplomatic” and “legal” for want of better denomination. They must, however, not be confounded with the three schools of the “Naturalists,” “Positivists,” and “Grotians”.’²⁵

²³ Koskenniemi/1992/xi.

²⁴ Goldstein/2000/397.

²⁵ Oppenheim/1912a/80/n.2.

Since legalism is ‘the common element in all the various and conflicting modes of legal thinking,’²⁶ it is common to most ‘mainstream’ lawyers insofar as they believe that the Rule of Law is the only legitimate form of governance even in international relations. Positivists and naturalists discussed how they should construct legal justice. However, it is a different question from the belief that legality is politically legitimate. Insofar as they entertain this belief, they are common in legalism, although it is not deniable that there is still a difference between legal-formalism (positivism) and legal-moralism (naturalism) with regard to the question of the relation of law with morality.

Even if the legal school of international lawyers believes that the Rule of Law is desirable in international relations, however, it is also true that the international community lacks the centralised authority to administer international law, which is the important condition of the Rule of Law in international relations. Hart pointed out that ‘[t]he absence of these institutions [international legislature, courts with compulsory jurisdiction, and centrally organized sanctions] means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation.’²⁷ It is essential, therefore, for the legal school to establish international institutions. In this context, the domestic analogy plays the decisive role for the institutionalisation of the international community. The legal school does not admit the difference between the domestic societies and the international community. It is so even if the international community has been unorganised, which simply means to the legal school that the international community is at the developing stage. If the international community were developed, it would seem to the legal school to be more similar to domestic societies. Therefore, the legal school of international lawyers wishes to establish the compulsory jurisdiction of the international courts in order to settle international disputes in accordance with international law. However, if international legal rules are not certain, the discretionary power of international judges might be very broad and sometimes arbitrary. Therefore, they emphasise the importance of the international law-making process. Furthermore,

²⁶ Shklar/1964/8-9.

²⁷ Hart/1994/214.

they expect that international law should be enforced impartially and coherently, which means they presuppose the existence of the administrative body to enforce international law. In other words, the legal school wants to introduce the liberal structure of the modern state into the international community as a whole.

The legal school, thus, claimed the Rule of Law in the international community. The Rule of Law seemed to the legal school of international lawyers to be the universal political principle of mankind, irrespective of whether people were European or not. It was natural, thus, for the legal school to think that international law was universally normative. Legalism did not matter to the actual difference between the military or economic powers of states, because all states are equal before international law. Neither was the legal school of international lawyers concerned as to whether states were European or not, because it would be racial discrimination to distinguish between them. International law, thus, became universal insofar as the image of the world was normatively constructed. It should be noted, however, that the Rule of Law itself is a product of European political culture at the same time.²⁸ It is the case that the Rule of Law is just one of several political traditions in Europe, because it is in Europe that some political ideologies such as communism or Nazism which were hostile to the ideal of the Rule of Law appeared.²⁹ Nevertheless, the fact remains that it is in Western Europe that the ideal of the Rule of Law was born and prevails. Thus, legalism has two characteristics: its European origin and universalism. It is the key concept to understanding how the European law of nations was transformed into the universal law of nations.

From such a viewpoint of universality, the League of Nations seemed to the legal school in the inter-war era to be one important step towards the organised community of states, which is the essential condition to the Rule of Law in international relations. Indeed, international law in the era of the League was clearly developed in accordance with the prediction of Oppenheim. The League of Nations system itself was based on domestic analogy.³⁰ It was expected that all kinds of

²⁸ Huntington/1996/70.

²⁹ Shklar/1964/22.

³⁰ On the domestic analogy which plays an important role in the creation of the League of Nations,

international disputes should be settled in accordance with law under the League of Nations System. The expectation embodied the establishment of the Permanent Court of International Justice and the General Act for the Pacific Settlement of International Disputes. International legislation such as the Conference on the Progressive Codification of International Law, held in 1930 under the auspices of the League of Nations, was also embodied as 'the Spirit of Geneva.' In other words, international politics was legalised under the League of Nations system. Oppenheim's prediction seems to the legal school of international lawyers to have come true.

However, when the Second World War occurred in 1939 after such crises as the Manchurian and Abyssinian incidents, nobody could deny that the Spirit of Geneva had already failed. The miscarriage of the Spirit of Geneva was true of international legal studies at that time. It became necessary to reconsider whether or not legalism was appropriate to international relations as the basis of the universality of international law. Some classical political realists argued for the inappropriateness of international legalism in the era of the League of Nations. E. H. Carr, for example, considered that international law is based on political decision:

'Every system of law presupposes an initial political decision, whether explicit or implied, whether achieved by voting or by bargaining or by force, as to the authority entitled to make and unmake law. Behind all law there is this necessary political background.'³¹

From such a viewpoint, the legal school of international lawyers in the era of the League seemed to disregard this presupposition: 'Unwilling to recognise the political basis of every legal system, they dissolve politics into law.'³² Consequently, it seems to Carr to be inevitable that the legal school damaged the authority of international law through the mistaken idea that international law can

see Suganami/1989/79-93.

³¹ Carr/1945a/166.

³² *Ibid.*/186.

solve the conflict of interests in the political sphere.³³

The legal school of international lawyers, nevertheless, still exercised influence over the reality of international law and on the academic paradigm of international legal studies even after the Second World War. What role did the legal school of international lawyers play from the historical perspective of how the European law of nations became universal beyond its European origin? From such a viewpoint, it is worthwhile to examine the theory of Sir Hersch Lauterpacht who was 'one of the most determined critics of the tenets of the diplomatic school.'³⁴

A.2. WHY HERSCH LAUTERPACHT?

Sir Hersch Lauterpacht was one of the great British international lawyers at his time. He occupied the Whewell Chair of International Law at the University of Cambridge (1938-1955), and later became the Judge of the International Court of Justice (1955-1960). His edition of *Oppenheim's* is still regarded as one of the best English textbooks of international law. Although Jennings and Watts published the ninth edition of *Oppenheim's*, Lauterpacht's edition is still valuable because Jennings and Watts have not yet published the part dealing with international organisations and its second volume with regard to the settlement of disputes and war. Furthermore, the trilogy of international judicial functions, namely *Private Law Sources and Analogy of International Law*, *The Function of Law in the International Community* and *The Development of International Law by the International Court*, remain essential reading for all international lawyers even after his death. His influence over international lawyers is shown by the fact that *European Journal of International Law* had a special issue about him under 'The European Tradition in International Law' on the centenary of his birth.³⁵ Undoubtedly, we owe Lauterpacht much, as Manfred Lachs

³³ *Ibid.*/187-188.

³⁴ Saganami/1989/17.

³⁵ The articles and notes on Hersch Lauterpacht published as 'The European Tradition in International Law' are: Koskeniemi/1997c; Scobbie/1997; Herzog/1997; Jennings/1997; Schwebel/1997; the reprint of Kelsen/1961 and McNair/1961a; Elihu/Lauterpacht/1997.

admired Lauterpacht particularly in his book discussing the teachers in international law.³⁶

It should be noted, moreover, that Lauterpacht influenced the so-called English school of international relations as represented by Hedley Bull. In his famous article *The Grotian Conception of International Society*, Bull discussed the opposition between Grotius and Oppenheim with regard to the conception of international society. However, it was, in fact, Lauterpacht as neo-Grotian whom Bull compared with Oppenheim, because Bull's understanding of Grotian conception that '[t]he central Grotian assumption is that of the solidarity, or potential solidarity, of the states comprising international society, with respect to the enforcement'³⁷ was essentially based on Lauterpacht's understanding of Grotius in *The Grotian Tradition in International Law*.³⁸ In this sense, Lauterpacht may be regarded as the solidarist origin of the English school of international relations.³⁹

There is no doubt, therefore, that the international legal theory of Lauterpacht is worth examining for explicating the role of legalism in the universalisation process of the European law of nations. However, it may be asked whether there is anything left to discuss concerning his international legal theory, because there are already many articles on this subject, not to mention his academic life. In particular, after Clarence Wilfred Jenks,⁴⁰ Shabtai Rosenne,⁴¹ Gerald Fitzmaurice,⁴² Martti Koskenniemi⁴³ and Iain Scobbie⁴⁴ wrote excellent articles about Lauterpacht's theory of international law, there seems to be nothing left to discuss about his theory. Nevertheless, it is still worth discussing Lauterpacht.

First, it can be argued that the perspectives of Wilfred Jenks and Fitzmaurice as contemporaries of Lauterpacht are naturally different from the viewpoint of subsequent generations.

³⁶ Lachs/1987/115.

³⁷ Bull/2000/97.

³⁸ Dunn/1998/101.

³⁹ Knudsen/2000.

⁴⁰ Wilfred/Jenks/1960.

⁴¹ Rosenne/1961.

⁴² Fitzmaurice/1960/1979/and/1986/634-843.

⁴³ Koskenniemi/1997c/and/2001/353-412.

⁴⁴ Scobbie/1997.

They knew his personality and experienced the same difficulties which he faced. Therefore, Wilfred Jenks and Fitzmaurice did not need to mention the circumstances of their times, namely situationality, which affected the development of Lauterpacht's legal theory. However, it is impossible for the generation of their grandchildren to share the common basis with Lauterpacht, which Jenks and Fitzmaurice must have had for understanding his theory. Therefore, it is natural to assume that the perspective adopted in this thesis would become different from their views. In order to understand Lauterpacht's theory, indeed, it is necessary for subsequent generations to put Lauterpacht and his contemporaries in the stream of history. In other words, Lauterpacht, Wilfred Jenks and Fitzmaurice, have all already been part of the history of international law for this author even before he started to study international law as an undergraduate. If history is not a self-evident fact, but 'a continuous process of interaction between the historian and his facts, an unending dialogue between the present and past,'⁴⁵ talking about Lauterpacht is nothing but an unending dialogue between our present consciousness and the spirit of an international lawyer playing an important role from the inter-war era to the post-colonial world.

Second, Martti Koskenniemi is conscious of situationality in his article *Lauterpacht: the Victorian Tradition in International Law*, which examines Lauterpacht by reference not only to published papers but also unpublished writings, including private letters, in the context of Jewishness and political liberalism in Europe. Indeed, at the beginning of his *Gentle Civilizer of Nations* which describes how European international lawyers made the paradigm of international legal studies from 1870 to 1960, Koskenniemi explains his *Victorian Tradition* that '[i]t tried to put in a historical frame the development of the idea and arguments of one of the twentieth century's most influential international lawyers.'⁴⁶ However, Koskenniemi gives too much emphasis to the situationality of Lauterpacht. His scrutiny of Lauterpacht is certainly inspiring and attractive, but tends to be general and impressionistic criticism without explaining the detailed substance of Lauterpacht's theory. Koskenniemi, for example, does not mention how Lauterpacht helped Robert

⁴⁵ Carr/1961/24

⁴⁶ Koskenniemi/2001/2.

Jackson with the legal justification of the non-belligerent policy of the United States before the Pearl Harbour. As will be explained later, Lauterpacht not only prepared for Jackson's famous address in Havana,⁴⁷ but also wrote a refutation of Borchard's criticism on behalf of Jackson,⁴⁸ with regard to the legal justification of the non-belligerency of the United States. There is certainly a hidden story, which cannot be neglected for understanding the role which Lauterpacht played in international legal practice, under one sentence of Koskenniemi that '[a]t the outset of the Second World War Lauterpacht's views were strongly affected by the interest not to interpret the Lend Lease and US economic assistance to the Allies as a violation of neutrality.'⁴⁹ Neither does Koskenniemi explain Lauterpacht's contribution to the preparation for the Nuremberg Trial except mentioning the personal help of Lauterpacht for Hartley Shawcross. Although it is true that 'the full story of Lauterpacht's role in Nuremberg remains untold,'⁵⁰ it had been already explicated that Lauterpacht played a significant role in the definition of war crimes, the creation of crime against humanity, and the problem of the plea of superior order through the International Commission for Penal Reconstruction and Development,⁵¹ or his personal influence over Jackson.⁵² In other words, Lauterpacht helped not only Shawcross but also Jackson in regard to the punishment of war criminals. These examples that Koskenniemi does not mention in *Victorian Tradition* shows the reason his article is not decisive as the research of the international legal theory of Lauterpacht. It may be because the limitation of words does not allow Koskenniemi to examine the detail of Lauterpacht's theory, though he undoubtedly grasps the general image of Lauterpacht as an international lawyer. However, the international legal theory of Lauterpacht is too minute and, at the

⁴⁷ Jackson/1941/351. Lauterpacht mentioned that he prepared for the address of Jackson. Lauterpacht/R2a/1942/4/para.6.

⁴⁸ Lauterpacht/R2d/1942/13.

⁴⁹ Koskenniemi/2001/380.

⁵⁰ *Ibid.*/389.

⁵¹ UNWCC/94-99/and/281-282.

⁵² According to Nathan Feinberg, Jacob Robinson 'discovered' the fact that Lauterpacht suggested to Jackson the three types of crimes which would be inserted in Article 6 of London Charter. Feinberg/1968/340. However, I could not read Robinson's original article as it is written in Hebrew. Robinson/1961. However, Robinson wrote an English article describing the friendly relationship between Lauterpacht and Jackson. Robinson/1972/3. On Jacob Robinson, see Rosenne/1992/831-

same time too massive, even for an intelligent lawyer to deal with its all aspects in just fifty pages.

Third, considering the wide range of Lauterpacht's theory, which covers almost the entire area of international law, it may be proper for a law scholar to deal with just one topic, or a few related ones, discussed by Lauterpacht. Rosenne and Scobbie essentially examine Lauterpacht's theory of international judicial function. Their articles are brilliant examinations. They do not, however, necessarily describe the international legal theory of Lauterpacht as a whole, although it is true that the theory of international judicial function lies at the centre of his legal theory of international law. However, it is necessary to examine other topics such as recognition in international law or the international protection of human rights for understanding the theory of international judicial function. The normative phenomena called international law is not so simple that even Lauterpacht, who undoubtedly tended to conceive international law from the viewpoint of judge, admitted the administrative, not judicial, organ of international law. Lauterpacht, indeed, seems to have conceived the idea of a Human Rights Council, which was stipulated under Articles 21-25 of his Draft of the International Bill of Men of Rights,⁵³ not from the viewpoint of international judicial function, but from the viewpoint of international supervision.⁵⁴ He explained the supervisory function of the Human Rights Council under his Draft Bill as follows:

'That scheme [of the Human Rights Council], while it does not exclude the jurisdiction of a court, is based primarily on the functioning an organ which, although including persons of judicial experience, is non-judicial in character. That organ must be the pivot of the supervision of the observance of a Bill of Rights which embraces the large majority of members of the United Nations.'⁵⁵

It is undeniable that the idea of international supervision in his theory was premature. However, it is

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⁵³ Lauterpacht/ILHR/318-320.

⁵⁴ On international supervision or international control, see Dupuy/1994; Cassese/2001/225-228; Morita/2000.

⁵⁵ Lauterpacht/ILHR/377-378.

also clear that the supervisory function of the Human Rights Council was regarded as different from the judicial function of the Court. Although it is certainly important to scrutinise only one topic, such as international judicial function, for a deeper understanding of Lauterpacht's opinion, it is necessary to conceive such a topic in the context of the international legal theory of Lauterpacht as a whole.

However, it should be noted, at the same time, that this thesis has no ambition to write the definitive article on the international legal theory of Lauterpacht, simply because such a task is beyond the ability of this author. Neither does he believe that this thesis will be a substitute for the articles on Lauterpacht previously written by many brilliant lawyers. Rather, the purpose of this thesis is to complement those previously written articles about Lauterpacht with an examination of his international legal theory in the historical context. This thesis undeniably owes much to the previous works of other law scholars. However, even this task necessarily needs not only a massive knowledge of international law, but also the ability to understand the atmosphere of the times and other disciplines such as jurisprudence, political theory, and history. It is clearly beyond the ability of this author to cover all topics which Lauterpacht discussed. He has, therefore, confined himself to the topic which is thought to be important from the viewpoint of the role of Lauterpacht's legalism in the context of the universalisation of the European law of nations.

Before explicating his theory, it is necessary to deal with some points covered in this thesis. The first point concerns the chronological development of his theory. It is possible, generally speaking, to divide his era into three periods. The first era is the inter-war period until the late 1930s. In this period, Lauterpacht essentially devoted himself to the problems of international judicial functions including the interpretation of treaty. This period is represented by his trilogy of international judicial functions, namely *Analogies*, *Function* and *Development-I*. The second era is the collapse of the League of Nations and the outbreak of the Second World War, from the late 1930s to 1945. In that period, Lauterpacht was concerned about the legal problem of war, including the principle of non-recognition, neutrality and the punishment of war criminals. Lauterpacht also

confessed his disappointment at the retrogression of international law and his hope in the reconstruction of the international community. The third era is that of the United Nations. During the third period, Lauterpacht established his academic authority. He was elected as *Associé* in 1947, and as Member of the Institute of International Law in 1952. Moreover, he was more involved in international legal practice such as the International Law Commission and the International Court of Justice especially in the 1950s. It is impossible, however, to discuss some topics, such as international judicial function, without cross-referencing the divided periods, because Lauterpacht discussed them in each period. Therefore, it is true that the chronology in this thesis cannot be maintained strictly for the purpose of explicating the international legal theory of Lauterpacht. Nevertheless, the thesis tries as far as possible to reflect Lauterpacht's chronological progression of thought and topics in the order of its chapters. Chapter 1 discusses the early background of Lauterpacht's theory as situationality as well as doctrinal influence over him. In chapter 2, Lauterpacht's construction of international law and the international community will be examined in the context of the universalisation of European civilisation in the inter-war period. Chapter 3 sets forth the legal problems in the process of outlawing war, which influenced the normative structure of international law, from the end of the era of the League of Nations in the 1930s to the end of the Second World War in the 1940s. Chapter 4 explicates the project of Lauterpacht with regard to the new world order after the Second World War with his proposal for the international protection of human rights. Chapter 5 examines those works dealing with the codification process of international law, especially within the International Law Commission. Chapter 6 argues his conception of the responsibility of judges to enhance the authority of the International Court of Justice. Conclusions indicates his legacy for international legal studies after his death in 1960.

Second, the author has to mention the treatment of Lauterpacht's editions of *Oppenheim's* in this thesis. There is a view that even Lauterpacht's edition of *Oppenheim's* should not be regarded as his own view, because Lauterpacht's approach to international law is completely different from the approach of Oppenheim. As Wilfred Jenks said,

'[I]ntellectually Oppenheim and he [Lauterpacht] had little in common except the range and thoroughness of their knowledge. Oppenheim was the last great master of the positivist school, and was in many respects a more confirmed positivist than Phillimore, Hall or Westlake had been; Lauterpacht was among the leading challengers of all the basic assumptions of that school. The result was a compromise satisfactory to no one. Oppenheim remained indispensable by reason of its thoroughness and the meticulous care with which new developments were incorporated in successive editions, but there was an increasing gap between the views of the author, who had frequently expressed himself with considerable dogmatism, and the equally strongly held and now far more widely acceptable convictions of the editor. These divergences related not to details but to fundamentals.'⁵⁶

Iain Scobbie follows Wilfred Jenks, and ignores Lauterpacht's view expressed in *Oppenheim's* in constructing his theoretical position.⁵⁷

It is true that Lauterpacht must have felt constrained from presenting his own original view in *Oppenheim's*. Elihu Lauterpacht said that Hersch Lauterpacht considered whether or not to produce his own textbook instead of *Oppenheim's*.⁵⁸ However, the original text by Oppenheim was only one-third of the total content of the eighth edition of Volume 1 of *Oppenheim's*.⁵⁹ Lauterpacht also considerably re-wrote Volume 2 of *Oppenheim's* after the Second World War.⁶⁰ Even though the structure of *Oppenheim's* as a whole is still attributed to Oppenheim himself, it is undeniable that the parts Lauterpacht wrote or amended are nothing but the view of Lauterpacht.⁶¹ The text written by Lauterpacht is essential in order to explicate how he constructed his international legal theory during the period of his editorship of *Oppenheim's* as far as the texts that he wrote are

⁵⁶ Wilfred/Jenks/1960/67.

⁵⁷ Scobbie/1997/264/n.1.

⁵⁸ Elihu/Lauterpacht/Note/CP-I/2-3.

⁵⁹ Oppenheim-Lauterpacht/1955/vi.

⁶⁰ Oppenheim-Lauterpacht/1952/v.

⁶¹ Some reviewers of Lauterpacht's editions of *Oppenheim's* hoped that Lauterpacht should have left *Oppenheim's* unchanged. H.A.S./1938; B.E.K./1936-1938; Finch/1950; Young/1953.

identified, compared with other editors' versions of *Oppenheim's*. There is, therefore, no reason to disregard Lauterpacht's edition of *Oppenheim's* in this thesis.

This thesis examines how Lauterpacht contributed to the modern paradigm of international legal studies in the universalisation process of international law. It starts by explicating Jewishness as the situationality of Lauterpacht and the doctrinal influence of Kelsenian normativism and the English tradition of international law in order to understand the place of Lauterpacht in the historical context.

1. THE EARLY BACKGROUND OF HERSCH LAUTERPACHT

It is necessary to discuss how Lauterpacht was educated before explicating his theory itself. Three elements affected Lauterpacht's theory: his Jewish origin, Kelsenian normativism and the English tradition of international law. In Lauterpacht's theory, these elements are amalgamated with each other. In particular, the doctrinal influence of Kelsenian normativism and the English tradition explains why Lauterpacht had a special position in the British school of international law,¹ although he was typically seen as 'the Anglo-American school of international law' from the viewpoint of non-British international lawyers.² Without the above three elements, the real meaning of Lauterpacht's theory of international law cannot be understood properly.

1.1. THE JEWISHNESS OF LAUTERPACHT AS SITUATIONALITY

Lauterpacht is always remembered as a British lawyer. Consequently, it is often forgotten that his Jewish origin in Eastern Galicia influenced not only his personal life but also his career as an international lawyer and his own idea of international law. Outi Korhonen refers to such an influence of a situation as 'situationality.'³ Korhonen's explanation of situationality is too pedantic. However, Rein Müllerson more lucidly explains 'situationality' that 'the past and present of a person who interprets and applies international law inevitably affects her interpretation.'⁴ Whether the concept of situationality is novel or not, it is a matter of course that the personal experience of the individual influences his/her idea and life. It is true of Lauterpacht as international lawyer.

Hersch Lauterpacht was born on 16 August 1897 at Zolkiew (Zhovkva) in Eastern Galicia as

¹ Warbrick excluded Lauterpacht as well as Rosalyn Higgins from his conception of 'English approach' due to the fact that 'they were exposed to educational experiences outside English law schools.' Warbrick/1991/49.

² See Schmitt/1938/21-26.

³ Korhonen/1996/7-9.

⁴ Müllerson/2000/55.

the second son among three children. His birth year seems to symbolise his fate as a Jew. In the same year, the first Zionist Congress was held in Basel. The Congress meant the first political declaration of Zionism for Jewish people; it betokened 'the core of a Jewish world conspiracy'⁵ for anti-Semites on the other hand. In a sense, Lauterpacht was fated to be involved in the problem of anti-Semitism and totalitarianism from his birth.

His father, Aaron Lauterpacht, was a middle class Jewish timber merchant. Although 'the financial condition of the family, though not precarious, was variable,'⁶ his father was very keen on education like other Jewish fathers in Galicia; his brother became a lawyer; his family moved to Lwow for the sake of Hersch's education in 1910.⁷ The movement of his family affected not only his secondary education but also his consciousness as a Jew. Although it is said that his parents were very orthodox,⁸ Lauterpacht joined 'an organized group of young Jews whose object was self-education in a group of subjects which included Zionist history and the geography of Israel'⁹ at the age of 15. When Lwow was first occupied by the Russian army, and later reoccupied by the Austrian army during the First World War, young Hersch was working in his father's factory, requisitioned by the Austrian Army. However, Lauterpacht was involved in Zionism even during the First World War:

'In 1916, he revived in Lemberg the *Zevre Zion* movement and in 1917 he arranged a demonstration in celebration of the issue of the Balfour Declaration on Palestine. For this activity he was tried by a military court ... and acquitted. In 1918 he and a friend led a movement which succeeded in bringing about the formation of a Jewish Gymnasium ... where Hebrew and Jewish history were taught and a Jewish atmosphere prevailed.'¹⁰

⁵ Arendt/1976/108.

⁶ McNair/1961b/371.

⁷ This city, which is fifteen miles from Zolkiew, was called Lemberg in Austrian-Hungarian Empire before World War I. Now it is called L'viv in Ukraine.

⁸ See Koskenniemi/2001/369.

⁹ McNair/1961b/371.

¹⁰ *Ibid.*

It is not so clear from McNair's remark how exactly young Hersch participated in Zionism. It would be useful, however, to mention the general features of Galician Zionism. The origin of Galician Zionism is the *Haskalah* movement, which is the Hebrew name of the Jewish Enlightenment. The Jewish Enlightenment originated with 'the Jewish Socrates' Moses Mendelssohn (1729-1786), whose original aim was 'to create a hybrid culture which would incorporate the best of both worlds – Jewish and Western.'¹¹ The Jewish Enlightenment influenced the emancipation of the Jews in Germany and Austria in the middle of the 19th century. The emancipation of the Jews especially in Germany, however, resulted in their assimilation into the larger society of enlightened individuals. Indeed, German Jews tended to think Jewishness as religion rather than as ethnicity. The *Haskalah* movement, however, inspired in Galician Jews a legacy of Jewishness rather than individualism during the awakening of nationalism and political anti-Semitism. They felt it necessary to see themselves as 'the nation' rather than a religious group in order to keep their identity.¹² The identity of Lauterpacht as a Jew should be understood in this context.

In the dynamic awakening of nationalism, it was natural for Zionists to devote themselves to Jewish education especially in Galicia where the Jews had been keen on education since their emancipation; for them, Zionism was the re-identification process of Jewishness. The First World War, furthermore, gave Zionists a chance to educate their co-religious children, because the war had prevented Jewish children from having a normal education. This aspiration to Zionist education in Galicia produced the first autonomous youth movement in the history of Zionism. The *Zeire Zion*, which Lauterpacht is thought to have joined, was one of the autonomous Zionism movements of the young Jews. Although this young Jewish movement is often confused with the left-wing Zionist Russian-Polish political movement of the same name, it was the Galician group of

¹¹ Taylor/1974/23.

¹² Lucas/1974/17.

secondary school students whose purpose was purely educational.¹³ It is not certain which *Zeire Zion* movements young Hersch participated in. However, being adolescent at that time and more interested in education than politics, Lauterpacht seems to have participated in ‘an organization of youths engaged in the study of Judaism and contemporary Jewish problems’¹⁴ rather than in the Russian-Polish political *Zeire Zion* movement.

The ideal of the *Zeire Zion* was also influenced by the Jewish Enlightenment. Martin Buber (1878-1965), one of the leaders of the *Zeire Zion*, later to become a professor of social philosophy at the Hebrew University of Jerusalem, showed the young Jews the way to bridge the gap between Jewish values and universalism: ‘Be a man, but in a Jewish way.’ Zionism appears to the young Jews ‘not as a particularist movement of interest only to Jews but as a movement of potential importance for all mankind.’¹⁵ In a sense, the young Zionist movement in Galicia expressed ‘the will of young Jews to devise radical world outlooks in order to deal with the new historical situation, and to devise new identities which would enable them to find their way both as Jews and as citizens of the modern world.’¹⁶ Such a young Zionist movement in Galicia clearly influenced Lauterpacht’s humanistic and educational commitment to Zionism, as evidenced by the establishment of World Union of Jewish Students.

It is not certain why Lauterpacht decided to study law; perhaps because his brother was a lawyer in Lwow; perhaps because legal profession was ‘the only road to a Jew who refused to convert.’¹⁷ Lauterpacht at first wished to study law at the University of Lwow. Indeed, according to the editor of *Glos Prawa*, in which he published his article *Succession of States with Respect to Private Law Obligations* in Polish, Lauterpacht had ‘spent the first two years of legal studies at the Jan Kazimierz University in Lwow.’¹⁸ However, in November 1918, the Polish army occupied Lwow and soon the Lwow pogrom took place; the Jews were thought to be on the side of

¹³ Patai/1971/896-897.

¹⁴ Mendelsohn/1981/81.

¹⁵ *Ibid.*/82.

¹⁶ *Ibid.*/86.

¹⁷ Beller/1989/37.

Ukrainian forces in the Polish-Ukrainian war. The University of Lwow was also under the control of the Polish government and renamed after the Polish King Jan Kazimierz. Consequently, the University of Lwow became more anti-Semitic than before. The University applied the *numerus clausus* to ensure Polish students occupied not less than 50 percent of the total number of University students.¹⁹

In 1918, Lauterpacht finally decided to move to the University of Vienna, although the university also applied the *numerus clausus* to Jewish students in order to limit them to 25 percent of law students at that time.²⁰ His involvement in Zionism continued in Vienna. It is not difficult to understand that Jewish students needed to help each other due to the lack of commodities and the anti-Semitic atmosphere in Vienna. Lauterpacht 'became president of the *Hochschule Ausschuss*, which was concerned with the welfare, material and otherwise, of some eight to ten thousand Jewish school-children and students and was their representative in dealing with the educational authorities.'²¹

In 1923, after a short visit to Berlin,²² Lauterpacht became a research student at the London School of Economics and Political Sciences under the supervision of Arnold McNair, who later became his academic patron. However, Lauterpacht still continued to participate in the educational aspect of Zionism even after his settlement in the United Kingdom. His frustration with the *numerus clausus* drove him to institute the organisation for Jewish students. His main concern was how Jewish students could protect their right to higher education, considering the difficult situation that anti-Semitism was widespread throughout Europe. In 1924, Lauterpacht as Chairman of the Provisional Executive Committee, finally succeeded in establishing the World Union of Jewish

¹⁸ Elihu/Lauterpacht/Note/CP-III/121.

¹⁹ On the history of the University of Lwow, see <http://www.franko.lviv.ua/general/about.html>

²⁰ See Beller/1989/34/Table-2.

²¹ McNair/1961a/4.

²² According to the biographical notice of the Hague Academy, Lauterpacht was at the University of Berlin for a while. See, for example, Lauterpacht/1947-I/3. Elihu Lauterpacht makes it certain that his parents got married in Berlin at an interview with me on 3rd July 2001.

Students (WUJS).²³ The first Congress of WUJS was held in Antwerp on 30 April 1924 for four days. Nearly 2000 people joined the Conference. 76 delegates from 17 countries discussed the Jewish students' problem. At that Congress, Lauterpacht was elected as the Chairman of WUJS. Albert Einstein accepted the offer from Lauterpacht to become President of the Union in 1925.

WUJS had the three aims at that time. The first was to foster 'cultural and national co-operation between all the Jewish students through the world.' Lauterpacht especially hoped for reconciliation between Western Jewish students and Eastern Jewish students. The second aim was to lobby support 'in the work of upbuilding the Hebrew University and the University Library in Jerusalem and, if possible, in establishing a Jewish University in Europe.' Lauterpacht joined the opening ceremony of the Hebrew University of Jerusalem in 1925. When he joined the twenty-fifth anniversary of the Hebrew University on 7 May 1950, Lauterpacht also remembered his presence in the opening ceremony as the Chairman of WUJS.²⁴ The third task of the WUJS was to seek 'economic relief for those students who are compelled by conditions in their own countries to emigrate in order to study at foreign universities.' Lauterpacht himself experienced a financial hardship in his LL.D. era; he was supported by his father in Lwow and his wife's family in Palestine. Indeed, financially WUJS helped many Jewish students in Eastern Europe to 'emigrate' to Western Europe. By mid-1925, one thousand Eastern European Jewish students were successful in their academic 'immigration' to Italy. However, even Lauterpacht was forced to admit that the academic 'immigration' to France failed, and that the situation of his fellow Eastern European Jewish students was still bleak. In 1930, the second Congress was held, though it was unsuccessful in reinvigorating WUJS. The situation of Nazism becoming powerful not only in Germany but throughout Europe forced WUJS to become inactive. It is not certain when Lauterpacht retired from the Chairman of WUJS. However, another person was elected as Chairman at the third

²³ On the role of Lauterpacht in the establishment of World Union of Jewish Student, see Kalman, 'The History of WUJS', <http://www.wujs.org.il/about/organisation/orghist.shtml>. Although Lord McNair, Elihu Lauterpacht and Koskenniemi referred that organisation as 'World Federation of Jewish Students,' the official name of this Jewish student organisation is World Union of Jewish Students.

Congress in 1933. It is thought that Lauterpacht became too busy reading international law to participate in WUJS or Zionism itself; he was appointed as Reader at the University of London in 1932.

The activity of WUJS shows that Lauterpacht's interest in Zionism was educational and cultural rather than political. Lauterpacht was not an active political Zionist, but he was definitively a Zionist and his identity was always Jewish. Indeed, he is said to have visited the summer schools of the Inter-University Federation of Jewish Students. He was seen to talk to Jewish students in Polish in the Jewish Students' Centre in Warsaw in 1935.²⁵ Furthermore, he maintained contact with the Hebrew University. Feinberg said that 'Lauterpacht was deeply attached to Palestine and to Israel all his life, and followed the progress of the Hebrew University and of its Law Faculty ever since its establishment in 1949.'²⁶ Indeed, the chair of international law at the Hebrew University would be named after Lauterpacht in memory of his contribution to the Hebrew University. Therefore, it is not appropriate for Koskenniemi to say that 'he [Lauterpacht] allowed his Zionism to lapse.'²⁷ It is thought that for Lauterpacht, Zionism was nothing but the re-identification process of Jewishness, which is the crux of the Jewish Enlightenment.

It is also true, however, that the Jewish consciousness of Lauterpacht appears less in the writing of international law.²⁸ The exception is his thesis submitted to the University of Vienna. After he became a Doctor of Law, Lauterpacht chose the department of political science within the Law School at the University of Vienna. At that time, Leo Strisower and Alexander Hold-Ferneck taught international law in the department of political science. Lauterpacht submitted *Das völkerrechtliche Mandat in der Satzung des Völkerbundes*²⁹ as his doctoral dissertation. His hope

²⁴ Lauterpacht/1950b/CP-II/159.

²⁵ D./Stone/1982/109.

²⁶ Feinberg/1961/vii.

²⁷ Koskenniemi/2001/371.

²⁸ According to Koskenniemi, Lauterpacht wrote a paper on the persecution of the Jews in Germany in 1933 other than papers published in *Collected Papers*, however it has not been published yet. Koskenniemi/2001/371-372/n.89.

²⁹ Lauterpacht/1921/CP-III/29-84. It is ascertained by Kelsen that the original text was missing from the archives of the University of Vienna. Kelsen/1961/2. However, the copy was fortunately

for Zionism seems to have motivated him to choose this topic; it seemed to be the legal autonomy of Palestine that Lauterpacht wished to defend from power politics.

One of the legal questions of the Mandate system was whether the Mandatory has sovereignty over the Mandated territories. This question was very serious for Lauterpacht as a 'Zionist.' If the Mandatory has the sovereignty over the Mandated territory, Palestine would face the danger of being annexed to the Mandatory as was South-West Africa after the dissolution of the League of Nations. Furthermore, it should be recognised that this danger was not academically absurd even during the inter-war era. Carl Schmitt, for example, insisted in his *Verfassungslehre* that the Mandated territories are only protectorates or colonies of the Mandatories, because the League of Nations is an organisation of sovereign states, not a 'federation' state which has territorial sovereignty.³⁰

In his thesis, Lauterpacht constructed his argumentation based on the purpose of the Mandate system as a whole. He especially emphasised the term that 'this tutelage should be exercised by them [nations] as Mandatories on behalf of the League' in Article 22, paragraph 2, of the Covenant. He said 'the purpose of the Mandate is tutelage, not in the sense of a limitation of the acknowledged sovereignty of the Mandatories, but as the exercise, on behalf of the League of Nations, of some sovereign rights over the Mandate territory and its population.' He continued as follows:

'Therefore sovereignty lies with the League of Nations and is derived from it. This assertion is based, however, only on legal-logical reasoning. An explicit and formal transfer of sovereign rights to the League of Nations can not be found either in the Covenant of the League of Nations or in the Peace Treaties. By virtue of Article 119 of the Treaty of Versailles sovereignty over the German overseas possessions is transferred to the Allied and Associated Powers. Between this Article and Article 22 there is a gap which can be filled only by assuming a tacit transfer by the Principal Powers to the League of Nations. From this tacit transfer the League

found in the house of Lauterpacht, and translated to English text.

³⁰ Schmitt/1928/384.

of Nations derives its legal title to sovereignty.³¹

Lauterpacht kept to his view on this point in *Analogies*: 'The League became mandant [*sic*] and sovereign over the mandated territories at the moment the Council approved the draft mandates laid before it.'³² It is doubtful whether the authority of the League of Nations should have been called 'sovereignty.' However, apart from this doubt, it is sufficient to indicate the persuasiveness of his teleological interpretation that the International Court of Justice denied the sovereignty of the Mandatory in the *International Status of the South-West Africa* case.³³ He received the degree of Doctor of Political Science on 15th July 1922.

Apart from the above thesis, it is only as professional legal advice to the Jewish Agency for Palestine and the Intergovernmental Committee for Refugees that Lauterpacht published his opinion on international legal questions which the Jews faced during this era. Lauterpacht no doubt tried not to express his Jewishness in the writing of international law. It may be partly because of the general tendency of the Jews, partly due to the demand for neutrality as the ethics of lawyers. However, this fact does not mean that Lauterpacht abandoned his Jewishness. He rather seems to have tried to sublimate his Jewishness to universal value as the young Zionism movement had tried.

The synthesis between Jewishness and universal values is not unreasonable at least insofar as Europe is concerned. Jewishness implied European internationalism at that time. The Jews as a national group did not have their own nation-state in Europe. They were always in a minority and outsiders in European nation-states, even though individually they tried to be assimilated into the majority. Even Hans Kelsen, for example, who had already converted, was advised to give up his academic career due to his origin.³⁴ However, the Jews lived all over Europe. Their solidarity easily crossed over the political boundaries of nation-states. Their isolation in nation-states and their own

³¹ Lauterpacht/1921/CP-III/68.

³² Lauterpacht/*Analogies*/198.

³³ ICJReps/1950/132-133.

solidarity in Europe allowed them to have the international status in Europe. Hannah Arendt summarised this point as follows:

‘Representatives of the nation, whether Jacobines from Robespierre to Clemenceau, or representatives of Central European reactionary governments from Metternich to Bismarck, had one thing in common: they were all sincerely concerned with the “balance of power” in Europe. They tried, of course, to shift this balance to the advantage of their respective countries, but they never dreamed of seizing a monopoly over the continent or of annihilating their neighbours completely. The Jews could not only be used in the interest of this precarious balance, they even became a kind of symbol of the common interest of the European nations.’³⁵

Therefore, it can be said that the Jewish problem meant a problem for ‘the common interest of European nations’ at the same time.

However, it was the balance of power which aggravated the First World War. The beginning of the First World War itself occurred within the balance of power. The Austrian government did not think that its use of force against Serbia would cause a long and miserable war. It just wished to show its prestige in Balkans. Neither did any government predict so. Most governments thought that the Austrian use of force was simply a battle in the Balkans. However, the tragedy lies in the fact that the mechanism of the balance of power in 1914 already became too automatic to control for any governments.³⁶ Consequently, the collapse of the balance of war transformed the Austrian-Serbian war into the First World War as a total war.

The total war which annihilates the enemy, furthermore, caused the inter-European status of Jews to become meaningless. ‘As soon as “victory or death” became a determining policy, and war actually aimed at the complete annihilation of the enemy, the Jews could no longer be of any use.’³⁷ Furthermore, since the European monarchies such as Austro-Hungary, Germany and Russia, on

³⁴ Beller/1989/205.

³⁵ Arendt/1976/22.

³⁶ Kosaka/1978/311.

which the protection of the Jews has traditionally been dependent, decayed at the end of the Great War, the Jews' position became more unstable in such new Central European nation-states as Poland, Czechoslovakia and Hungary. As a result, the status of the Jews in the new nation-states, especially in Poland, became just one topic of the protection of minorities under international law. Indeed, in a letter to Lloyd George, Clemenceau said that 'in view of the historical development of the Jewish question and the great animosity aroused by it, special protection is necessary for the Jews in Poland.'³⁸

The conclusion of the minority treaties means that 'the common interest of European nations' needed to be guaranteed by international law. However, it is this point which becomes a serious problem for international law. If Oppenheim is correct in saying that 'a Law of Nations can exist only if there be an equilibrium, a balance of power between the Family of Nations,'³⁹ why does international law function properly in the situation where the essential condition had already disappeared? Oppenheim, however, already prepared for the alternative to the balance of power. It is 'a central political authority above the Sovereign State that could enforce the rules of Law of Nations'⁴⁰ which international law necessitates in the situation where the balance of power was thought to be inappropriate as the fundamental principle of international relations.

This point explains Lauterpacht's belief in internationalism. It is due to the 'inter-European' status of the Jews that Lauterpacht became an internationalist who denies the supremacy of state sovereignty. He knew from his experience that the Jews could not rely on sovereign states, especially in Central Europe. However, neither could he trust the balance of power, which guaranteed the inter-European status of the Jews, after the First World War. In his revision of *Oppenheim's*, Lauterpacht deleted the explanation of the balance of power as the first moral principle.⁴¹ On the contrary, he chose the international authority such as the League of Nations. The

³⁷ Arendt/1976/21.

³⁸ Lloyd/George/1938/1386-1387.

³⁹ Oppenheim/1912a/80.

⁴⁰ *Ibid.*

⁴¹ It is noteworthy that instead of the balance of power, Lauterpacht adopted 'the victory

sole problem for him is whether the League of Nations can function as ‘a central political authority above the Sovereign State that could enforce the rules of the Law of Nations.’ It is one of the reasons Lauterpacht insisted the ‘sovereignty’ of the League over the Mandate, including Palestine.

Furthermore, the atmosphere at the time seems to affect Lauterpacht’s idea. It is in the 1920s that he started to study international law. This means that young Hersch must have found his ideal in international law with no hesitation in the optimistic atmosphere of the 1920s. Since the League of Nations System generally worked in the 1920s, it is no wonder that Lauterpacht saw the 1920s as the most progressive era of international law. Indeed, he said:

‘[T]he Covenant as laid down in 1919 stands for radical changes, express and implied, in the structure of international law. In comparison with these changes, the normal development of international law must appear to be trifling.’⁴²

In this sense, his internationalism is the product of his own experience in the inter-war era. His harsh criticism of voluntarism should be understood in this context. As Koskenniemi points out, Lauterpacht tried to show that ‘pre-war doctrines had failed because they had been too close to state policy, in a sense, not Utopian.’⁴³

Nor is it difficult to imagine that his enthusiasm for the international protection of human rights was influenced by his own personal and professional experiences as a Jew.⁴⁴ However, he seems to have tried to sublimate his Jewishness to the universal value; the problem of the protection of the Jews for Lauterpacht is one of how individuals should be protected from the arbitrary will of sovereign states. Lauterpacht clearly showed this point in the article about the question of the

everywhere of constitutional government over autocratic government, or, what is the same thing, of democracy over autocracy’ as the first moral principle of international law. Oppenheim-Lauterpacht/1937/80.

⁴² Lauterpacht/1936d/CP-II/146.

⁴³ Koskenniemi/1992/xvii.

⁴⁴ His family in Lwow was killed in a Nazi concentration camp. Only one niece survived.

retroactivity of the Allied legislation repealing the discriminatory laws of Nazi Germany.⁴⁵ The crux of this problem seemed to him to be ‘a question of restoring compulsorily to individuals or holding them against their will to a nationality of which they have been divested (or, at least, of which an attempt was made to divest them) and which has justly become abhorrent to them.’⁴⁶ For him, this problem was how individuals should be protected, not how Jews should be, from the arbitrary decision of states to deprive them of nationality. It may be said that Lauterpacht sublimated his Jewishness to internationalism which lies the centre of his approach to international law.

Furthermore, it should be pointed out that his theory was mainly based on the experience of the inter-war era. This point shows the problems of his theory of international law at the same time. It is no wonder that he may have considered the United Nations System from the viewpoint he held in the inter-war era. In this sense, Lauterpacht’s theory of international law is seen as a typical type of ‘the legal school of International Jurists’ in the inter-war era. What now needs to be examined is how Lauterpacht developed his theory of international law, whose basis is Kelsenian normativism and the English tradition of international law.

1.2. THE DOCTRINAL INFLUENCES OVER THE INTERNATIONAL LEGAL THEORY OF LAUTERPACHT

1.2.1. KELSENIAN NORMATIVISM

When Lauterpacht read law at the University of Vienna, Hans Kelsen (1886-1973) was Professor of General Theory of States and Austrian Constitutional Law.⁴⁷ Kelsen was very prominent from that time. He was also a judge of the Austrian Constitutional Court from 1920 to 1929 after he

⁴⁵ Lauterpacht/1949a/CP-III/383-404. It should be pointed out, furthermore, that the article ‘The Nationality of Denationalized Persons’ in was also originally written for the Intergovernmental Committee for Refugee in 1946. Elihu/Lauterpacht/Note/CP-III/383.

⁴⁶ Lauterpacht/1949a/CP-III/402.

⁴⁷ On the life of Kelsen in Vienna, see Petterson/1952; Gross/1973; Jabloner/1998.

himself drafted the Austrian Constitution in 1920. It is well known that Kelsen and his Pure Theory of Law had a great influence on Lauterpacht.⁴⁸ It is not difficult to imagine that Lauterpacht had attended Kelsen's lectures at the University of Vienna from the fact that he referred to the 'History of Neo-Kantian Philosophy, Problems of Pure Jurisprudence and the Doctrine of Interpretation,' all which seem to be Kelsen's lectures, as the regular courses in his note on the legal education at the University of Vienna.⁴⁹ On the other hand, Kelsen himself remarked about Lauterpacht, 'how much I was impressed by the extraordinary intellectual capacity and the truly scientific mind of this young man.'⁵⁰

It should be noted, however, that Lauterpacht did not adopt the Pure Theory of Law. He was opposed to the separation thesis of law from morality, which symbolises the 'purity' of the Pure Theory. The separation thesis of law from morality seemed to him unable to explain 'a process of incorporation of natural law by positive law.' Lauterpacht continued as follows:

'Positive law refers to and incorporates, in various forms, extra-legal rules which, but for the fear of flouting suspiciously general disapproval, we might find it quite convenient to call by the name of natural law. This process of delegation will be found in the codes of many a country expressly referring the judge, in the absence of applicable provisions of the law, to natural justice, to principles of good faith, or to general principles of law.'⁵¹

Therefore, it cannot be said that Lauterpacht was a Pure Theorist. Nevertheless, his opposition to the separation thesis of law from morality does not mean that he rejected Kelsen's theory. On the contrary, Lauterpacht accepted the crux of the Pure Theory of Law, namely normativism.

What is normativism? Guastini explains the tenets of normativism as follows. First,

⁴⁸ The influence of Kelsen over Lauterpacht in the context of the concept of the international community and judicial functions will be discussed later. Scobbie/1997; Carty/1998.

⁴⁹ Lauterpacht/1927b/45.

⁵⁰ Kelsen/1961/2.

⁵¹ Lauterpacht/1933b/CP-II/425.

normativism sees law as a set of norms, which are different from facts. In other words, norms belong not to the world of 'be' but to the world of 'ought.' Secondly, from the viewpoint of normativity, legal science is a science of norms which are in the world of 'ought.' Therefore, normativism is the theory that legal science must be expressed in normative or deontic language.⁵² In other words, normativism changes everything into norms on the deontic plane. A person, for example, is regarded as the unity of rights and obligation, namely legal personality, from the viewpoint of normativism. Even state sovereignty can be changed into 'the bundle of jurisdiction' from the viewpoint of normativism. The world itself can be explained in the term of legal norms.

The term 'Kelsenian normativism', therefore, is used for describing almost the same content as the Pure Theory of Law. However, it is not the Pure Theory itself. Although the purity of the Pure Theory is dependent on the separation thesis of law from morality, normativism does not necessarily eliminate morality or natural law. Even naturalists, regarded as a target by Kelsen, can accept Kelsenian normativism without the separation thesis of law from morality. This point is seen in the following remark of Lauterpacht:

'He [Kelsen] finds himself in company which he may otherwise not find congenial. ... He has only to admit – as every positivist lawyer ought to do in justice to himself – that positive law has always incorporated and does incorporate ideas of natural law and justice.'⁵³

The problem here is to what extent Lauterpacht adopted Kelsenian normativism in his theory of international law.

1.2.1.1. THE PERSONIFICATION OF INTERNATIONAL LEGAL ORDER

The personification of legal order is a good example of how Lauterpacht adopted Kelsenian

⁵² Guastini/1998/317.

⁵³ Lauterpacht/1933b/CP-II/429.

normativism. Normativism conceives of everything from the normative viewpoint. This point is clear with regard to the subject of law. Kelsenian normativism distinguishes legal personality from human beings. The 'juristic person', such as a corporation or state, is not a human being, but conceived of as a 'person' in law, the holder of rights and obligations. The same logic is applicable to a 'physical person.' Although a 'physical person' is a human being, it is by law that his/her legal personality is given; slaves are human beings, but they do not have legal personality. In this sense, legal personality, whether 'juristic person' or 'physical person,' is nothing but the bundle of rights and obligations:

'What we have in both cases – in that of the physical and in that of the juristic person – is legal obligations and legal rights that have human behavior as their content and constitute a unity. A legal person is the unity of a complex of legal obligations and legal rights.'

As a result, from the viewpoint of normativism, even a 'physical person' is 'not a human being, but the personified unity of the legal norms that obligate or authorize one and the same human being.'⁵⁴

The state is also conceived from the viewpoint of normativism; the state is the personification of a legal order. Kelsen defined the state as a centralised coercive order legitimated by law:

'It is usual to characterize the state as a political organization. But this merely expresses the idea that the state is a coercive order. For the specifically "political" element of this organization consists in the coercive acts which the legal order attaches to certain conditions stipulated by it. As a political organization, the state is a legal order.'⁵⁵

Furthermore, the state is relatively centralised in the sense that it has organs that individuals actually act in the name of the state. Then, the question who is the state organ occurs. It is law that

⁵⁴ Kelsen/1970/173-174.

⁵⁵ *Ibid.*/286.

determines the answer to the question, which activity of certain individuals is attributed to the state. It is by the law of deciding the attribution that the state is regarded as a 'juristic person.' In this sense, the state is the personification of the legal order itself. Kelsen explained this point as follows:

'Since the attribution of a function determined by the legal order and performed by a certain human being to the state as a person is only a way of expressing the idea that a function is referred to the unity of the legal order which determines this function, any function determined by the legal order may be attributed to the state as the personification of this legal order.'⁵⁶

The identification of the state with law presupposes that the existence of a legal order meant to Kelsen the existence of a society itself. However, a society is not necessarily the state. The state is one type of society; whether the society should be called the state or not is dependent on the degree of the centralisation of the society. If there is an effective legal order backed by sanctions, the society exists. This argument is directly applied to international law. For Kelsen, the existence of international law relies on the effectiveness of international legal order as the coercive order. It suffices here to point out that Kelsen thought that self-help such as reprisal and war is the sanction of international law.⁵⁷ Thus, Kelsen recognised the existence of the international community, although it is not the world state but is more similar to a primitive society with regard to the centralisation of society.

Consequently, Kelsen conceived the international community as the personification of international legal order:

'[I]f it is the "state" that is back of the national legal order, if it is the state that is thought of as the sustainer or guarantor of this legal order, the state which is the community constituted by the national legal order, then back of international law is the international community constituted by this order just as the state stands

⁵⁶ *Ibid.*/292.

⁵⁷ *Ibid.*/320-322; Kelsen/1942/27-55.

behind “its” law. And this international legal community can be called the sustainer, guarantor, or source of international law in just the same sense as the state can be called the sustainer, guarantor, or source of national law.⁵⁸

Therefore, the supremacy of the state sovereignty is denied: ‘[J]ust as single individuals are, here, subjected to an order, an authority regulating their mutual conduct, so are states, there; and the authority to which the states are subjected in international law is really sovereign.’⁵⁹

The state, thus, is recognised as a juristic person in international law. This means that the state is also recognised as the normative unity of obligations and rights in international law: ‘Just as the corporation constituted by a statute is subject to the national legal order which imposes obligations and confers rights upon it as a juristic person, so the state may be considered as being subject to the international legal order which imposes obligations and confers right upon the state as a juristic person.’⁶⁰ However, this point does not mean that only the state is the subject of international law, because the state is ‘an auxiliary construction of legal thinking.’⁶¹ It is human beings who actually act in the name of the state. In this sense, it is human activity that legal norms regulate. There is no difference for Kelsen between international law and domestic law with regard to the regulation of human activity. The only difference between international law and domestic laws is the technique of how legal obligations are imposed on individuals as the organ of the state:

‘The legal norm specifies who is to do something or refrain from doing it and it specifies what is to be done or not done. In general, the norms of international law specify only the material element, not as do the norms of national law, the personal element as well. International Law leaves the determination of the personal element to the national legal order.’⁶²

⁵⁸ Kelsen/1942/81.

⁵⁹ *Ibid.*/80.

⁶⁰ Kelsen/1970/290.

⁶¹ *Ibid.*/292.

⁶² Kelsen/1942/87.

However, this point does not mean that it is impossible for international law to impose rights and obligations on individuals directly. On the contrary, Kelsen said that ‘the direct obligating of individuals by international law ...is possible, just as is the direct authorization of individuals by international law.’⁶³

Lauterpacht fully adopted the above characteristics of Kelsenian normativism in the conception of the international community. He did not change, throughout his life, the view that the individuals as the organ of the state are the real bearers of international obligations, and persistently rejected the view that only the state is the subject of international law. Lauterpacht also tried to base the source of international law on the concept of the international community as *civitas maxima*. ‘That ultimate source [of law] is the assumption that the impersonal will of the international community – as formulated by treaties voluntarily concluded by its members, by custom created by their implied consent, and by general principles of law expressive of the fact that the international legal community is a community under law – must be obeyed.’⁶⁴ Lauterpacht called this hypothesis *voluntas civitatis maximae est servanda*.⁶⁵

However, why did Lauterpacht hypothesise *voluntas civitatis maximae est servanda*? One of the main reasons is the same as why he denied voluntarism; the will of states by itself cannot explain the binding force of international law; he thought that voluntarism finally denied the legal nature of international law. Lauterpacht, therefore, had to find more persuasive explanation on the basis of obligation of international law than the will of states. However, unlike Kelsen or Verdross, Lauterpacht did not think *pacta sunt servanda* the ultimate source of international law. It is not only because he was not a Pure Theorist of Law, but also because Lauterpacht considered *pacta sunt servanda* cannot explain obligations of international law which come other than from the will of states, such as general principles of law.

⁶³ *Ibid.*/96.

⁶⁴ Lauterpacht/General-Part/CP-I/92.

⁶⁵ Lauterpacht/Function/421-422.

On the other hand, since he believed that the initial hypothesis of municipal law is that the will of the State must be obeyed, Lauterpacht had no hesitation in applying this hypothesis to international law. Therefore, he said that '[t]here is no reason why the original hypothesis in international law should not be that the will of the international community must be obeyed.'⁶⁶ Lauterpacht fully recognised that there is no political authority superior to sovereign states. Nevertheless, he contended that '[l]aw may be a command without being the command of an organized political authority.'⁶⁷ He continued:

'Once it is recognized that, for juristic perception, the State is identical with the law, and that the juxtaposition or opposition of the two is only a convenient mode of expression, then there is no difficulty in accepting the view that the law may be a command merely by virtue of its external nature.'⁶⁸

The above passage clearly shows that Lauterpacht identified the will of the international community with international law. Furthermore, following Kelsen's doctrine of the identification of States and law, Lauterpacht described the superior authority of the international community over states as the *civitas maxima*, which is the 'super-state of law which states, though the recognition of the binding force of international law *qua* law, have already recognized as existing over and above the national sovereignties.'⁶⁹ In sum, his conception of the international community is nothing but the personification of international law from the viewpoint of Kelsenian normativism. Indeed, Lauterpacht recognised the doctrine of the identification of state with law:

'If the State is only an expression of the unity of the legal system and if international law is recognized – as admittedly it is – as a body of rules of law binding upon States independently of their will, then, from a purely legal point of view, there is already in existence a State over and above the national sovereignties. ... A truly

⁶⁶ *Ibid.*/421.

⁶⁷ *Ibid.*/419-420.

⁶⁸ *Ibid.*/420.

legal treatment of the conception of the *civitas maxima* will be greatly facilitated by the realization of the essential identity of law and State.⁷⁰

Therefore, the supreme basis of the binding force of international law is the existence of international law as a fact: '[T]he realization of the essential identity, for the purposes of legal science, of the law and the State will facilitate the adoption of the view that the international State has already been created by the acceptance of the rule of international law.'⁷¹ In other words, Lauterpacht just said that international law has binding force because international law does bind states in international relations. He never changed his view throughout his life. Lauterpacht insisted in his draft for the 9th edition of *Oppenheim's*:

'The fact that a rule is sanctioned by or brought into operation through consent, is not inconsistent with its essential quality as evidencing the general will of the international community of which consenting States are members. Thus it must be considered to be the general will of the international community that its members should regulate their legal relations through treaties constituting a source of legal obligations.'⁷²

However, his effort to base international law on the international community was in vain in the sense of self-validation. Lauterpacht legitimated the authority of international law by the very existence of international law itself. It is the weak point of normativism, which was criticised as the tautology of the fact that it should be valid if a norm is actually valid.⁷³ In a sense, this tautology is the result that Lauterpacht applied Kelsenian normativism to international law.

⁶⁹ *Ibid.*/422.

⁷⁰ Lauterpacht/1933b/CP-II/419.

⁷¹ Lauterpacht/Function/422/n.1.

⁷² Lauterpacht/General-Part/CP-I/93-94.

⁷³ Schmitt/1928/9.

1.2.1.2. THE GRADUAL CONCRETIZATION OF LAW

The gradual concretization of law is another good example explaining how Lauterpacht adopted Kelsenian normativism. Kelsen explained that the validity of legal norms is derived from the higher norms, and finally from the Basic Norm. However, there are two types of reasons for the validity of legal norms: the static aspect and the dynamic aspect. The static aspect of legal validity is dependent on the content of norms. Kelsen said that ‘their validity can be traced back to a norm under whose content the content of the norms in question can be subsumed as the particular under the general.’⁷⁴ Therefore, it is from the content of norms that the legal validity is deduced logically. On the other hand, the dynamic aspect of the legal validity explains the derogation of the law-creating authority in a legal system. Kelsen explained that ‘the presupposed basic norm contains nothing but the determination of a norm-creating fact, the authorization of a norm-creating authority or (which amounts to the same) a rule that stipulates how the general and individual norms of the order based on the basic norms ought to be created.’⁷⁵ It is the dynamic aspect that Kelsen emphasised:

‘A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way – ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore any kind of content might be law.’⁷⁶

Kelsen introduced the gradual concretization of law into the dynamics of a legal order. The application of general norms is always done by the creation of individual norms. Even legislation is just only relative law-creating. It applies the legal norms embodied in the constitution. It is true of

⁷⁴ Kelsen/1970/195.

⁷⁵ *Ibid.*/196.

⁷⁶ *Ibid.*/198.

the task of the judiciary. Kelsen said that ‘the courts apply the general legal norms by creating individual norms whose content is determined by the general norms which authorize a concrete sanction.’⁷⁷ The application of general (higher) norms is the creation of individual (lower) norms itself. It is the theory of the gradual concretization of law.

There are two consequences of the gradual concretization of law. The first is the denial of the distinction between public law and private law. Even the conclusion of a private contract is the application of the general legal norm which makes the contract legally valid. It is only the difference between public law and private law which is the method of creating norms. Legal transaction is the norm-creating process between parties. On the other hand, legislation is the norm-creating process by the competent organ:

‘A typical example of a private-law relationship is the one established by a legal transaction, especially the contract (that is, the individual norm created by the contract), by which the contracting parties are legally obligated to a mutual behavior. Whereas here the subjects participate in the creation of the norm that obligates them – this is, indeed, the essence of contractual law creation – the subject obligated by the administrative order under public law has no part in the creation of the norm that obligates him.’⁷⁸

Kelsen continued as follows:

‘If the decisive difference between private and public law is comprehended as the difference between two methods of creating law; if the so-called public acts of the state are recognized as legal acts just as the private legal transaction; if, most of all, it is understood that the acts constituting the law-creating facts are in both cases only the continuations of the process of the creation of the so-called will of the state, and that in the administrative order just as much as in the private legal transaction only the individualization of general norms are effected – then it will not seem so paradoxical that the Pure Theory of Law, from its universalistic

⁷⁷ *Ibid.*/237.

⁷⁸ *Ibid.*/281.

viewpoint, always directed toward the whole of the legal order (the so-called will of the state), sees in the private legal transaction just as much as in an administrative order an act of the state, that is, a fact of law of law-making attributable to the unity of the legal order.’⁷⁹

Lauterpacht again adopted the gradual concretization theory of law. It is clear that Lauterpacht found that international treaties are essentially contractual:

‘The legal nature of private law contracts and international law treaties is essentially the same. The autonomous will of the parties is, both in contract and in treaty, the constitutive condition of a legal relation which, from the moment of its creation, becomes independent of the discretionary will of one of the parties.’⁸⁰

However, the contractual nature of international treaties does not deny the status of treaties as the source of law: ‘All international treaties are sources of law for the parties who conclude them, none is a source of law for non-signatories.’⁸¹

It is true, therefore, that Lauterpacht did not distinguish between the source of obligation and the source of law; for him law is nothing but the bundle of legal obligations. On this point, Scobbie criticises Lauterpacht for the elimination of the conceptual distinction between obligation and law. Lauterpacht seems to Scobbie not to have understood the fact that state parties can modify their legal relationship by making treaties, and derogate from general international law. According to Scobbie, this is the reason why Lauterpacht failed to escape from the dilemma of the Koskenniemi’s utopia/apology opposition. Scobbie says:

‘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

⁷⁹ *Ibid.*/281-282.

⁸⁰ Lauterpacht/*Analogies*/156.

⁸¹ *Ibid.*/158.

Koskenniemi has labelled “apology” and “utopia”.⁸²

However, it should be noted that the utopia/apology opposition itself is very doubtful in the sense that Koskenniemi fails to explain the concept of objectivity which means the balance between concreteness and normativity. Scobbie himself has pointed out that:

‘The underlying problem here is Koskenniemi’s quest for “objectivity,” which is dependent on his bivalent truth theory which presupposes that a given proposition is either true or false: if bivalence is inadequate even for relatively simple logics which manipulate univocal terms, *a fortiori* it is an inadequate array for law.’⁸³

Moreover, it is worthwhile revisiting the conceptual distinction between obligation and law itself. Fitzmaurice distinguished between the source of obligation and the source of law. He said that law is ‘rules of general validity for and application to the subjects of the legal system, not arising from particular obligations or undertaking on their part.’⁸⁴ In other words, he discussed law from the viewpoint of applicability. When he said that international treaties are the source of obligation, Fitzmaurice just meant that an international treaty does not bind non-parties unless the treaty is regarded as customary law at the same time: ‘If the treaty rule does eventually pass into general law, its formal source *as law* ... is clearly custom or practice – i.e. its adoption into general customary law.’⁸⁵ If so, the distinction is useful only so far as the question on the opposability of treaties to third parties is concerned; apart from this question, the conceptual distinction between law and obligation is simply a question of terminology. Rosalyn Higgins says as follows:

‘What it seems to boil down to is that, in the Fitzmaurice view, if obligations are binding only upon parties who agree to them, and no others (because they are new, albeit contained in a treaty), they are not law. The

⁸² Scobbie/1997/285

⁸³ Scobbie/1990/349.

⁸⁴ Fitzmaurice/1958/157/n.2.

argument has now become one of definition.⁸⁶

On the other hand, law meant to Lauterpacht nothing but the source of legal obligations. It is because Lauterpacht adopted the Kelsenian normative concept of law, namely the view that law is a norm system composed of obligations which reflect rights. From the obligation-centred viewpoint, the applicability of treaties becomes the sphere of validity. There is no difference with regard to the quality or level of legal obligations between treaties and custom; if there is, the difference between them would be the relative degree of normativity. Insofar as the applicability of treaties is concerned, however, Lauterpacht dealt too strictly with law-making treaties. He emphasised the relativity of the difference between contractual treaties and law-making treaties. The only difference between them for Lauterpacht is the more permanent and general applicability of the so-called law-making treaties:

‘The above-mentioned distinction [between contractual treaties and law-making treaties] is useful if meant to emphasise the fact that some treaties are of more permanent and general application than others, and that they resemble therefore an act of legislation. Apart from this, however, it is obvious that its value is a relative one.’⁸⁷

Lauterpacht did not recognise the higher normativity of law-making treaties over the normativity of contractual treaties unless he introduced the conceptual origin of *jus cogens* into the Law of Treaties.

The second result of the gradual concretization of law is that judicial discretion is admitted. The judiciary does not only apply the general norms but also creates the individual norm from the viewpoint of normative hierarchy. Kelsen said,

⁸⁵ *Ibid.*/160.

⁸⁶ Higgins/1994/33-34. See Müllerson/2000/211/n.4.

⁸⁷ Lauterpacht/Analogies/157.

‘When settling a dispute between two parties or when sentencing an accused person to a punishment, a court applies, it is true, a general norm of statutory or customary law. But simultaneously the court creates an individual norm providing that a definite sanction shall be executed against a definitive individual. This individual norm is related to the general norms as a statute is related to the constitutions. The judicial function is thus, like legislation, both creation and application of law.’⁸⁸

The creation of individual norms by judges implies that they necessarily use the judicial discretion. Lauterpacht explained that ‘within the orbit of the statute there exists a multitude of possible decisions to be arrived at by the exercise of judicial discretion within the four corners of the law.’⁸⁹

Lauterpacht’s theory of the international judicial function, especially the law-making function of the international tribunals, is based on the gradual concretization of law. This point is seen in the following remark:

‘When applying the necessarily abstract rule of law to concrete cases, they [judicial tribunals] create the actual legal rule for the individual case before them. The actual operation of the law in society is a process of gradual crystallization of the abstract legal rules 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 judgment of a court or by an adjudication or decision of an administrative authority or by an agreement of the interested parties.’

‘There are,’ he continued, ‘obvious limits to this law-making activity of judges, but these limitations do not materially alter the fact that courts do not slavishly administer abstract rules without being able to exercise creative discretion. It is irrelevant whether this exercise of discretion is done by recourse to conceptions of justice, or general principles of law, or the law of nature, or public policy. ... These considerations apply with special force to the functioning of international

⁸⁸ Kelsen/1945/134.

⁸⁹ Lauterpacht/1933b/CP-II/411.

tribunals.’⁹⁰ Lauterpacht did not change this basic view of the gradual concretization of law throughout his academic life. In *Development-II*, Lauterpacht mentioned that ‘judicial discretion as governed by law’ is the proper judicial activity: ‘Subject to that overriding primacy of the existing law, ...the necessity of a choice between conflicting legal claims is of the very essence of the judicial function, whether within the State or in the international sphere.’⁹¹ This point will be discussed later in the context of judicial function in chapter 6.

1.2.2. THE ENGLISH TRADITION OF INTERNATIONAL LAW

Although Kelsen affected the legal thought of Lauterpacht in the era of Vienna, it is impossible to discuss Lauterpacht without mentioning the influence of the English tradition of international law over him. This section will examine how English tradition of international law affects Lauterpacht.

It is sometimes said that Alberico Gentili (1552-1608) was one of the founding fathers of international legal studies in England.⁹² Gentili was born at Sanginesio in Northern Italy. Although he read Roman law at the University of Perugia, Gentili, and his father and brother, escaped from Italy for fear of the Inquisition. After a short stay in Austria and Germany, although promised a professorship at the University of Heidelberg, Gentili came to London, and soon became a fellow of New Inn Hall in Oxford, and taught civil law in St. John’s College and New College. He became famous for his legal opinion in the *Mendoza* case and for *De Legationibus Libri Tres* (1585). While he left for Germany in 1586, Gentili returned to England one year later, and was appointed Regius Professor of Civil Law at the University of Oxford. In the year of the Great Armada, 1588, he delivered a lecture on the law of war, which became a part of his main work *De Jure Belli Libri Tres* (1589). However, he was not satisfied with purely academic posts. He joined Gray’s Inn in 1600, and started to work as a barrister in London. Furthermore, in 1605, he became

⁹⁰ Lauterpacht/1930a/144-145.

⁹¹ Lauterpacht/Development-II/399.

⁹² On the life of Alberico Gentili, see Wheaton/1845/50-54; Holland/1898/1-39; Nys/1924/11a-37a;

the counsel for Spain in the Court of Admiralty with the permission of King James I. At that time, Spain was at war with Netherlands, and Britain was neutral. He died in 1608 in London. After his death, his brother Scipione Gentili, who was also a famous civilian lawyer, published *Hispanicae Advocationis Libri Duo* (1613). The life of Gentili shows the very characteristics of the English tradition of international law: (1) the reception of foreign lawyers, (2) the development of international law from civil law practice in England.

Firstly, English academic society tends to welcome foreign but eligible scholars, whatever their origin. It is true of the English academia of international legal studies. Wilfred Jenks pointed out that '[i]t is typical of the British tradition of and approach to international law that they have constantly, from Gentili onwards, enriched themselves by extending a warm hospitality to intellectual currents from elsewhere.'⁹³ This academic hospitality is valuable compared with the academia of other nations. Indeed, many 'British' international lawyers are originally from foreign lands. The success of Lassa Oppenheim as a 'British' international lawyer fully tells this point.⁹⁴ In particular in the inter-war period, many Jewish international lawyers escaped from Nazi Germany to England. These lawyers include Albrecht Mendelssohn-Bartholdy (1874-1936),⁹⁵ Wolfgang Gaston Friedmann (1907-1972),⁹⁶ Frederick Alexander Mann (1907-1991),⁹⁷ and George Schwarzenberger (1908-1991).⁹⁸

Secondly, international legal studies in England directly developed from civil law practice. McNair pointed out as follows:

'[T]he "reception" of international law in England in the sixteenth and seventeenth centuries is primary due to

Phillipson/1933/9a-51a; Lacks/1987/50-52.

⁹³ Wilfred/Jenks/1960/2.

⁹⁴ See Whittuck/1920-21.

⁹⁵ See BYIL/vol.18/1937/158.

⁹⁶ Although being famous as a professor of international law at the University of Columbia in the United States, Friedmann held British nationality throughout his life after his settlement in England in 1933. Obata/2001. Also see Sovern/1971.

⁹⁷ See Collins/1992.

⁹⁸ See Mendelson/1992.

two factors: (i) its real or supposed identification with the “civil law,” as that term was then understood, namely, the common stock of legal principles regarded in Western Europe as its heritage from Rome, because mainly based on, or derived from, the law of Rome; the “common law of nations” as Senior has called it, whose Roman origin or background endowed it with the character of universality and so enhanced its authority: (ii) the professional and literary labours of the civilian lawyer in England.⁹⁹

Indeed, the fact that Gentili became a practitioner indicates the important aspect of the English tradition that even academic lawyers tend to prefer practice. This point includes the following two meanings as well; academic lawyers’ respect for practitioners, and their readiness to participate in legal practice; practitioners contribute academically to the development of international legal studies.

It is Doctors’ Commons that contributed to such a development of international legal practice and studies in England. Doctors’ Commons was the society for civilian lawyers who practised as advocates in the Ecclesiastical and Admiralty Courts with the degree of Doctor from Oxford and Cambridge.¹⁰⁰ Some civil lawyers who contributed significantly to the development of international law belonged to this society. Richard Zouche (1590-1661) was a member of Doctors’ Commons, and became the president of the High Court of Admiralty in 1660, while he succeeded to the Regius Chair of Civil Law at the University of Oxford in 1620.¹⁰¹ William Scott (1745-1836), later Lord Stowell, is famous for his judgments in the High Court of Admiralty. Robert Phillimore (1810-1885), author of *Commentaries on International Law*, also practised as an advocate of Doctors’ Commons from 1839. Travers Twiss (1809-1897), Professor of International Law at King’s College, London (1852-1855), and later Regius Professor of Civil Law in the University of Oxford (1855-1870), gave legal opinions to the British government as the Queen’s Advocate, though Doctors’ Commons came to the end when he retired. The history of international law in

⁹⁹ McNair/1974/221.

¹⁰⁰ Squibb/1977.

¹⁰¹ On Richard Zouche, see Nussbaum/1947/118-122.

England, thus, shows that English international lawyers are ‘in the Temple rather than the schools.’¹⁰² Indeed, it is only from the middle of the 19th century that the academic post of international legal studies, which was independent of civil law, was created in Universities in England. The Chichele Chair of International Law and Diplomacy at the University of Oxford was created in 1859, and occupied by Mountague Bernard (1820-1882). William Harcourt (1827-1904) became the first Whewell Professor of International Law at the University of Cambridge in 1869, while the chair itself was founded in 1867. The academic career of Henry Maine (1822-1888) symbolises the development of international law from civil law in England; he was Regius Professor of Civil Law from 1847 to 1854, and became Whewell Professor of International Law from 1887 to his death in 1888 at the University of Cambridge.

Moreover, the history of the development of international legal studies in England from civil law practice shows that legal pragmatism is the essence of the English tradition of international law. English international lawyers have a belief that law is nothing but legal practice. This belief seems to be very much a matter of course. However it should be noted that this point is very different from the Continental tradition, in which international law was the subject of theologians and philosophers.¹⁰³ The belief in ‘the legal’ leads English international lawyers to the general tendency to be cautious about the intervention of non-lawyers or academic theorists into the legal subject. It is noteworthy that in *De Jure Belli Libri Tres*, Gentili tried to eliminate the influence of theology from international law: ‘Let the theologians keep silence about a matter which is outside of their province.’¹⁰⁴

However, it also cannot be denied that a ‘theory’ affected the English tradition of international law from the late eighteenth century. Jeremy Bentham (1748-1832) influenced modern international legal studies by his utilitarian positivism and the coining of the term ‘international

¹⁰² Warbrick/1991/53.

¹⁰³ Nussbaum/1947/233-234.

¹⁰⁴ Gentili/1933/57.

law.¹⁰⁵ The change of terminology modifies the theory itself. Indeed, the use of the term ‘international’ symbolises the change of the theory of international legal studies in the two meanings. Firstly, the old term ‘law of nations’ or *jus nature et gentium* seemed to Bentham to confuse ‘internal’ law and ‘international’ law:

‘The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D’Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*.’¹⁰⁶

In this sense, Bentham tried to criticise Blackstone’s famous theme that ‘the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land’¹⁰⁷ by the invention of his new term ‘international law.’ The adoption of the term ‘international’ is clearly linked to the rationalisation of international law by denying natural law tradition in England.¹⁰⁸ Secondly, the concept of ‘international law’ is universal rather than European. The new states in the American Continent emerged from the end of the eighteenth century, and non-Christian states such as Turkey and Japan started to participate in the family of nations from the middle of the nineteenth century. Consequently, the old concept of *jus gentium* or ‘European law of nations’ was becoming inappropriate for describing the legal relations of sovereign states. In this sense, the adoption of the term ‘international law’ shows that international lawyers tried to deal with the expanding process of

¹⁰⁵ See Schwarzenberger/1948.

¹⁰⁶ Bentham/1948/426/n.1.

¹⁰⁷ Blackstone/2001/53.

¹⁰⁸ Nussbaum/1947/136.

the international community.¹⁰⁹

In the middle of the 19th century, although positivism flourished in Europe, it was not necessarily true in Britain until the late 19th century. Both natural law tradition and positivism were seen in the literature of international law. Although he borrowed the term 'international law' and 'international jurisprudence' from Bentham, Robert Phillimore emphasised the divine law nature of international law.¹¹⁰ On the other hand, John Austin (1790-1859), who is one of the successors of Bentham, defined international law as positive morality which is law improperly so-called by applying his command theory:

'The so-called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called.'¹¹¹

Although Austin denied the classification of international law as law properly so-called, he did not reject the objective existence of international order and obligation.¹¹² Indeed, Austin said as follows:

'[T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.'¹¹³

Austin became very influential not only in jurisprudence but also in international legal studies after his death. While he was an American lawyer, but influential over the English tradition of international law, Henry Wheaton (1785-1848), for example, introduced the theory of Austin

¹⁰⁹ Grewe/2000/462-463.

¹¹⁰ Phillimore/1854/56.

¹¹¹ Austin/1995/124.

¹¹² Koskenniemi/1989/102.

¹¹³ Austin/1995/171.

positively in the definition of international law with no criticism.¹¹⁴ Thomas Holland (1835-1926) also accepted Austinian Jurisprudence:

‘Convenient therefore as is on many accounts the phrase “International Law,” to express those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of the civilised world, nations are expected to act, it is impossible to regard these rules as being in reality anything more than the moral code of nations.’¹¹⁵

Thus, the Austinian command theory forced even English international lawyers to reconsider the legal nature of international law.¹¹⁶

However, there was ‘a certain dissatisfaction with the positivism of the last century’¹¹⁷ all over Europe after the First World War. The realistic view of international law based on the balance of power seemed to international lawyers to have become bankrupt at the outbreak of the war. Especially in Britain there was a strong stream of lawyers back to the natural law tradition.¹¹⁸ It was in such an atmosphere that Lauterpacht started to study international law at London School of Economic and Political Sciences, although international legal education in England was not sufficient at that time.¹¹⁹

Lauterpacht was educated in Austria in law in a different academic atmosphere to that prevailing in England. International lawyers in Austria and Germany conceived international law from a philosophical perspective: ‘The history of international law in Germany during that period is a narrative about philosophy as the founding discipline for reflecting about statehood and what lies

¹¹⁴ Wheaton/1857/18-19.

¹¹⁵ Holland/1924/134-135.

¹¹⁶ See Maine/1915/Lectures/II/and/III; Hall/1924/13-16; Westlake/1904/8-9; Oppenheim/1912a/4-15.

¹¹⁷ Nussbaum/1947/274.

¹¹⁸ Grewe/2000/603.

¹¹⁹ Pearce Higgins openly showed his deep concern about the future of the English academia of international law: ‘[T]he credit of British scholarship is at stake if we cannot maintain an adequate supply to continue the succession.’ Pearce/Higgins/1923/508.

beyond.¹²⁰ How did Lauterpacht succeed to the English tradition which was very different from the Austro-German positive theory of international law? When he was at the LSE, Lauterpacht was very influenced by two international lawyers, who represent the English tradition of international law: John Westlake and Arnold McNair. From Westlake, Lauterpacht learnt legal-moralism, which is the attitude aimed at moralising states by international law. From McNair, Lauterpacht was taught legal pragmatism. In this sense, Lauterpacht succeeded to the English tradition from Westlake and McNair.

John Westlake (1828-1913) was Whewell Professor of International Law at the University of Cambridge from 1888 to 1908.¹²¹ However, before holding the Whewell Chair, he was already famous for the *Treatise on Private International Law*, which was the first English book to systemise private international law. Furthermore, he founded the world's first academic journal of international law, *Revue de Droit International et de Législation Comparé* (1862) and *Institut de Droit International* (1873) with Gustav Rolin-Jaequemyns (1835-1902) and Tobias Asser (1838-1913).¹²² These activities show the process that international legal studies was becoming independent of civil law or philosophy in the middle of the nineteenth century. In this sense, Westlake was one of the fathers of modern international legal studies.

Lauterpacht was impressed by the Whewell Lecture of Westlake (1888). In the lecture, Westlake said as follows:

'The strong insistence with which most writers on the subject have dwelt on the artificial entity of the state, the sharp contrast which, of late more especially, they have drawn between a state and its subjects, may easily have an evil influence on a student of International Law, and on the public so far as it is affected by the tone of thought among such students. It may weaken the sense that the action of a state is the action of those within it who help to guide it, whether in a public capacity or even by merely expressing an opinion...The influence

¹²⁰ Koskenniemi/2001/182.

¹²¹ See Westlake/1914a.

¹²² See Koskenniemi/2001/Ch.1.

of the same tone of thought will again be evil if it allows us to forget that not only is the action of our state that of ourselves, but that those towards who it is taken are also men like ourselves, though they may be veiled from our eyes by the interposition of another artificial entity.¹²³

Lauterpacht appreciated Westlake's view: 'It is unusual to find in a modern leading international lawyer this insistence on personal responsibility.'¹²⁴ Later, Lauterpacht developed the problem of the responsibility of government officials into the criminal responsibility of the individuals. In this sense, the above remark of Westlake became the basis of Lauterpacht's legal-moralism.

Apart from Westlake, Arnold Duncan McNair (1885-1975), later Baron McNair of Gleniffer, was the person who decisively affected the life of Lauterpacht as a British international lawyer. McNair read law at Gonville and Caius College in Cambridge from 1906 to 1909. After graduation, he had practised as a solicitor in London until he returned to Cambridge as a fellow of Gonville and Caius College in 1913. At that time, he taught not international law but English contract law.¹²⁵ His interest in English contract law and the experience as a solicitor are the origins of the common law approach of McNair. His so-called common law approach shows itself in *Essays and Lectures upon Some Legal Effects of War* (1920), later *The Legal Effects of War*.

McNair succeeded to the English tradition of international law. First, he was taught Roman law by William Buckland (1850-1946), who was Regius Professor of Civil Law at the University of Cambridge.¹²⁶ McNair wrote *Roman Law and Common Law* (1936) with Buckland. Secondly, McNair had the solid belief that international law is as much law as English law is. There was no reason for him to treat international law differently from English law, because he did not doubt that law is nothing but practice: 'I suspect this attribution of international law to an academic rather than to a practical source to be mistaken and incapable of substantiation.'¹²⁷ This belief led him to

¹²³ Westlake/1914b/410-411.

¹²⁴ Lauterpacht/1925/CP-II/391.

¹²⁵ Fitzmaurice/1947-75/xiii. Also see Jennings/1998/1307-1312.

¹²⁶ Brooke/1993/226.

¹²⁷ McNair/1974/369.

pragmatism and domestic analogy.

His pragmatism includes the contempt for ‘theory’ and the quest for ‘hard law.’ McNair did not hide his contempt for ‘theory’ when he said about the relationship between international law and municipal law that ‘[s]uch controversies as that between the monist and the dualist theories, into which the late Professor Oppenheim in vain tried to lead us, have found no abiding-place in our literature.’¹²⁸ Indeed, English international lawyers still tend to emphasise the practical aspect of the relation between international law and domestic law more than the theoretical aspect of controversy between monism and dualism, although the theoretical aspect of the controversy itself is now seen even in the English text books of international law. Michael Akehurst (1940-1989), for example, did not mention the controversy between monism and dualism at all in his last edition of *A Modern Introduction to International Law*. Although the controversy is now discussed in the seventh revised edition by Peter Malanczuk, Malanczuk himself says that ‘[a]uthors with a common law background tended to pay lesser attention to these theoretical issues and preferred a more empirical approach seeking practical solutions in a given case.’¹²⁹ This tendency is also seen in the so-called ‘theories of co-ordination,’ which shows the preference of English lawyers for practice over theory.¹³⁰

However, it should be pointed out that his pragmatism is one of the answers to the Austinian theoretical question, ‘Is international law really law?’ Fitzmaurice summarised the answer of McNair to the question as follows:

‘[H]e [McNair] nevertheless felt... that what international law suffered from was a lack of, so to speak, “edge”, of sufficiently clearcut definitions and established certainties. What he wanted to find in it were those elements of what he called “hard law” that could give it these qualities.’¹³¹

¹²⁸ *Ibid.*/147.

¹²⁹ Malanczuk/1997/63-64.

¹³⁰ Fitzmaurice/1957/68-94; Brownlie/1998a/34.

This quest for 'hard law' becomes the publication of the *Annual Digest of Public International Law Cases*, later *International Law Reports*. Indeed, the *Annual Digest* was the brainchild of McNair, although it is Lauterpacht who brought it up.¹³² In the preface of the *Annual Digest 1925-1926*, McNair and Lauterpacht said as follows:

'The work, of which this book is the first fruit, was prompted by the suspicion that there is more international law already in existence and daily accumulating "than this world dreams of" and by the conviction that it is more international than this world wants. As the work has progressed that suspicion has ripened into a certainty.'¹³³

Such is also seen in *International Law Opinions* as a result of his effort to trace the development process of international law in England. For him, the opinions of the Law Officers are very similar to judgments, even though they are not law itself, but 'material source.'¹³⁴

McNair influenced Lauterpacht on the matter of legal pragmatism as the English tradition of international law. First, McNair's quest for 'hard law' affected Lauterpacht. The influence of McNair over Lauterpacht is not only Lauterpacht's edition of 24 volumes of *International Law Reports*. It is also seen in *Recognition in International Law*. According to Elihu Lauterpacht, this book is based on the investigation that his father had made in the late 1920s into the opinion of the Law Officers of the Crown.¹³⁵ Although the construction of the duty of recognition was very

¹³¹ Fitzmaurice/1974b/XI.

¹³² Elihu/Lauterpacht/ILR/vol.49/1976/v.

¹³³ McNair-Lauterpacht/AD/vol.3/1929/ix.

¹³⁴ McNair/1956/xviii-xix.

¹³⁵ Elihu/Lauterpacht/Note/CP-III/113. This investigation seems to have been under the guidance of McNair as Lauterpacht's supervisor. Robert Jennings recalls the international law teaching of McNair as follows: '[I]n the early thirties he was beginning his work on the materials in the Public Record Office ... He made available to his seminar pupils lists of P.R.O. references for particular topics, which he suggested they should follow up on day excursions to London, not to help provide material for his own work but for them to work up into an article of their-own if they were ambitious enough to do so.' Jennings/1998/1311. It seems to be reasonable to think that McNair gave Lauterpacht the same instruction.

Kelsenian,¹³⁶ the materials used in *Recognition* were English practice of international law itself.

It may have been less easy for Lauterpacht to assimilate to English legal academia without McNair. Lauterpacht got an academic post at LSE with the recommendation of McNair and Norman Bentwich.¹³⁷ Since then, Lauterpacht followed McNair in regard to *Oppenheim's* editorship in 1935 after helping McNair's edition of *Oppenheim's*,¹³⁸ Whewell professorship at the University of Cambridge after McNair retired for becoming the vice-chancellor of the University of Liverpool, the judgeship of the International Court of Justice in 1955. Due to the strong recommendation of McNair, Lauterpacht prepared for being called to the bar in 1936, although he was bored with English contract law.¹³⁹ Lauterpacht's examination paper became the article *Contract to break Contract* which was finally developed into the conceptual origin of *jus cogens* in international law. Since then, Lauterpacht was qualified as practitioner. Indeed, later he would be consulted by many governments, including the British government. Although he must have considered himself a scholar rather than practitioner,¹⁴⁰ it is undeniable that Lauterpacht succeeded to the English tradition of international law with regard to legal pragmatism.

¹³⁶ See below 4.3.1.1.

¹³⁷ D./Stone/1982/103.

¹³⁸ Oppenheim-McNair/1926/vii; Oppenheim-McNair /1928/vii.

¹³⁹ Jennings/1997/301.

¹⁴⁰ See Sinclair/2002/60-61.

2. THE LEGALISTIC CONSTRUCTION OF THE INTERNATIONAL COMMUNITY IN THE INTER-WAR PERIOD

2.1. GENERAL BACKGROUND

The universalisation of the European law of nations was accompanied by the expansion of the international community. However, international lawyers from the 19th century to the early 20th century doubted whether non-European people could understand the European law of nations. It is the reason why some international lawyers of the period spent considerable time discussing membership of the international community. The international community in the early 19th century was called the Family of Nations, being the society of European nations and Christian nations in the American Continent. The concept of the Family of Nations had been based on Christianity until Turkey was admitted to 'a participation in the advantages of the public law of Europe and the system of concert attached to it' under Article 7 of the Treaty of Paris in 1856. Indeed, Lawrence's edition of *Wheaton's Elements of International Law* published in 1857 does not admit the existence of the universal law of nations:

'Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.'¹

As non-Christian nations, such as Turkey and Japan, started to join the Family of Nations, the criterion of membership of the Family of Nations changed from Christianity to civilisation. However, the term 'civilisation' denoted nothing but European civilisation in the late 19th century. While recognising civilisation as the standard for membership of the international community,

¹ Wheaton/1857/16.

William Hall still distinguished non-European nations from European civilised nations with regard to the admission of the membership:

‘[S]tates outside European civilisation must formally enter into the circle of law-governed countries. They must do something with acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction.’²

Further, Hall continued as follows:

‘When a new state comes into existence its position is regulated by like considerations. If by its origin it inherits European civilisation, the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If on the other hand it falls by its origin into the class of states outside European civilisation, it can of course only leave them by a formal act of the kind already mentioned.’³

Thus, some international lawyers in the late 19th century constructed the conception of the international community according to the standards of European civilisation. James Lorimer, for example, no doubt measured the degree of civilisation by European standard. He said as follows:

‘As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilised humanity, that of barbarous humanity, and that of savage humanity. To these, whether arising from peculiarities of race or from various stages of development in the same race, belong, *of right*, at the hands of civilised nations, three stage of recognition – plenary political recognition, partial political recognition, and natural or mere human recognition. ... The sphere of plenary political recognition extends to

² Hall/1924/47.

³ *Ibid.*/48.

all the existing States of Europe, with their colonial dependencies, in so far as these are people by persons of European birth or descent; and to the States of North and South America which have vindicated their independence of the European States of which they were colonies. The sphere of partial political recognition extends to Turkey ..., and ... to Persia and the other separate States of Central Asia, to China, Siam, and Japan. The sphere of natural, or mere human recognition, extends to the residue of mankind; though here we ought, perhaps, to distinguish between the progressive and non-progressive races.⁴

The concept of civilisation, however, gradually came to denote not only Europe when Japan appeared as a Great Power in the Far East. Japan defeated Russia in 1905 with the backup of the United Kingdom and the United States. In the First World War, furthermore, Japan expelled the German army from German-leased territories in China. Consequently, Japan was recognised as a Great Power in the era of the League of Nations, and started to assert its own civilisation. Article 9 of the Statute of the Permanent Court of International Justice, for example, stipulated that ‘the whole body also should represent the main forms of civilization and the principal legal system of the world.’ Mineichiro Adachi, who later became President of the Permanent Court, proposed this article in the Advisory Committee of Jurists in order to secure the seat of Japanese judge in the Permanent Court: ‘All kinds of civilisation must be taken into account, among them the civilisation of the Far East, of which Japan was perhaps the principal representative.’⁵ Answering Adachi, Baron Descamps suggested the clause, ‘the main forms of civilization and the principal legal system in the world’⁶ which in his view ensures the representation of the Great Powers.⁷ In other words, the terms ‘the main forms of civilisation and the principal legal system of the world’ were another expression of the Great Powers at that time, whether Europe or non-Europe. In a sense, this clause indicates one example of the transformation of the European law of nations to the universal law of nations. The Report of the Advisory Committee says as follows:

⁴ Lorimer/1883/101-102. Emphasis original.

⁵ *Procès-Verbaux*/136.

⁶ *Ibid.*/356.

'It was not enough therefore, to recommend the representation of the great legal systems of the world; the various forms of civilisation must also be represented. This is an essential condition, if the Permanent Court of International Justice is to be a real World Court for the Society of all Nations.'⁸

The concept of civilisation, however, started to lose its meaning after it ceased to denote European civilisation essentially. The international community in the era of the League of Nations became universal in the sense that it included not only European nations but also non-European ones. The League of Nations was open not only to Japan, which had already been accepted as a 'civilized nation,' but also other Asian nations which had not necessarily been thought of as 'civilised' from a European perspective. The concept of civilisation was significant only insofar as it prevented what European nations recognised as semi-civilised or barbarian people from becoming members of the international community. When even non-European nations became the members of the international community through joining the League of Nations, all members of the League were supposed to be 'civilised.' Thus, the concept of civilisation under Article 9 of the Permanent Court's Statute became meaningless insofar as it was not clear 'how this rule can be effectively carried out, except by the good will of the electors, as the extent of its application is rather vague and uncertain.'⁹ It was only in the context of the Mandate system that the concept of civilisation was useful in the era of the League. It legally justified members of the League dominating the former Ottoman-Turkey territories and the former German colonies in Central Africa and the South Pacific in the name of 'a sacred trust of civilization' under Article 22 of the Covenant of the League.

The changes in the consciousness of international lawyers in the inter-war era is clearly shown by the revised editions of *Oppenheim's* with regard to the admission of non-European nations,

⁷ *Ibid.*/371.

⁸ *Ibid.*/710.

⁹ De/Bustamante/1925/115.

except Japan, to the international community. In the second edition of his textbook published in 1912, Oppenheim said:

‘The position of such States as Persia, Siam, China, Morocco, Abyssinia, and the like, is doubtful. These States are certainly civilised States, and Abyssinia is even a Christian State. However, their civilisation has not yet reached that condition which is necessary to enable their Governments and their population in every respect to understand and to carry out the command of the rules of International Law. ...All of them make efforts to educate their populations, to introduce modern institutions, and thereby to raise their civilisation to the level of that of the Western. They will certainly succeed in this respect in the near future. But as yet they have not accomplished this task, and consequently they are not yet able to be received into the Family of Nations as full members.’¹⁰

Ronald Roxburgh, editor of the third edition of *Oppenheim's* published in 1920, revised the above remarks by changing the verbs of the above sentences from the present tense to the past tense, and from the perfect to the pluperfect, and by adding some new observations on the situation affected by the First World War:

‘Before the World War the position of such States as Persia, Siam China, Abyssinia, and the like, *was* doubtful. ...[T]heir civilisation *had not yet reached* that condition which *was* necessary to enable their Governments and their population in every respect to understand and to carry out the command of the rules of International Law. ... In the World War China and Siam took part on the side of the Allied and Associated Powers, and were represented at the Peace Conference at Paris. At the conclusion of the World War, Persia, Siam and China became members of the League of Nations. Abyssinia was not invited to accede to the Covenant of the League, and its position would seem to be unchanged.’¹¹

¹⁰ Oppenheim/1912a/33-34.

¹¹ Oppenheim-Roxburgh/1920/35. Emphasis added.

Arnold McNair, editor of the fourth edition of *Oppenheim's*, added the following new sentence:

'Abyssinia, China, Persia, and Siam are now all members of the League of Nations. The membership of these four States is a fact of considerable political significance, and it is impossible to deny that they are now International Persons and members of the Family of Nations.'¹²

In the fifth edition of *Oppenheim's*, Hersch Lauterpacht, the third editor of *Oppenheim's*, wrote the following sentences in 1937:

'After the World War the Capitulations and some other restrictions upon the territorial sovereignty of most of these States were abolished. These and other non-Christian States have been admitted to membership of the League of Nations and it is impossible to deny that they are full members of the Family of Nations. Religion or the controversial test of degree of civilisation have ceased to be, as such, a condition of recognition of Statehood.'¹³

In the sixth edition of *Oppenheim's*, furthermore, Lauterpacht added the sentence indicating that other non-European nations, such as Egypt, Iraq, Saudi Arabia, Lebanon and Syria, become the members of the United Nations after the Second World War: 'In general, the question of the membership of the "Family of Nations," as distinguished from the position of a State as a subject of International Law, is now a matter of purely historical interest.'¹⁴ During the Second World War, Lauterpacht already declared that '[i]nternational law today knows of no distinction between civilized and uncivilized States or between States within and outside the international community of civilized States.'¹⁵ Thus, the concept of civilisation had been radically transformed in international law.

¹² Oppenheim-McNair/1928/41.

¹³ Oppenheim-Lauterpacht/1937/46.

¹⁴ Oppenheim-Lauterpacht/1947/47.

Another reason for the concept of civilisation being deleted from international law is the legal school of international lawyers' conception of international law from the deontic viewpoint of normativism. Wilhelm Grewe said:

'Heterogeneous intellectual and ideological motives merged in this new universalist conception. Those international lawyers whose philosophy was rooted in positivism rejected the link between international law and the idea of civilisation because it would introduce an extra-judicial element into that law.'¹⁶

Normativism played an important role in this universalisation process of the European law of nations. Insofar as the concept of civilisation was regarded as 'an extra-judicial' or political one, it was natural that the legal school of international lawyers should try to delete the non-juristic idea of civilisation from international law. Instead of the concept of civilisation which had been the basis of the European law of nations in the 19th century, international lawyers in the inter-war era normatively searched for the basis of the binding force of international law. It was the maxim *pacta sunt servanda* as the basic norm for Kelsen.¹⁷ It was morality for James Brierly.¹⁸ For Lauterpacht, it was *voluntas civitatis maximae est servanda*.¹⁹ Although they formulated the basis of international law in their own way, the common element is that their formulations were normative and abstract in the sense that international law was presumed to be universally binding on all nations, whatever the reality of states was. Thus, the normative construction of the European law of nations became the basis of the universality of international law.

The concept of civilisation, therefore, gradually faded from international law in the inter-war era. One of the results of the disappearance of the concept of civilisation is that all states are assumed to be civilised in the sense that they will voluntarily comply with international law.

¹⁵ Lauterpacht/1944d/413/n.66.

¹⁶ Grewe/2000/584.

¹⁷ Kelsen/1970/216.

¹⁸ Brierly/1958/65.

¹⁹ Lauterpacht/Function/421-422.

Although he discussed the international community in 1955, the following remark of Bin Cheng is also applicable to the inter-war period in which the international community gradually became universal: 'If the present international society is almost universal in scope and includes States with different civilisations and legal systems, this is because it is assumed that members of the international society have all attained the requisite standard of civilisation, and that they accept the basic concepts of justice, law and equity which are and have been at the foundation of international law.'²⁰ Thus, the concept of civilisation was transformed into the normative cognisance of international law.

It does not mean, however, that even the universalism of international law in the inter-war era succeeded in deleting the European character from international law. The centre of world politics was still in Europe. The League of Nations had its headquarters in Geneva. The Permanent Court was in The Hague. Edouard Herriot, the socialist French Prime Minister, expressed the Eurocentric consciousness of the League: 'If I have devoted my energies ... to the League of Nations, I have done so because in this great institution I have seen the first draft of the United States of Europe.'²¹ Thus, the international community in the inter-war era was conceived as European society of nations even if it gradually became universal. It is true of international law. The international lawyers who claimed the universality of international law in the inter-war era were not so sensitive to their hidden Euro-centrism. They tended to think that the legal debates in Geneva and in The Hague truly reflected the universal image of international law. In this sense, the universalism in the inter-war era concealed the European centrality of world politics and European legal consciousness of international law.

It is true of Lauterpacht's international legal theory. Although he claimed the universality of international law, Lauterpacht constructed his universal theory from the synthesis viewpoint between Kelsenian normativism and the English tradition. In the context of the universalisation of the European law of nations, normativism played a decisive role in the universality of international

²⁰ Cheng/1955/187.

²¹ Cited from Gathorne-Hardy/1950/337.

law. This chapter discusses the problems of Lauterpacht's normative construction of international law, and the results of the disappearance of the concept of civilisation in international law.

2.2. THE UNIVERSALITY OF *la conscience juridique des peuples civilisés*

The academic career of Lauterpacht, educated in Vienna and London, enabled him to deny the difference between the Anglo-American school and the Continental school of international law. He was used to 'international legal studies as philosophy' in Vienna, and now fully understood 'international law as practice' in Britain. Therefore, the supposed difference of the two schools seemed to him to be due to 'the fact that, for historical reasons, the preoccupation on the Continent with the problems of legal philosophy, especially with regard to the purpose of the law and the nature of the judicial function, has been more intensive than in this country [the United Kingdom] and, until recently, in the United States.'²² If the difference between the two schools is the matter of academic experience for lawyers, the only solution is that both English lawyers and Continental lawyers pay more attention to each other. Indeed, Lauterpacht persuaded Charles Manning, who was one of the fathers of the so-called English school of international relations, to translate a German textbook of international law in 1930.²³ Thus, Manning published an English translation of Julius Hatschek's textbook, *Völkerrecht als System rechtlich bedeutsamer Staatsakte*.²⁴

It should be noted, however, that there was undoubtedly a belief in the universality of international law beneath his denial of the difference between two schools. Lauterpacht was afraid that the existence of the two schools questioned 'that ultimate uniformity of the sense of right and justice which is the foundation of the legal ordering of the relations between States.'²⁵ Wilfred Jenks would be right in defining 'that ultimate uniformity of the sense of right and justice' as 'the moral

²² Lauterpacht/1931a/CP-II/472-473.

²³ Suganami/2001/93.

²⁴ Hatschek/1930.

²⁵ Lauterpacht/1931a/CP-II/483.

basis of all law.²⁶ Thus, Lauterpacht's claim of the universality of international law is based on universal human rationality. In this sense, Lauterpacht's conception of universal international law is essentially naturalistic.

Lauterpacht's naturalistic conception of universal international law is typically European at the same time. It is a matter of course that the international community was composed essentially of the European nations in the inter-war period. Therefore, it is also a matter of course that the perspective of international lawyers in that period was essentially Eurocentric. Nevertheless, it is worth while pointing out that Lauterpacht constructed the universality of international law with a European legal conscience. From such a 'European' viewpoint, Lauterpacht was able to claim the universality of international law, overriding the difference between the Anglo-American School and the Continental School.

This point is well seen in *Analogies*, because private law analogy was nothing but the application of natural law. The naturalistic tendency of the English tradition seemed to Lauterpacht to confirm the development of the European law of nations: '[T]he great respect for Roman law and the acknowledgement of its importance as a subsidiary source of international law have become one of the characteristic features of British international jurisprudence.'²⁷ This tradition seemed to Lauterpacht not to have changed in the 19th century in England: 'The attitude of the nineteenth century English writers does not differ appreciably from that adopted by the above-mentioned representatives of the Oxford school.'²⁸ Furthermore, he saw the reason why English international lawyers tend to affirm civil law as the source of international law:

'The reason for this affirmative attitude to Roman law so far as international law is concerned lies... in the fact that English writers on international law...had never lost sight of what may be called the natural law

²⁶ Wilfred/Jenks/1960/1.

²⁷ Lauterpacht/Analogies/24.

²⁸ *Ibid.*/26.

foundation of international law.²⁹

Lauterpacht noticed the question of private law analogy when he started to study the Mandate system at the University of Vienna, because the Mandate system borrowed the concept and forms from private law:

‘It takes as its starting point Jellinek’s proposition that “analogies from a self-contained legal system must not be advanced as *jus cogens* in a totally different system.” Nonetheless, the concepts and forms of private law are incorporated into international law. How do scholars cope with this difficulty?’³⁰

Although *Analogies* is the definitive answer to the question, Lauterpacht also partly answered this question as well in the thesis submitted to the University of Vienna, which showed his respect for Austro-German positivism. In the thesis, he said that ‘private law analogy’ was harmful to the scientific development of positive international law by emphasising the different character of international law from domestic law. His denial of private law analogy in the thesis shows his loyalty to Austro-German positivism, a pivot of which is to reject the domestic analogy. However, his loyalty seems to be more apparent than real, because Lauterpacht, at the same time, strongly affirmed ‘private law formulation of concepts as a matter of legal construction.’ What is the difference between ‘private law analogy’ and ‘private law formulation of concepts’ in his view? He defined ‘private law analogy’ as ‘the (analogous) application in international law of private law legal principles’ on the one hand, and ‘private law formulation of concepts’ as ‘the application of private law concepts in international law.’³¹ However, these definitions would be meaningless if the difference between ‘private law analogy’ and ‘private law formulation of concepts’ remains as the difference between ‘private legal principle’ and ‘private law concepts.’ It seems impossible to

²⁹ *Ibid.*/27/n.5.

³⁰ Lauterpacht/1921/CP-III/53.

³¹ *Ibid.*/52/n.1.

separate ‘concepts’ from ‘principles’ insofar as both are composed of languages.³² Rather, the main difference between them seems to be that ‘private law analogy’ denies the special character of international law, while ‘private law formulation of concepts’ admits it. The reason why Lauterpacht denied ‘private law analogy’ was because it ‘endangers the independence of international law and fails to recognize its peculiarity.’³³ On the other hand, he explained ‘private law formulation of concepts’ as follows: ‘Rules governing inter-State relationships, which are in fact laid down by treaty or custom are, for the sake of order and categorization and for easier understanding and interpretation, attributed *ex post facto* to an already existing and well-developed private law concept.’³⁴ However, even if the difference between ‘private law analogy’ and ‘private law formulation of concepts’ depends on whether the independence of international law is recognised or not, the separation between the two methods is too formalistic to be appropriate. Indeed, Lauterpacht admitted the relative difference between them:

‘[T]his method of concept formulation is not essentially different from private law analogy. Even though, in origin, it is a question purely of form, it leads easily to analogy in substance.’³⁵

Insofar as ‘the application of private law concepts’ was defined as the process that ‘positive international law itself adopts concepts and institutions which have already specific implications in one or more legal systems,’³⁶ the application of private law concepts, which Lauterpacht affirmed in his thesis, was nothing but the process of private law analogy to international law which McNair admitted in the *International Status of South-West Africa* case by saying that ‘the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles

³² On the linguistic relation between concepts, rules and principles, see Thirlway/2002/290-298.

³³ Lauterpacht/1921/CP-III/51.

³⁴ *Ibid.*/57.

³⁵ *Ibid.*/58.

³⁶ *Ibid.*/59.

rather than as directly importing these rules and institutions.³⁷

Lauterpacht improved his theory of the development of international law by private law analogy in *Analogies*. It is sometimes said that Lauterpacht's *Analogies* proved how municipal law thinking had affected the development of international law.³⁸ However, such an appreciation would be misleading if what Lauterpacht called 'private law' were understood as municipal laws such as English law or German law. Lauterpacht himself cautioned against the tendency of international lawyers to refer to their own municipal laws in constructing international legal theory:

'The recourse, in the domain of international public law, to private law sources is no doubt fraught with dangers. ... There is, firstly, the tendency on the part of many writers to resort to notions peculiar to their own municipal law or to some other system of private law regardless of the fact that conceptions of that kind cannot, owing to their technical character or the altogether special reason of their creation, claim that degree of cogency which is conditioned by the actual universality of a legal rule, from the point of view either of juristic logic or of legal justice, and which alone may reasonably serve as a basis of analogy.'³⁹

The conception of private law which Lauterpacht argued was more vague and uncertain. Indeed, he did not give us the exact definition of private law. It includes not only 'Roman law as embodying the principles of the law of nature and right reason'⁴⁰ but also 'the principles of legal justice common to all law.'⁴¹ However, Lauterpacht seems to have thought that private law denoted the general principles of law recognised by civilised nations under Article 38 (1) (c) of the Statute of the International Court of Justice. He explained that 'general principles of law, recognised by civilised States and adopted by customary and conventional international law as a source of decision in international disputes, are for the most part identical with generally recognised

³⁷ ICJReps/1950/148.

³⁸ Onuma/1991/75-76; Serita/1996/227.

³⁹ Lauterpacht/*Analogies*/85.

⁴⁰ *Ibid.*/33.

⁴¹ *Ibid.*/84.

principles of private law.’⁴² Therefore, it seems proper to think that, in Lauterpacht’s view, private law is the same as the general principles of law recognised by civilised nations. Indeed, he clearly said as follows: ‘This book [*Analogies*] is, in a sense, a commentary on Article 38 (3) of the Statute [of the Permanent Court of International Justice] and a respectful acknowledgement of the great service rendered to the cause of international law by the Committee of Jurist assembled in 1920 at the Hague.’⁴³ Therefore, it is useful to mention the drafting process of Article 38 (3) of the Statute of the Permanent Court in order to explicate Lauterpacht’s conception of private law.

The general principles of law appeared in the discussion regarding to *non-liquet* in the Advisory Committee of Jurists. In the discussion, it is the President of the Committee, Baron Descamps, who proposed ‘the rules of international law as recognised by the legal conscience of civilised nations’⁴⁴ to the Advisory Committee of Jurists. Answering a question whether the judge could pronounce *non-liquet* in the case that neither law nor custom exist, Descamps explained that

‘[T]he judge must then apply general principles of law. But he must be saved from the temptation of applying these principles as he pleased.’

Then, he continued that ‘the judge render decisions in keeping with the dictates of the legal conscience of civilised people.’⁴⁵ The Committee adopted the amendment text of Root-Phillimore, which stipulated ‘the general principles of law recognised by civilised nations.’ Descamps agreed with the amendment text of Root-Phillimore.⁴⁶

It is true that the Advisory Committee clearly avoided the conclusion as to what ‘the general principles of law recognised by civilised nations’ are. De Lapradelle, a member of the Committee, said that it is preferable ‘to keep to a simple phrase: such, for example, as “the general principles of

⁴² *Ibid.*/viii.

⁴³ *Ibid.*/viii-ix.

⁴⁴ *Procès-Verbaux*/306.

⁴⁵ *Ibid.*/318-319.

⁴⁶ *Ibid.*/331.

law,” without indicating exactly the sources from which these principles should be derived.⁴⁷ Such an attitude of the Advisory Committee was sagacious in the sense that it avoided limiting the meaning of Article 38 (3) of the Permanent Court’s Statute; whether or not the Committee defined the general principles of law, it would be inescapable that the controversy between lawyers about the concept of the general principles of law happened. It is not necessary here to explicate the endless controversies about what the general principles of law are,⁴⁸ because insofar as the purpose of this thesis is to explicate the view of Lauterpacht, it suffices to mention that he was included in the group which interpreted the general principles of law as ‘*la conscience juridique des peuples civilisés*.’⁴⁹

Lauterpacht clearly conceived such a conception of private law as ‘*la conscience juridique des peuples civilisés*.’⁵⁰ Indeed, he said that ‘the approximation to corresponding general principles of private law is, as a rule, tantamount to the realisation of a principle of justice and equity hitherto obscured by the part which force plays in international relations.’⁵¹ He kept to such a conception of private law throughout his life. In his draft of the 9th edition of *Oppenheim’s*, Lauterpacht said as follows:

‘They [general principles of law] are principles arrived at by way of a comparison, generalization and synthesis of rules of law in its various branches – private and public, constitutional, administrative, and procedural – common to various system of national law. They are the modern *jus gentium* in its wider sense. In the sense here suggested, they are no more than a modern formulation of the law of nature which played a decisive part in the formative period of international law and which underlay much of its subsequent

⁴⁷ *Ibid.*/336.

⁴⁸ On the controversy, see Tunkin/1958/23-26.

⁴⁹ Bin Cheng argued that the translation of ‘*la conscience juridique des peuples civilisés*’ into ‘legal conscience of civilised people’ is wrong because in French the term ‘*conscience*’ does not include the sense of what is morally right or wrong, though in English the same term denotes the sense of moral rightness. Therefore, Cheng recommends us to use the term ‘the sense common to all civilised peoples of what is juridically right or wrong,’ or as ‘the opinion *juris communis* of civilised mankind.’ Cheng/1987/7-9.

⁵⁰ Lauterpacht/Analogies/68/n.2. Also see J/B./Scott/1928/219.

development. ...It [the law of nature] was primarily a generalization of the legal experience of mankind.⁵²

This remark highlights two points. First, the conception of private law or general principles of law in Lauterpacht's view is too broad to define exactly. Consequently, his conception of the general principles is close to legal thinking or 'the opinion *juris communis* of civilised mankind.' Second, Lauterpacht unconsciously universalised the European legal conscience when he referred to the law of nature as 'a generalization of the legal experience of mankind,' because the natural law tradition is nothing but European legal culture. In this sense, Koskenniemi is correct in pointing out that Lauterpacht typified 'the reconstructive scholarship of the inter-war period' who 'simply generalized the legal experience of European societies into the international level, bringing into existence a universal international law through private law analogies, conceiving the Covenant of the League of Nations as a constitution of the world and by allocating to the juristic class the function of "filling the gaps" in an otherwise primitive-looking legal system.'⁵³

Thus the view of Lauterpacht with regard to private law analogy was naturalistic in the sense that private law amounted to the general principles of law, which he recognised as 'a modern formulation of the law of nature.' However, it is clear that Lauterpacht did not advocate the old tradition of natural law.⁵⁴ He recognised the possible arbitrariness and abuse of natural law, although he emphasised the natural law theory as the basis of human rights later.⁵⁵ Nussbaum explained the revival of natural law theory in the inter-war era as follows:

'The new invocation of the natural law simply expressed the growing awareness of the fact that treaties and custom cannot tell the whole story of international law, and that a decision on controversial issues can be found only by a process of reasoning which, in addition to the given positive material, includes within certain

⁵¹ Lauterpacht/Analogies/303.

⁵² Lauterpacht/General-Part/CP-I/74-75.

⁵³ Koskenniemi/2003/109.

⁵⁴ Rosenne/1961/829/n.19.

⁵⁵ Lauterpacht/ILHR/100-113.

limits considerations of justice and equity. Even in the interpretation of a treaty – no less than in the interpretation of a private contract – such considerations are indispensable indeed, though in any case they must be controlled by juristic principles.⁵⁶

This explanation by Nussbaum is correct even as the explanation of Lauterpacht's private law analogy. In other words, private law analogy in Lauterpacht's view is nothing but 'the role of "reason" in the treatment of the positive material.'⁵⁷ Thus, the application of the general principles of law as 'a modern formulation of the law of nature' is turned into legal reasoning.⁵⁸ This implies that Lauterpacht constructed private law analogy from the viewpoint of international judge. This viewpoint of international judge is the another feature of *Analogies* that connects it to *Function and Development-I*.

2.3. THE CENTRALITY OF THE INTERNATIONAL JUDICIARY IN THE INTERNATIONAL COMMUNITY

The existence of international judges had been hypothetical rather than actual in international relations, when Grotius⁵⁹ or Vattel⁶⁰ claimed the utility of the judicial settlement of international dispute. However, international adjudication system has developed since the *Alabama* case in 1872. The 1899 Peace Conference was successful in adopting Hague Convention for the Pacific Settlement of International Dispute, which established the Permanent Court of Arbitration under Articles 41-50. Finally, the Permanent Court of International Justice was established in 1921 in accordance with Article 14 of the Covenant of the League. Thus, international judges gradually appeared on international scene. The development of international adjudication system since the

⁵⁶ Nussbaum/1947/275.

⁵⁷ *Ibid*.

⁵⁸ Degan/1997/15.

⁵⁹ Grotius/1925/561-563.

⁶⁰ Vattel/1916/223-224.

19th century unavoidably affected the paradigm of international lawyers. In particular, the establishment of the Permanent Court in the inter-war period was decisive. The international community was for the first time given the permanent judicial organ which could have compulsory jurisdiction if states accept it under the Optional Clause. The legal school of international lawyers could not claim the centrality of international judges in the international community unless the Permanent Court was established. As Ludwik Ehrlich suggested, the inter-war period was the beginning of the era whereby 'judge or scholar relies now, in addition to conventions, on judicial precedent as a means of determining whether there is a general practice accepted by law, what general premises of legal thinking may be applied as recognized by civilized nations, and what rules follow from principles recognized as prevailing.'⁶¹

However, the legal school of international lawyers, and their critics as well, often confused the two meanings of the centrality of international judges. The first meaning of the centrality of international judges is the place of international adjudication within international legal system. It is the question whether or not we can identify the case law of international courts and tribunals with international law itself, even though the international community is not given the international judiciary which has the compulsory jurisdiction. The second meaning of the centrality of international judges is about the role of international adjudication as the peaceful settlement of international dispute in the context of international politics. This aspect of the centrality of international judges is a question whether or not international adjudication is the most appropriate method of settling international disputes. These aspects of the centrality of international judiciary in the international community are often confused in the name of the Rule of Law. However, they are different questions, because the former belongs to a matter of law, how international lawyers should conceive international law, while the latter is a political question, how international adjudication plays a role in international relations. Thus, here, it is important to distinguish between the two questions. The former question will be discussed as 'lawyer's perspective.' The latter will be

⁶¹ Ehrlich/1962-I/256.

discussed as the problem of legalism.

2.3.1. THE LAWYER'S PERSPECTIVE OF INTERNATIONAL LAW

The common feature of his trilogy of international judicial functions is that Lauterpacht adopted 'the lawyer's perspective' which is coined by Joseph Raz as the unconscious attitude of lawyers to accept the basic intuition that '[t]he law has to do with those considerations which it is appropriate for courts to rely upon in justifying their decisions.'⁶² In other words, the crux of 'the lawyers' perspective' is the identification of the theory of law with the theory of adjudication:

'From the lawyer's perspective all the considerations pertaining to judicial reasoning are equally relevant. A lawyer has to concern himself not only with legislation and precedent but also with other considerations relevant to judicial reasoning. A lawyer, therefore, fortified in virtue of BI [Basic Intuition] with the knowledge that the law has to do with judicial reasoning finds no reason from the perspective of his own professional preoccupations to stop short of identifying the theory of law with a theory of adjudication.'⁶³

Indeed, Lauterpacht adopted this lawyer's perspective in *Analogies*, when he said that 'there is no better opportunity for testing the value of certain doctrines and conceptions of international law than those cases of international arbitration in which recourse to these conceptions and doctrines has become relevant.'⁶⁴ Then, he discussed how international judges had used private law analogy in the interpretation of international law. In this sense, the subtitle of *Analogies* 'With Special Reference to International Arbitration' embodies his lawyer's perspective of international law.

This lawyer's perspective also appears in *Function and Development-I*. In *Function*, which shows that it is possible for tribunals and courts to function at the centre of the international legal system, Lauterpacht referred to the place of courts in a legal system as follows:

⁶² Raz/1982/111.

⁶³ *Ibid.*/116.

‘Whatever may be the nature of such rules the very fact that there are no impartial tribunals to adjudicate upon their operation seriously impairs their character as rules of law. There is substance in the view that the existence of a sufficient body of clear rules of conduct is not at all essential to the existence of law, and that the decisive test is whether there exists a judge competent to decide upon disputed rights and to command peace.’⁶⁵

This point is related to the problems of the determinacy of law. Without judges, law continues to be indeterminate:

‘[O]nly through final ascertainment by agencies other than the parties to the disputes can the law be rendered certain; it is not rendered so by the *ipse dixit* of an interested party. Such certainty is of the essence of law. The object of law to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of dispute. It must so remain as long as no agencies exist capable of determining existing legal rights with finality and without appeal.’⁶⁶

In *Development-I*, Lauterpacht again clearly expressed his lawyers’ perspective:

‘What are rules of international law? They are rules which, in the opinion of a sound and learned international lawyer, the Court will apply.’⁶⁷

Thus, the lawyer’s perspective is coherently seen in his trilogy of international judicial function. In

⁶⁴ Lauterpacht/Analogies/38.

⁶⁵ Lauterpacht/Function/424.

⁶⁶ *Ibid.*/425.

⁶⁷ Lauterpacht/Development-I/10. In *Development-II*, Lauterpacht slightly changed this remark: ‘For what are rules of international law for the purpose of judicial settlement? They are rules which, according to legal opinion, based – among other thing – on the study of the work of the Court, the latter will apply.’ Lauterpacht/Development-II/21.

other words, he constructed his international legal theory from the viewpoint of judges⁶⁸ or the 'internal viewpoint of law' which is described by Hart as 'the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour.'⁶⁹

The prerequisite of the lawyers' perspective is to think that law is the social practice of normative argumentation with reference to rules, principles and previous decisions. The crux of the lawyers' perspective is the normative conception of law. This point explains why Lauterpacht is recently discussed in comparison with Ronald Dworkin. Koskenniemi, for example, points out that '*Function of Law* puts forward an image of judges as "Herculean" gap-fillers by recourse to general principles and the law's moral purposes that is practically identical to today's Anglo-American jurisprudential orthodoxy.'⁷⁰ It was of course impossible for Lauterpacht to know Dworkin; Lauterpacht had already died 3 years before Dworkin discussed judicial discretion in his first article.⁷¹ Nor does Dworkin discuss international law. Therefore, there is clearly no academic connection between Lauterpacht and Dworkin. Nevertheless, it cannot be denied that there is certainly a similarity between them. It is Kelsen who connects between Lauterpacht and Dworkin with regard to lawyer's perspective.

According to Raz, Kelsen adopted lawyer's perspective without being aware of this. Raz explains this point as follows:

'Kelsen indicates his belief that the analysis of legal concepts and the determination of the content of any legal system depends in no way at all on the effects the law has on the society or the economy, nor does it involve examination of people's motivation in obeying the law or in breaking it. The picture of law dictated by the methodology of the Pure Theory is of law in the books, of an analysis of law using as the raw material only

⁶⁸ Also see Lauterpacht/1937-IV/CP-I /247.

⁶⁹ Hart/1994/98. Emphasis original.

⁷⁰ Koskenniemi/1997c/228. Furthermore, Koskenniemi points out the very similarity between Lauterpacht's theory and Dworkin's as constructivism. Koskenniemi/1989/35-40.

⁷¹ Dworkin/1963.

law reports and statute books. Now the only possible justification for legal studies to ignore the social realities behind the law is a conception of law and legal studies which concentrates on the lawyer's perspective.⁷²

On the other hand, Dworkin seems to Raz to typify American theorists who 'jumped to the conclusion that all the considerations which courts may use are legal.' Raz continues that Dworkin assumes that 'all the considerations which courts legitimately use are legal considerations.'⁷³ Dworkin certainly conceives law as normative argumentation from the internal viewpoint of judge.

'Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions.'⁷⁴

Although he admits that there are two points of view for studying legal argumentation, namely the external viewpoint of historian or sociologist and the internal viewpoint of those who make legal claim, Dworkin declares that he adopts 'the internal, participant's point of view.' He goes on,

'We will study formal legal argument from the judge's viewpoint, not because only judges are important or because we understand everything about them by noticing what they say, but because judicial argument about claims of law is a useful paradigm for exploring the central, prepositional aspect of legal practice.'⁷⁵

Lauterpacht is between Kelsen and Dworkin, because while adopting Kelsenian normativism, Lauterpacht was opposed to the separation thesis of law from morality which proves the purity of Pure Theory of Law. Thus, unlike Kelsen, Lauterpacht did not need to be bothered about the

⁷² Raz/1982/114.

⁷³ *Ibid.*/116.

⁷⁴ Dworkin/1986/13.

question how judges should distinguish between legal considerations and moral considerations, because all considerations judges take into account as 'law' is law for Lauterpacht. This explains the reason Lauterpacht emphasised the case law of the international courts and tribunals. The case law is a set of the experiences that lawyers argue about what is 'law' from the internal point of view. Therefore, the question what international law is for Lauterpacht is naturally converted into the question of legal interpretation, how judges interpret international law:

'[T]he decisions of the Court are, as a matter both of legal principles and of actual experience, one of the weighty factors which will influence its future decisions. They are evidence of what the Court considers to be the law; they show what the Court will do in fact; for most practical purposes they show, therefore with, what international law is.'⁷⁶

It is so because international courts and tribunals can function as the forum for legal argumentation even in the less organised society of states. The parties plead their legal arguments before the bench, and judges justify their decisions by legal reasoning. Nobody can deny that the argumentation practice in international tribunals is nothing but the job of international lawyers. In such an argumentative practice, the role of judges is decisive, because they have the duty to find the applicable rules of law insofar as they have jurisdiction. It is so even if the Court does not have compulsory jurisdiction. Legal practitioners consider legal questions from the perspective of judges on the assumption that the Court is seized of the case. In this sense, it is no coincident that the Legal Advisors of the Foreign Office adopt the lawyer's perspective of international law. Indeed, William Beckett said that the judgements or advisory opinions of the Permanent Court were 'the most authoritative pronouncements on questions of international law and procedure that can be made while the family of nations remains as at present constituted.'⁷⁷ Following Beckett, Fitzmaurice also

⁷⁵ *Ibid.*/14.

⁷⁶ Lauterpacht/Development-I/11.

⁷⁷ W./Beckett/1930/1.

said as follows:

'[T]hey [the decisions of international tribunals] have a more direct and immediate impact on the realities of international life, the attitude of States, and the mind of judges and arbitrators in later cases. A decision is a *fact*. ...For the reasons it would seem that ...it must be regarded as having a special status that differentiates it from other material sources, and causes it to be at least a quasi-formal source.'⁷⁸

In this sense, international law should be regarded as 'those which an impartial judge would apply to the problem if it were brought before him'⁷⁹ from the lawyer's perspective. As Thirlway pointed out, 'the court remains in the background as, literally, the final arbiter and therefore the final yardstick of what is legal.'⁸⁰ This statement by Thirlway shows the crux of the lawyers' perspective of international law, namely the centrality of international judges in international legal system.

2.3.2. PEACE THROUGH LAW?

However, it would be a different story if it were thought that international judges should be in the center of international politics. In other words, a problem easily occurs when international lawyers overestimate the function of international adjudication as the forum of legal argumentation to regulate international politics. In the inter-war period, the legal school of international lawyers, which believes that law prevails over politics even in the international sphere, claimed the famous slogan 'all-in-arbitration' which reflected a widespread feeling that 'the way to establish an international "rule of law" and avoid future wars was for states to submit all international disputes of every kind to an international arbitral tribunal having power to decide them at its discretion on

⁷⁸ Fitzmaurice/1958/172-173. Emphasis original.

⁷⁹ Thirlway/2002/305.

⁸⁰ *Ibid.*/306/n.104.

grounds either of strict law or of equity and common sense.’⁸¹ It is the crux of the problem for the international law of Geneva in the inter-war period. Lauterpacht’s *Function* defends such a slogan ‘all-in-arbitration’ by claiming that all international disputes are justiciable. It is certainly true that international disputes are always legal disputes from the lawyers’ perspective, because any kind of social relations can be conceived as the normative relationships of rights and obligations.

However, the justiciability of international disputes does not mean that international judges can regulate the political decisions of states. In a sense, the question of whether the parties actually decide to use the Court as the method of dispute settlement is a highly political matter. It does not mean, of course, that the Court cannot answer legal questions pertaining to an international dispute, even if one party does not wish to solve it by using the peaceful settlement process of international law. Insofar as the Court has jurisdiction, it can clarify legal aspects of a dispute. However, the legal answer given by the Court may not directly solve a political controversy between parties in the situation that the enforceability of judgment is limited. It is dependent upon the willingness of states to accept the judgment, even if it is contrary to their claim. In this sense, international adjudication functions only in the limited sphere that state parties politically agree to solve the dispute by adjudication.

The agreement that the parties choose international adjudication for solving the problem between them belongs to the sphere of political choice in the sense that the parties find it appropriate to ask international judges to settle the dispute between them by taking all elements into consideration. It is undeniable that, without such political agreement, international judges become ‘an array of wigs and gowns vociferating in emptiness.’⁸² The conclusion of a *compromis* itself is essentially political, although the *compromis* is legally regulated once it is concluded. In this sense, international adjudication, where international law functions as normative argumentation, presupposes the agreement that the judicial settlement is politically desirable to the parties. Carr set it out as follows:

⁸¹ Carr/1945a/183.

⁸² Zimmern/1936/125.

‘The judicial settlement of disputes presupposes the existence of law and the recognition that it is binding; and the agreement which makes the law and which treats it as binding is a political fact. The applicability of judicial procedure depends therefore on explicit or implicit political agreement.’⁸³

Thus, the international courts and tribunals do not work if the international community is politically unstable. It was particularly true of the inter-war period. The average number of cases and advisory opinions which were submitted to the Permanent Court from 1922 to 1932 was 4.45 cases and 2.27 advisory opinions per year. However, from 1933 to 1939, only 2.28 new cases and 0.28 advisory opinions were counted per year.⁸⁴

Lauterpacht certainly noticed that political agreements were a prerequisite to judicial settlement after his careful examination of the distinction between political disputes and legal disputes.⁸⁵ He concluded that ‘[i]t is not the nature of an individual dispute which makes it unfit for judicial settlement, but the unwillingness of a State to have it settled by the application of law.’⁸⁶ However, as Carr appropriately pointed out, Lauterpacht stopped analysing this problem. It was clearly insufficient for Lauterpacht to treat such unwillingness of states as ‘perverse and undeserving of the attention of an international lawyer.’⁸⁷ Lauterpacht presupposed that it is a matter of course that states were subject to the authority of international courts. However, the reason why states use the judicial settlement is because they find it appropriate to ask judges to settle disputes. If the actual willingness of states to use the Court belongs to the question of politics, the attitude to criticise ‘the unwillingness of a state to have it settled by the application of law’ is also a matter of political morality. It is from the viewpoint that law should prevail over politics that Lauterpacht could criticise the unwillingness of states to obey the authority of international law. Indeed,

⁸³ Carr/1945a/180.

⁸⁴ See Hudson/1943/779.

⁸⁵ On the summary of his examination of the distinction between legal dispute and political dispute, see Oppenheim-Lauterpacht/1935/4/n.1.

⁸⁶ Lauterpacht/Function/369.

Lauterpacht said,

‘The opposition, on the part of many international lawyers of authority, to the universal application of judicial settlement, and their insistence on the necessity for retaining in some form the traditional classification of disputes, come from the conviction that law must not be treated as a panacea able to secure peace in all circumstances. ...But it is essential that international lawyers should develop an attitude of criticism with regard to the very effective ...argument that law is not a panacea.’⁸⁸

Then, Lauterpacht continued as follows:

‘[I]f pacifism is identical with the insistence on the reign of law in international relations, then it may be doubted whether a jurist conscious of the true nature of his task may hope to achieve a rigid separation of this nature. ... Peace is pre-eminently a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal system. Juridical logic inevitably leads to condemnation, as a matter of law, of anarchy and private force. It is one of the unsatisfactory features of modern international law that it has neglected to find a legal foundation for the so-called pacifism.’⁸⁹

However, the crux of the problem he posed is whether or not such an evangelic attitude of ‘Peace Through Law’ as political morality is really appropriate to international relations. Lauterpacht seems to have desired the Rule of Law in the international community too much to consider this question.

The actual willingness of the state to abide by international law is the political basis of international law, even if there is a normative basis of international law, such as the maxim *voluntas civitatis maximae est servanda* in the view of Lauterpacht, which explains why states should obey

⁸⁷ Carr/1945a/189/n.3.

⁸⁸ Lauterpacht/Function/437.

⁸⁹ *Ibid.*/438.

international law. Lauterpacht was certainly correct in criticising voluntarism, because the consent of states cannot explain the binding force of international law. However, it is also true that the compliance with international law is based on the willingness of governments. If the leaders of a state have no intention of complying with international obligation for the sake of the national interest of the state, it is difficult to expect that the state which such leaders govern will abide by international law. Either is it too simple to think that international obligation can be imposed upon the state which is reluctant to abide by international law. If such a state has the military power to defeat other states, furthermore, it is not difficult to imagine that the state also finds it easy to defeat the authority of international law which restricts the freedom of the state to increase its national interest. This problem actually occurred in the 1930s.

2.4. THE DISINTEGRATION OF THE INTERNATIONAL COMMUNITY

There is no era in which international law was more overestimated than the era of the League of Nations. The international community was universally organised as the League of Nations. The establishment of the Permanent Court of International Justice encouraged people to believe that the Rule of Law in the international community came true as the compulsory peaceful settlement of international disputes and as the outlawry of war. Such an expectation reached a climax, when the Great Powers concluded the Kellogg-Briand Pact which stipulates the renouncement of war as an instrument of national policy under Article 1, and the peaceful settlement of international disputes under Article 2. However, it should be noted that the Kellogg-Briand Pact lacks the enforcement provision and the compromissory clause. The Pact presumes the willingness of the contracting parties to comply with the Pact voluntarily. And, more fundamentally, it was presumed that the interpretation of the Pact was unified among the contracting parties. However, these assumptions were easily broken in the Manchurian affair. In other words, it was recognised as a matter of course in the inter-war era that states naturally obey international law, because the compliance with

international law was thought politically and morally correct too much.

However, this presumption gradually collapsed from the early 1930s. The Manchuria affair was thought to be the turning point of the inter-war period in the sense that '[f]or the first time not only the action of the Council and Assembly, but the fundamental moral and political conception on which the Covenant was based were exposed to a powerful and determined attack.'⁹⁰ The Assembly of League of Nations adopted the resolution to request Japan to withdraw the Kwantung army from the occupied territory after the Lytton commission examined the affair.⁹¹ However, Japan decided to withdraw from the League instead of accepting the resolution in 1933. In the same year, Nazi Germany also decided to cease to be a member of the League. In 1935, Italy invaded Abyssinia. The League of Nations decided to impose economic sanctions upon Italy. However, since the United Kingdom and France were reluctant about sanctions, Italy was not prevented from annexing Abyssinia.

Thus, it was unavoidable that the international law of the League had no power to keep peace in the situation that the Axis nations did not accept its authority, and that the members of the League had no determined will to protect the League system even at the sacrifice of their interest. The problem for international lawyers in the inter-war era was that the belief that voluntary compliance with international law is politically legitimate collapsed. However, it should be noted that there was a difference between Nazi Germany on the one hand, and Italy and Japan on the other hand, with regard to their attitude toward international law. Concerning the attitude of Nazi Germany toward international law, Hitler had no intention of complying with international law from the start. For example, he said quite openly, 'I shall shrink from nothing. No so-called international law, no agreements will prevent me from making use of any advantage that offers.'⁹² On another occasion, Hitler also confessed his unwillingness to keep international treaties:

⁹⁰ Walters/1952/465.

⁹¹ AJIL/Supplement/vol.27/1933/119.

⁹² Raushning/1939/21.

'I am willing to sign anything. I will do anything to facilitate the success of my policy. I am prepared to guarantee all frontiers and to make non-aggression pacts and friendly alliances with anybody. It would be sheer stupidity to refuse to make use of such measures merely because one might possibly be driven into a position where a solemn promise would have to be broken. There has never been a sworn treaty which has not sooner or later been broken or become untenable. There is no such thing as an everlasting treaty. Anyone whose conscience is so tender that he will not sign a treaty unless he can feel sure he can keep it in all and any circumstances is a fool. Why should one not please others and facilitate matters for oneself by signing pacts if the others believe that something is thereby accomplished or regulated? Why should I not make an agreement in good faith to-day and unhesitatingly break it to-morrow if the future of the German people demands it?'⁹³

Indeed, the subsequent practice of Nazi Germany proved that Hitler confessed his true intuition by concluding non-aggression treaties. Nazi Germany concluded non-aggression treaties with Poland,⁹⁴ Denmark,⁹⁵ and the Soviet Union,⁹⁶ which it later invaded.

On the other hand, the attitude of Italy and Japan to international law was slightly different from the attitude of Nazi Germany. George Schwarzenberger pointed out that:

'Italy and Japan base their political ideologies on the conception of the State, and the sovereign State is the corner-stone of the classical and individualistic system of International Law. They, therefore, show marked tendencies to go back to the pre-1914 state of International Law which would have given them all the scope and freedom they desired.'⁹⁷

⁹³ Raushning/1939/114.

⁹⁴ Declaration of Non-Aggression between Germany and Poland, 26 January 1934, Grenville-Wasserstein/2001/207-208.

⁹⁵ German-Danish Treaty of Non-Aggression, signed on 31 May 1939, Documents-on-International-Affairs/1939-1946/256-257.

⁹⁶ Treaty of Non-Aggression between Germany and the Soviet Union, Moscow, 23 August 1939, Grenville-Wasserstein/2001/229-230.

Indeed, Japan adhered to the old conception of the European law of nations before 1919 that freely allowed states to use armed force. Though not a lawyer, Helen Mears correctly pointed out how Japan adhered to the European law of nations before 1919:

‘In adapting themselves to Western practice, the Japanese leaders had their own experience to guide them, and they also meticulously studied the history of the empire-building activities of the Western Powers in general. They saw, or thought they saw, that Western principles – whether in the field of international law or the field of humanitarian concern for people’s welfare – were, in practice, merely techniques developed by the strongest Powers to promote their own interests at the expense of weaker Powers. Looking about them it seemed obvious to the Japanese that annexing territory, or gaining commercial and financial advantages by force, were considered legitimate activities as long as they were “done legal [*sic*]” – according to the rules worked out by the major Powers. The legal techniques seemed clear enough: a Power strong enough to do so applied force to a “backward” area to secure “legitimate” demands (for diplomatic or commercial-financial relations). . . .

According to the accepted code of international relations, as the Japanese saw it in practice, a nation which had achieved a position of power was accorded a privileged status in its relations to less powerful nations. It was recognized that a Great Power had “commitments” abroad which it was entitled to “defend” by force if necessary; it was accepted as “legal” that a Great Power had “special interests” in neighbouring less powerful areas, and that these “special interests” . . . gave the Great Power a legitimate right to “maintain law and order” in the government of those areas. It was accepted as “legally” correct for the Great Power to desire a “friendly” government in such near-by – or distant – regions, and when conditions made it necessary to “protect nationals” or “maintain security,” it was considered legitimate to help to establish such a friendly government, by means of financial-commercial pressures, or by diplomatic procedures if possible; by force if “vital for defence”.⁹⁸

Japan understood the Kellogg-Briand Pact in the same way. In the view of Japan, the Kellogg-

⁹⁷ Schwarzenberger/1943/14.

⁹⁸ Mears/1948/202-203.

Briand Pact accepted that the parties could decide whether or not the use of force was the self-defence. Japan claimed as follows:

‘The special position of Japan in Manchuria “to which so much mystery is attached,” is a very simple matter. It is nothing but the aggregate of Japan’s exceptional treaty rights (plus the natural consequences of her propinquity, geographical situation, and historical associations) and vital and justified measures of self-protection as the standard principle laid down in the *Caroline* case, that every act of self-defence must depend for its justification on the importance of the interests to be defended, or the imminence of the danger and on the necessity of the act. . . The statements at the time of the negotiations which led up to the signature of the Briand-Kellogg Treaty for the outlawry of war, made by Mr. Kellogg himself (Note of June 23, 1928) in the Senate of the United States; by the British Foreign Secretary of the date (Notes of May and July, 1928) and by the French and German Governments, clearly reserved the right of self-defence, and more contradict the observations made by Mr. Kellogg that “every nation . . . is alone competent to decide whether circumstances require recourse to war in self-defence,” which the British and French notes expressly corroborate.’⁹⁹

It was certainly arguable for Japan to claim the self-judgement nature of the self-defence by reference to the reservations or interpretations of other parties to the Pact. In his circular note of 23 June 1928, Kellogg clearly said as follows:

‘There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign state, and is implicit in every treaty. Every nation is free at all times, and regardless of treaty provisions, to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defence.’

⁹⁹ Cited from Brown/1933/100-101. According to Shinohara, this interpretation was made by Thomas Baty who was British legal advisor to the Foreign Ministry of Japan at that time. Shinohara/2003/167.

The Senate of the United State interpreted the self-judgment right of self-defence in 1929 as Japan pleaded so in 1933. The Foreign Relations Committee of the Senate said as follows:

‘The committee reports the above treaty [the Kellogg-Briand Pact] with the understanding that the right of self-defence is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defence and the necessity and extent of the same.’

Moreover, the Foreign Relations Committee claimed that ‘[u]nder the right of self-defence allowed by the treaty must necessarily be included the right to maintain the Monroe doctrine which is a part of our system of national defence.’¹⁰⁰ The British government, more or less, had the same interpretation of the self-defence. Austen Chamberlain, the Foreign Secretary at that time, also made the following statement.

‘The language of Article I, as to the renunciation of war as an instrument of national policy, renders it desirable that I should remind your Excellency that there are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty’s Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty’s Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a foreign Power they have declared that they would regard as an unfriendly act. His Majesty’s Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government.’¹⁰¹

¹⁰⁰ DIA/1928/6.

¹⁰¹ *Ibid.*/5-6.

Therefore, the legal question of the Manchurian affair was not that Japan disregarded the Kellogg-Briand Pact.¹⁰² The Japanese interpretation of self-defence was certainly opposable, due to the principle of reciprocity, to other parties who made the self-judgment reservations of self-defence to the Kellogg-Briand Pact, although it was legally possible for the parties to the Pact, such as the Soviet Union, Egypt and Persia, who did not accept any reservations to the Pact, to reject the Japan's invocation of self-defence¹⁰³ If Japan could not authoritatively decide 'what constitutes the right of the self-defence and the necessity and extent of the same' by itself, the United States also would have not been entitled to claim that it was the sole judge of the right of self-defence, including Monroe doctrine. Neither could the United Kingdom claim that it would use the self-defence for the protection of the region of a special and vital interest for the peace and security of the United Kingdom. In this sense, as Brown pointed out, 'the fact is that Japan, in common with other signatories, adhered to the Pact because of the very interpretations given by Mr. Kellogg, and particularly by his unreserved recognition of an undefined and unrestricted right of self-defence.'¹⁰⁴

After its withdrawal from the League in March, 1933, however, Japan still had a chance to reconcile with other nations. Japan settled the Manchurian affair by concluding Tangku Truce with the Nanking government of China in May, 1933. However, the Japanese government which was under the significant influence of Imperial Army after the coup d'état on 26 February 1936 was deeply involved into the armed conflict with China. In order to establish the regional hegemony in the Far East, Japan joined the Axis nations group of Nazi Germany and Italy in 1936 by concluding the *Anti-Comintern Agreement* with Germany.¹⁰⁵ Finally, the three nations concluded the *Three*

¹⁰² The real problem for Japan in the Manchurian affair was the political insensibility of the Imperial Army, and of the opportunistic politicians and the mass-media which unwarrantedly stimulated Japanese people, to the interests of western nations in China, particularly the United States and the United Kingdom, and to the public opinion of the world which preferred political stability at that time. However, it is a completely different story from the legal question of the Kellogg-Briand Pact and the right of self-defence in the 1930s.

¹⁰³ DIA/1928/6.

¹⁰⁴ Brown/1933/101.

¹⁰⁵ Italy signed the Pact in 1937. See Grenville-Wasserstein/2001/216.

Powers Pact.¹⁰⁶ The Axis nations were united in opposition to the international legal order of Geneva.

The international community started to disintegrate, thus, as the Axis nations clearly showed their unwillingness to accept the authority of international law of Geneva. Hannah Arendt correctly pointed out as follows:

‘If it is true that the link between totalitarian countries and the civilised world was broken through the monstrous crimes of totalitarian regimes, it is also true that this criminality was not due to simple aggressiveness, ruthlessness, warfare and treachery, but to a conscious break of that *consensus iuris* which, according to Cicero, constitutes a “people,” and which, as international law, in modern time has constituted the civilized world insofar as it remains the foundation-stone of international relations even under the conditions of war.’¹⁰⁷

Therefore, the collapse of the belief in legality led to the disintegration of the international community. Furthermore, the disintegration of the international community in the inter-war period was regarded by some lawyers as the result of the disappearance of the concept of civilisation from international law, because the lawlessness of totalitarianism was conceived as nothing but the disappearance of the standard of ‘civilisation’ from the international community. As Carr pointed out, ‘[a] state which does not conform to certain standards of behaviour towards its own citizens and, more particularly, towards foreigners will be branded as “uncivilized”.’¹⁰⁸ In this sense, H. A. Smith seems to be more persuasive:

‘[I]n practice we no longer insist that States shall conform to any common standard of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say

¹⁰⁶ See *Ibid.*/241-242.

¹⁰⁷ Arendt/1976/462.

¹⁰⁸ Carr/1945a/141.

that they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means, in effect, that we have now abandoned the old distinction between civilised and uncivilised States.¹⁰⁹

Then, the following question occurs: 'Should nations which had for centuries been important members of the international legal community now be excluded because their domestic political regimes no longer corresponded to the criteria of Western civilisation?'¹¹⁰

Lauterpacht's answer to this question is to deal with the Axis nations as law-breakers. In the Manchurian affair, Lauterpacht was strongly opposed to Japan. One of the reasons is because he seems to have been consulted by the Chinese government about the Manchurian affair.¹¹¹ Lauterpacht completely rejected the argument of Japan that it had to protect its nationals against the boycott committed by Chinese people under the guidance of the National Party of China, because the boycott under the guidance of a political party was neither illegal, nor attributable to the state, even though the party dominated the state.¹¹² Furthermore, he considered that Japan was in contravention of the Covenant even if Japan and China did not declare state of war.¹¹³ Lauterpacht clearly claimed the sanction under Article 16 of the Covenant against Japan.

With regard to the Abyssinian crisis, Lauterpacht argued that the Abyssinian delegation to the League of Nations was entitled to be admitted even after Italy had conquered Abyssinia. He confessed his concern that the authority of international law and the League would be damaged, if the member states of the League recognise the Italian Annexation of Abyssinia or if Abyssinian government refused to appear in the League.¹¹⁴ However, the situation around the Abyssinian affair was contrary to Lauterpacht's hope. The United Kingdom claimed that each member of the League could decide the question of recognition of the Italian regime in Abyssinia. Indeed, Neville

¹⁰⁹ Smith/1938/183.

¹¹⁰ Grewe/2000/585.

¹¹¹ Elihu/Lauterpacht/Note/CP-III/297.

¹¹² Lauterpacht/1933a/CP-III/305-311.

¹¹³ Lauterpacht/1932/and/1934b.

Chamberlain answered the question of Atlee whether the United Kingdom would act in conformity with the resolutions of the League Assembly relating to the non-recognition of the conquests effected in violation of the League Covenant:

'His Majesty's Government have in no way changed their view of the importance of the principles enunciated in the Assembly Resolutions... but in their application to any case His Majesty's Government must be entitled to take into account the attitude of other Members of the League and the facts of the international situation.'¹¹⁵

In fact, twenty nine members of the League recognised the Italian annexation of Abyssinia, whether *de facto* or *de jure*, until June, 1938.¹¹⁶ The United Kingdom gave *de facto* recognition to the Italian annexation of Abyssinia in December 1936,¹¹⁷ and *de jure* recognition by concluding a treaty with Italy on 16 April 1938.¹¹⁸ Although it is true that the British government considered that it was relieved of all commitments to Italy after Italy declared war against the United Kingdom, which automatically meant the withdrawal of *de jure* recognition of the Italian annexation.¹¹⁹ However, the fact remains that the principle of non-recognition was considerably damaged in the Abyssinian affair.

When invited to deliver an address to the Cambridge University League of Nations Union on 16 November 1938, even Lauterpacht could not help but admit that the League of Nations had completely failed to keep international peace. In that address, he did not conceal his disappointment

¹¹⁴ Lauterpacht/1937b/CP-III/591.

¹¹⁵ Commons/vol.334/col.1099.

¹¹⁶ The member states of the League which recognised the Italian annexation of Abyssinia before June, 1938 were as follows: Hungary/November/1936; Albania/November/1936; Switzerland/December/1936; Chile/December/1936; Britain/December/1936; France/December/1936; Honduras/March/1937; Poland/May/1937; Yugoslavia/November/1937; Ecuador/December/1937; Latvia/January/1938; Netherlands/March/1938; Bulgaria/March/1938; Belgium/March/1938; Rumania/April/1938; Greece/April/1938; Turkey/April/1938; Czechoslovakia/April/1938; Finland/April/1938; Lithuania/May/1938; Panama/May/1938; Eire/May/1938; Estonia/May/1938; Peru/May/1938; Sweden/May/1938; Norway/May/1938; Uruguay/May/1938; Denmark/May/1938; Argentina/June/1938. Commons/vol.337/col.1890.

¹¹⁷ Commons/vol.333/cols.617-618. Also see ADR/vol.8/1935-1937/120-122

¹¹⁸ See ADR/vol.9/1938-1939/99-101.

at the failure of the League of Nations with regard to collective security: 'In its principal object the League has failed, and in comparison with the extent and the persistency of that failure its successes, both administrative and political, fade into insignificance.' He continued as follows:

'The frustration of the overriding object of the Covenant has gone so far that it is no longer merely a political fact constituting a regrettable departure from the law. That failure has now become part of the law; or, to put it in different words, the Covenant of the League is now, in law, no longer what it was in 1919.'¹²⁰

In this sense, he admitted the legal outcome of the non-fulfilment of the Convention upon collective security. It was clear even to Lauterpacht that the provisions on the collective security of the League had become a dead letter.

Even though he did not conceal his disappointment at the collapse of the League, Lauterpacht still adhered to its ideal. His attachment to 'the Spirit of Geneva' is clearly seen in the distinction between 'the duty to enforce the peace' and 'the duty to observe the peace.' According to him, the former is about collective security, while the latter concerns the prohibition of unlawful war:

'What was and is still revolutionary in the Covenant is not only the duty to repress unlawful recourse to war but also the obligations not to go to war in disregard of its provisions. ... While the duty to enforce the peace has thus lapsed, at least temporarily, the obligation to observe the peace is still a prominent feature of the Covenant and is of undiminished vitality.'¹²¹

This argument shows that Lauterpacht tried to save the Covenant as a normative justification from the reality of the collapse of the League. The obligation to use force under collective security passed away, but the obligations not to use illegal force was still alive, so that '[t]he Covenant is still a valid

¹¹⁹ Commons/vol.362/col.814. Also see ADR/vol.9/1938-1939/93.

¹²⁰ Lauterpacht/1938c/CP-III/576.

¹²¹ *Ibid.*/579.

and solemn legal authorization to repress aggression – a power from which restraining and coercive action may well spring.’¹²² Therefore, in Lauterpacht’s view, the Covenant now justifies the resort to war against aggressive states. Since he gave more emphasis to the normativity of the Covenant than its effectiveness, Lauterpacht failed to examine the question whether or not liberalism was an appropriate idea in international relations. For him, the collapse of the League was just a nightmare in ‘a period in which progress in things essential has been arrested and the clock turned back.’¹²³ In a sense, Lauterpacht retreated to the normative phase of law from the factual aspect of the effectiveness of law. However, his retreat to the normative phase of law itself is clearly a failure of the international law of Geneva.

It was proved, thus, that the legal school as represented by Lauterpacht overestimated the function of international law to control world politics. This overestimation was so influential that it seems undeniable that the international law of Geneva disappointed not only laymen but also their academic fellows, once it was found that it was powerless to regulate the crisis in the 1930s. Hans Morgenthau was the representative of the scholars who were disappointed at international law.

‘The breakdown of the main bulk of post-world war international law has altogether destroyed public confidence in a science which, unmoved by what experience may show, invariably follows its preconceived pattern. This breakdown implies the practical refutation of the ideas which have determined the development of international law in the last half-century.’¹²⁴

It is no exaggeration to say that the legal school of international lawyers, including Lauterpacht, was responsible for disappointing them, because they misled people, as well as themselves, about the potential of international law to solve international problems. Payson Wild pointed out that ‘international law has suffered at the hands of some of its over-zealous friends who have claimed

¹²² *Ibid.*

¹²³ *Ibid.*/587.

¹²⁴ Morgenthau/1940/260.

too much.’ He continued as follows:

‘Supporters of the proposition that it either regulates or can regulate every dispute between nations only overstate the case and set up the law as an easy target for its foes. The impression gained all too frequently from standard texts to the effect that the world of states is a tidy one, regulated by precise rules, is false, and one, which, unfortunately, in time often makes for disillusionment and cynicism.’

In Wild’s view, Lauterpacht typified such ‘over-zealous friends.’¹²⁵

The negative impression that international law was irrelevant to international problems became the source of the realism of international politics especially in the United States. On the other hand, the international lawyers who took the failure of international law to prevent the Second World War seriously would pay too much attention to negotiation, where political considerations naturally play the greater role than law. The so-called policy-orientated approach proposed by McDougal and Lasswell is a typical example which the disappointment with the legal school of international lawyers in the inter-war era produced. However, the result of their approach is the politicisation of international law which paradoxically loses the relevancy of international law, although the policy-orientated lawyers wish to make international law relevant to world politics. Political decision makers seem not to use ‘policy-oriented lawyers’ who find it difficult not only to persuade judges but also to communicate with other lawyers by using their own idiosyncratic terms. Koskenniemi says as follows:

‘[F]or such decision-makers the policy-approach seems like a useless exercise in academic theory. What they are interested in is not which decision will fulfil which values but which rules are valid and which are not. As the policy-approach provides no answer to this question, it undermines its own claim for instrumental usefulness.’¹²⁶

¹²⁵ Wild/1938/480.

¹²⁶ Koskenniemi/1989/174-175.

A more serious problem for the legal school is to treat their enemies as law-breakers or criminals in war. The treatment of Germany after the First World War was, as Shklar pointed out, the result of legalistic idea that 'make the "righteous" state feel its "due" was a matter of justice, and so prevented all possible compromise.'¹²⁷ Indeed, on 4 October 1918, the French government declared as follows:

'Conduct which is equally contrary to international law and the fundamental principle of all human civilization will not go unpunished. ...[T]he authors and directors of these crimes will be held responsible morally, judicially and financially. They will seek in vain to escape the inexorable expiation which awaits them.'¹²⁸

However, only a few scholars noticed this actual danger of legalism in the inter-war period. A. V. Lundstedt was one of the scholars who criticised international legalism from this perspective in the inter-war period.

'...Oppenheim, the great master of International Law, says that the "wronged" state has to take the law into its own hands and enforce it by means of self-help and the aid of sympathizing states. However, nothing prevents *both* of the dispute parties, in the character of the "wronged" party, from getting sympathy from others. Then it may be seen which side gains the victory. In fact, one can not learn how the question "Who is right, who is wrong?" stands, until one party lies bleeding to death and powerless. Then, and not until then, does one know that *this party* was in the wrong, and that the other party and its allies have done nothing but *vindicate its rights!* Now, what can the talk about a law of nations of this kind be, if not a manifestation of the fact that there is no law but that of the victor, who would be "legally" entitled to be judge and executor in his own case? In other words, the science of the law of nations can produce no evidence to show that this "law" is anything but

¹²⁷ Shklar/1964/142.

¹²⁸ Cited from Jørgensen/2000/5.

the “order” that is practised by beasts of prey.¹²⁹

Thus, for Lundstedt, ‘the World War gave us a good picture of how the absolute rights of states were asserted, without being checked by any consideration for the weal of other peoples, for the weal of mankind.’¹³⁰ The same problem actually occurred when the Second World War took place. International legalism allows people to confuse the idea of the victory of war with the accomplishment of justice. The result of war is essentially dependent upon the military powers of belligerents. The fact that ‘war is nothing but a duel on a large scale’¹³¹ does not change at all from the era of Clausewitz. The victory of the Allied nations in the Second World War came from the fact that the Allied nations, particularly the United States, possessed greater military power than the Axis nations. However, legalism permits the people of the victorious nations to consider that they can defeat their enemy because they are legally and morally right, even though the legal problem of *jus ad bellum* has nothing to do with the result of war. This confusion between the military power and legal justice, or the hypocrisy of the victorious belligerent, easily justifies the use of force as the punishment of the defeated nations which are conceived as law-breakers or aggressors.

After the Second World War, George Kennan ascertained this point as ‘the carrying over into the affairs of states of the concepts of right and wrong, the assumption that state behavior is a fit subject for moral judgement.’ He went to say that

‘Whoever says there is a law must of course be indignant against the lawbreaker and feel a moral superiority to him. And when such indignation spills over into military contest, it knows no bounds short of the reduction of the lawbreaker to the point of complete submissiveness – namely unconditional surrender. It is a curious thing, but it is true, that the legalistic approach to world affairs, rooted as it unquestionably is in a desire to do away with war and violence, makes violence more enduring, more terrible, and more destructive to political

¹²⁹ Lundstedt/1932-1933/334. Emphasis original.

¹³⁰ *Ibid.*,/335.

¹³¹ Clausewitz/1993/83.

stability than did the older motives of national interest. A war fought in the name of high moral principle finds no early end short of some form of total domination.¹³²

Thus, the allied nations justified their own mass-destruction such as the target area bombing or the use of atomic bombs, although they punished the military officers and soldiers of the defeated nations as war criminals.¹³³ It is not difficult for the legal school of international lawyers to conceal such a double standard of the Allied nations in the name of the international community.

These problems are the events which happened during the universalisation process of the European law of nations, of which the political basis changed from the balance of power to liberalism. As the Great War was over, the international community started to lose its homogeneity as the basis of the European law of nations, which was civilisation until the First World War occurred. The Asian nations such as Japan or China came on to the stage of European politics. In particular, Japan was recognised as a Great Power and given a seat on the Council of the League. Consequently, the concept of civilisation lost its meaning in international law, because it was useless after the non-European nations joined the international community as represented by the League of Nations, apart from justifying colonialism in the name of 'a sacred trust of civilisation.' Thus, the European law of nations was conceived as the universal law of nations, even though the structure of international politics did not change.

In the universalisation process of the European law of nations, international lawyers in the inter-war era started to seek the universal foundation of international law, because the basis of international law had already disappeared. They found it in normativism including the Pure Theory of Law and the return to natural law theory. Lauterpacht was a typical member of such a group of international lawyers. He thought that it was a matter of course that sovereign states should obey international law from the normative viewpoint. Therefore, he naturally presumed that the state has

¹³² Kennan/1951/100-101.

¹³³ On the typical excuse of an American politician with regard to this matter, see Stimson/1947/189.



a willingness to abide by international law. 'Ought' easily becomes 'Be' from the viewpoint of normativism. It is from such a viewpoint that Lauterpacht assumed that all states had no choice but to obey international law. However, the fact was that totalitarian states such as Nazi Germany, which apparently had no intention of admitting the authority of the international law of Geneva, acquired the military power to defeat other members of the League. Japan and Italy had originally co-operated with the League of Nations. However, as they tried to establish their regional hegemony, they left the League. In this sense, Lauterpacht's formulation *voluntas civitatis maximae est servanda* as the normative basis of the binding force of international law was clearly inappropriate to explain the international legal phenomenon in the inter-war era. The international community, which Lauterpacht considered as the normative hypothesis of the binding force of international law, disintegrated completely. It is no wonder, however, that he did not admit that the international community had disintegrated, because his conception of the international community was nothing but the personification of international law from the normative viewpoint. The international community had to exist as well as international law, even if it had already actually dissolved. Thus, the problem for Lauterpacht was how he should defend his ideal in the period which he regarded as retrogression. This question will be discussed in the following chapters.

3. LEGAL PROBLEMS IN THE OUTLAWRY PROCESS OF WAR

Although it was an extra-legal feature in the 19th century, war became unlawful in the inter-war era through the Covenant of the League of Nations, the Draft Treaty of Mutual Assistance, the Geneva Protocol and the General Treaty for the Renunciation of War (the Kellogg-Briand Pact or the Paris Pact). The legal school of international lawyers in the League era generally welcomed the outlawry of war. However, this process produced serious legal problems pertaining to war, including neutrality, the punishment of war criminals and the applicability of the law of war. What does 'war' mean in the process of the outlawry of war? Do neutral states still have an obligation to treat all belligerents equally, even though one of them wages illegal war under *jus ad bellum*? How should the government officials of aggressive states be punished? As many international lawyers at that time grappled with these questions, Lauterpacht tried to answer these questions. This chapter explicates his answer to these riddles.

3.1. THE CHANGE IN THE CONCEPT OF WAR

The legal regulation of *jus ad bellum* has been one of the main ambitions of international lawyers. Indeed, it is noteworthy that Grotius distinguished between just war and unjust war. He defines self-defence, the recovery of property and punishment as the causes of just war. If there is no justifiable cause for war, such a war is as unjust as a 'war of savages' or 'war of robbers.'¹ However, as Brierly points out, the distinction between just war and unjust war had 'never become part of actual international law.'² It is because the fact still remains that there is no central authority to decide the justness of war in the international community. Consequently, international lawyers had recognised war as legal or extra-legal rather than illegal until the Kellogg-Briand Pact came into force.

¹ Grotius/1925/547-548.

² Brierly/1963/33.

There were two views with regard to the concept of war in the 19th century. The first view is here called the legal process theory of war. According to this view, war is something like ‘a procedure which was provided for and regulated by international law for the enforcement of legally protected claims and interests.’³ Robert Phillimore said that ‘[w]ar is the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights.’⁴ Holland also conceived war as ‘the litigation of nations.’⁵ The second view is called the extra-legal condition theory of war or ‘the state of war doctrine.’⁶ According to this view, in the situation where each belligerent state claims the legality of its own use of force without a decision of supra-national authority, international lawyers could not help but recognise war as a state or condition of affairs in which the laws of war are applied. In other words, they set aside the legality of having resort to war. Westlake, for example, said that ‘war is a state or condition.’ He continued as follows:

‘As such war is not set up by any mere act of force, whether an act of reprisal, embargo or pacific blockade, or an act of self-defence, or one of unlawful violence. It can be set up only by the will to do so, but that will may be unilateral because the state of peace requires the concurrent wills of two governments to live together in it, and is replaced by the state of war as soon as one of those wills is withdrawn.’⁷

Oppenheim also explained war as ‘a fact recognised, and with regard to many points regulated, but not established, by International Law.’⁸

However, these views were not so different from each other before war became illegal.⁹ It is

³ Grewe/2000/532.

⁴ Phillimore/1857/99.

⁵ Holland/1924/404.

⁶ Brownlie/1963/26-28.

⁷ Westlake/1907/2.

⁸ Oppenheim/1912b/60.

⁹ Roscher/2002/294.

certainly true that the view of Phillimore was a kind of just-war theory. He defined the purpose of war as ‘the reparation of injury, the re-establishment of right, the restoration of order into the mutual relations of States, and security against future derangement of these relations.’¹⁰ However, in the absence of an authority to decide on the legality of war, ‘the exercise of international right of action’ results in the same conclusion as the extra-legal condition view of war.¹¹ Each belligerent can make a unilateral claim for the justness of war. However, no authority can decide which belligerent is right. Consequently, it was impossible to accuse a state of unjust cause for war, even according to the legal process doctrine.¹² Although he admitted war as a legal remedy in principle, Hall confessed that ‘in most of the disputes which arise between states the grounds of quarrel . . . are too complex to be judged with any certainty by reference to them.’ He then continued that ‘it would be idle for it [a combatant state] to affect to impart the character of a penalty of war, when it is powerless to enforce its decision.’ Therefore, Hall drew the following conclusion concerning the concept of war:

‘International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal right.’¹³

Thus, whether from the legal process view or the state of war doctrine, war was regarded as extra-legal rather than illegal before the First World War.

This point, furthermore, shows that the legal effect of war is nearly the same, whether war is conceived as legal or as extra-legal. In other words, both views accepted the non-discriminative application of the law of war, which means that *jus in bello* should be applied equally to all

¹⁰ Phillimore/1857/100.

¹¹ Yanagihara/2001/4-6.

¹² Sogawa/1953/196.

belligerents, whether the recourse to war is legal or extra-legal under *jus ad bellum*. McNair, who thought war extra-legal, also says as follows:

‘Whether or not the initiation of a war was a breach of law, the rules which regulated it, once it had broken out, were the same for both or all parties. And, ... the rules which governed the attitude of states not participating in a war towards the belligerents – the law of neutrality – were the same, regardless of the rights and wrongs of the war. A rigid impartiality in their conduct towards the belligerents was required by the law.’¹⁴

However, war was becoming illegal in the inter-war era. It is noteworthy that Article 227 of the Treaty of Versailles stipulates the prosecution of former German Kaiser William II for ‘a supreme offence against international morality and the sanctity of treaties.’ Moreover, the Covenant of the League of Nations imposed some limitations on the right of states to have recourse to war. Although the limitation of the recourse to war was surely not enough, because the Covenant prohibits resorting to war under limited conditions such as the ‘cooling-down’ period of three months, it is undeniable that the states made efforts to prohibit war as a whole in the 1920s. The Draft Treaty of Mutual Assistance of 1923 stipulated that ‘[t]he High Contracting Parties solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission’ under Article 1. The Geneva Protocol for the Pacific Settlement of International Disputes of 1924 also stipulated in its preamble that ‘a war of aggression constitutes a violation of this solidarity and an international crime.’ Article 2 of the Geneva Protocol furthermore says that ‘[t]he signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol.’ However, these treaties did not come into force.

¹³ Hall/1924/81-82.

¹⁴ McNair/1974/104.

The efforts to outlaw war culminated in the Kellogg-Briand Pact in 1928. Although many governments had reservations concerning the right of self-defence, Article 1 of the Pact declared that '[t]he high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.' Many international lawyers held hopes for and confidence in the outlawry of war. Such confidence among lawyers in international law is well expressed by Manley Hudson in the Budapest Conference of the International Law Association in 1934:

'[I]n the past, we have proceeded on the theory that war – international war – was outside the reach of International Law; that did not mean that war was invested with a character of legality; it meant, rather, that war was invested with a character of extra-legality, and on the basis of the extra-legal fact of war, we built, especially during the nineteenth century, a great superstructure of neutral rights and belligerent rights. Our generation has definitely set its hand to the task of bringing war within the ambit of law. We propose to say that no longer is war to remain wholly extra-legal, and that now, under some circumstances, it may be illegal.'¹⁵

However, as war was conceived as illegal, the concept of war caused some confusion, because war had usually been regarded as a special situation in which the law of war became operative. Indeed, before the war outlawry movement, the international legal system was divided into two main autonomous parts: the law of peace and the law of war. In this dichotomy in the international legal system, war was 'a state or condition of affairs, not a mere series of acts of force.'¹⁶ Therefore, it was possible for some lawyers to think that war as the condition in which *jus in bello* had been operative was abolished by the Kellogg-Briand Pact.¹⁷ In other words, the Kellogg-Briand Pact denied the extra-legal condition doctrine of war. This point produced two results.

¹⁵ RILA/vol.38/1935/13-14.

¹⁶ McNair/1974/38.

¹⁷ With regard to the compatibility of the state of war with the Charter of the United Nations, see

First, the traditional dichotomy in the international legal system is no longer appropriate, because war as a legal institution was considered to be abolished.¹⁸ Second, the law of war which has been renamed as international humanitarian law or the law of armed conflicts becomes ‘the *lex specialis*, governing questions such as the legality of particular weapons or methods of warfare,’¹⁹ although some lawyers seriously doubted the law of war, because the legal institution of war as the precondition of the applicability of the law of war was no longer permitted to exist.²⁰ In a sense, the applicability of the law of armed conflicts became dependent not on the existence of *de jure* war but on the factual existence of armed conflicts. Greenwood says,

‘The creation of a state of war no longer triggers the operation of all the different bodies of rules which used to apply only in wartime. For the purpose of bringing into operation the rules regulating the conduct of hostilities, it no longer matters whether those hostilities are characterised as war. It is the factual concept of armed conflict rather than the technical concept of war which makes those rules applicable.’²¹

Thus, the concept of war as a legal condition becomes more or less insignificant insofar as the law of armed conflicts, including the law of neutrality, are applied irrespective of the existence of a state of war in a technical sense, although it is difficult to maintain the traditional dichotomy of the international legal system.

However, the abolition of the legal state of war was not enough to regulate the use of force, because a use of force not producing a state of war was interpreted as permissible under either the Covenant or the Paris Pact. Japan, for example, used armed force in Manchuria and China without declaring war. Nor did the Republic of China declare war. Both ‘belligerents’ tried to escape from the state of war in a technical sense. On the one hand, it was necessary for Japan not to declare war

Elihu/Lauterpacht/1968.

¹⁸ Ishimoto/1998/16.

¹⁹ Greenwood/1999/248.

²⁰ See, for example, the discussion in the International Law Commission on whether the Commission should choose the law of war as the topic. YBILC/1949/51-53.

in order to avoid being accused of breaching the related Articles of the Covenant. China, on the other hand, feared a lack of support from the United States due to the law of neutrality if it declared war. Consequently, it became necessary to grasp war as an act of the state. Quincy Wright said,

‘The characterization legal or illegal can properly be applied only to acts which proceed from responsible beings, not to events which exist from uncontrollable natural causes. Thus we are presented with the paradox that war in the legal sense is an event neither legal nor illegal, while war in the material sense is an act at least capable of legal characterization.’²²

Therefore, as war became illegal, it became necessary to distinguish between the two types of concept of war, namely those conditions under which the law of war is applicable, and as an act of state which is later conceived as a use of force.

Hersch Lauterpacht’s view of the concept of war should be understood in the context of this outlawry process of war. Although he also recognised war as the condition under which the law of war was applicable, it is noteworthy that he thought that it was war as an act of state that was prohibited. In other words, Lauterpacht did not believe that war as a condition was abolished. Indeed, he claimed that the armed conflict between Japan and China without a declaration of war could be regarded as a state of war by the third states or the Assembly of the League even if *de facto* belligerents had no *animus belligerendi*.²³ Later, Lauterpacht tried to refute the view that *jus in bello* was abolished or discriminatively applicable to the case of aggression. In his view, *jus in bello* is equally applicable to aggressor states regardless of the breach of *jus ad bellum* due to the autonomy of *jus in bello* from *jus ad bellum*.²⁴

On the other hand, Lauterpacht regarded that war as act of the state had been outlawed. According to Lauterpacht, war before the Paris Pact had two different functions as ‘a means of self-

²¹ Greenwood/1987/303-304.

²² Q./Wright/1924/163.

²³ Lauterpacht/1934b/51-55

help for giving effect to claims based or alleged to be based on International Law' and as 'a legally recognised instrument for challenging and changing rights based on existing International Law.'²⁵ These two functions of war stemmed mainly from the fact that there is no supra-national centralised authority to administer international law. On the one hand, the function of war as a legal remedy against international wrongs means that states had to protect their own interests by themselves in any situation where they could not expect an international authority to enforce the law. On the other hand, the function of war to change law is due to no international legislature. In this sense, war was nothing but the result of the defect of international law as 'law,' namely the unorganised structure of the international community. Lauterpacht said that '[p]rior to the Pact the main defect of International Law as a body of law consisted not so much in the absence of an international legislature or executive as in the admissibility of war as a regular legal institution.'²⁶

However, if the two functions of war before the Paris Pact were due to the unorganised structure of the international community, did the Pact really abolish the war as an international legal process? His answer is a normative one:

'The Pact of Paris altered that state of the law. War cannot now legally, as it could be prior to the conclusion of the Pact, be resorted to either as a legal remedy or as an instrument for changing the law.'²⁷

In Lauterpacht's view, therefore, the Pact was meaningful at least among the parties in the sense that the Pact limited the justification of war as self-defence on the normative phase of law. However, from the viewpoint of effectiveness, it is clear that the Pact was not enough without the international community providing an alternative procedure to war, such as a legislative process or remedy process. Lauterpacht noticed this point, when he wrote that '[i]n the long run the progress achieved by it [the Paris Pact] will probably tend to become unreal unless, in addition to the

²⁴ Lauterpacht/1953a/99-100/and/1953b/233.

²⁵ Oppenheim-Lauterpacht/1935/147-148.

²⁶ *Ibid.*/167.

necessary clarification of its terms and the adoption of obligations for its enforcement, it is supplemented by the gradual evolution of institutions for the discharge of a function which has hitherto been fulfilled by war.²⁸ For Lauterpacht, therefore, the Paris Pact was just the starting point of the outlawry process of war in the context of the institutionalisation of the international community.

This view of Lauterpacht, however, seems still to be unfulfilled, because there remains no alternative procedure to the two functions of war among the international community. Neither can we expect that the international community will be provided with an effective legal process of international legislation or the remedy of international rights in the near future. If so, how can we say that the Kellogg-Briand Pact renounces war as legal process, even accepting that the Pact limits types of legal justification for war? Indeed, Ryoichi Taoka pointed out that the Paris Pact had no legal binding force due to the impossibility of the performance of obligation, which was logically deduced from the fact that the Pact did not provide an alternative process to war.²⁹

It should be noted, furthermore, that Lauterpacht did not consider the Paris Pact to have abolished all kinds of war, only war as an 'instrument of national policy.' In other words, the Pact seemed to him to renounce only 'the right of war both as a legal instrument of self-help against an international wrong and as an act of national sovereignty for the purpose of changing existing rights.'³⁰ He admitted that the use of force still remained lawful (a) as 'a means of legally permissible self-defence; (b) as a measure of collective action for the enforcement of international obligations by virtue of existing instruments like the Covenant of the League and the Treaty of Locarno; (c) as between signatories of the Pact and non-signatories; (d) as against a signatory who has broken the Pact by restoring to war in violation of its provisions.'³¹ However, these permissible types of the use of force showed the collapse of Lauterpacht's theory that the Kellogg-Briand Pact

²⁷ *Ibid.*

²⁸ *Ibid.*/vii.

²⁹ Taoka/1973/141-144.

³⁰ Oppenheim-Lauterpacht/1935/153.

³¹ *Ibid.*

prohibited both functions of war, because the justifiability of the use of force as a counter-measure to a breach of the Pact means that states are allowed to use ‘the right of war as a legal instrument of self-help against an international wrong’, which Lauterpacht considered the Kellogg-Briand Pact to have abolished. Thus, although the significance of the Paris Pact is not so small in the normative phase of the outlawry process of war, it is going too far to say that the Pact was sufficient to renounce ‘the right of war both as a legal instrument of self-help against an international wrong and as an act of national sovereignty for the purpose of changing existing rights.’

Nevertheless, Lauterpacht thought that the Kellogg-Briand Pact had changed the normative structure of international law. In the Preface of the fifth edition of Volume 2 of *Oppenheim's*, he said that ‘the Treaty [the Paris Pact] must be considered to have effected a fundamental change in the system of International Law.’³² This point cannot be understood without the legal consequences of a breach of the Pact. In other words, the Paris Pact seemed to him to have caused the normative change in the international community. With regard to the legal questions of war, normativism is again the key to understanding Lauterpacht’s international legal theory. Such a tendency was not only seen from Lauterpacht’s point of view, but also in many international lawyers’ writings. The International Law Association in particular discussed the legal consequences of any breach of the Paris Pact, and adopted the Budapest Articles of Interpretation of the Paris Pact in 1934.³³ American international lawyers also adopted the Draft Convention on Rights and Duties of States in Case of Aggression.³⁴ Many international lawyers in the inter-war period, therefore, held the view that the Paris Pact undoubtedly changed the normative structure of international law, even if the Pact was too ineffective to regulate the use of force. The problem is what exactly ‘a fundamental change in the system of International Law’ means. This question itself is too large to answer here.³⁵ However, the principle of non-recognition, the change in the status of neutrality, and the punishment of war

³² *Ibid.*/vi.

³³ RILA/vol.38/1935/1.

³⁴ AJIL/Supplement/vol.33/1939/823.

³⁵ On the change in the structure of the international community, see Friedmann/1964; Ishimoto/1998.

criminals are examples of the fundamental change in the normative structure of international law at least in the context of the outlawry process of war. How did Hersch Lauterpacht consider these questions? These questions are discussed below.

3.2. THE PRINCIPLE OF NON-RECOGNITION

3.2.1. THE RELEVANCY OF THE PRINCIPLE OF NON-RECOGNITION

It is said that one of the most important legal results of the outlawry of war is the principle of non-recognition, which obliges states not to recognise the situation caused by internationally illegal acts. This principle was discussed with especial attention to the creation of Manchukuo. Henry Stimson, Secretary of State of the United States at that time, sent Japan and China a note known as the Stimson Doctrine on 7 January 1932. The text of the note is as follows:

'In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.'³⁶

It should be noted, however, that the Stimson Doctrine was not the first case of the application of

³⁶ Cited from Wright/1932/342.

the principle of non-recognition. As Stimson himself noted, '[t]he idea of using a notice of non-recognition as a warning to an aggressive power of course was not new.'³⁷ The United States dispatched the following statement of non-recognition to Japan on 11 May 1915, when Japan presented the Chinese government of Yüan Shin-k'ai with the so-called 'Twenty-One Demands.'

'In view of the circumstances of the negotiations which have taken place and which are now pending between the Government of Japan and the Government of China, and of the agreements which have been reached as the result thereof, the Government has the honor to notify the Imperial Japanese Government that it cannot recognize any agreement or undertaking which has been entered into or which may be entered into between the Governments of Japan and China, impairing the treaty rights of the United States and its citizens in China, the political and territorial integrity of the Republic of China, or the international policy relative to China commonly known as the open door policy.'³⁸

Lauterpacht also pointed out that '[t]he diplomatic history of the nineteenth and twentieth centuries supplies numerous examples of refusal of recognition on the grounds of the inconsistency of the new title with an existing obligation.'³⁹ He has given us some examples of non-recognition in the late 19th century and the early 20th century, such as the refusal of France to recognise the British-German treaty regarding the British protectorate over Zanzibar, which was contrary to the British-French Treaty of 1862.⁴⁰ Nor did France recognise the British occupation of Egypt until the Anglo-French Treaty of 1904. In 1908, the British government refused to recognise the Belgian acquisition of Congo and the Austrian annexation of Bosnia and Herzegovina. These cases showed

³⁷ Stimson/1936/93.

³⁸ Cited form Langer/1947/54.

³⁹ Lauterpacht/Recognition/414. Most of the text of Lauterpacht's article 'The Principle of Non-Recognition in International Law' was incorporated into his *Recognition*. Therefore, the texts in *Recognition* are essentially used as a matter of convenience here insofar as they are the same as 'Non-Recognition.' However, his evaluation of non-recognition in the Manchuria affair in 'Non-Recognition' was deleted in *Recognition*, so that the texts of 'Non-Recognition' are also referred to in the context of the Manchurian affair.

⁴⁰ *Ibid.*

that the non-recognition policy had not been so exceptional. Nevertheless, the reason the Stimson note was thought to be significant in international law is because it was regarded as a sanction to any breach of the Kellogg-Briand Pact. In other words, the significance of the Stimson doctrine was conceived in the context of the outlawry process of war. Quincy Wright, for example, appreciated that the Stimson notes could cause a revolution in international law.

‘[T]hese notes may mark important progress toward realizing the following propositions in international law:

(1) *De facto* occupation of territory gives no title, (2) treaties contrary to the rights of third states are void, and (3) treaties in the making of which non-pacific means have been employed are void. These propositions do not on their face seem very novel. Authority can be found in textbooks for them all, except possibly the third. Yet in the practice of states, all have frequently been neglected, at least according to the interpretation of the man in the street.’⁴¹

However, the principle of non-recognition was too ineffective to be regarded as a sanction. Non-recognition could not forestall the establishment of Manchukuo. Neither did it restrain Italy from annexing Abyssinia. Although Stimson himself was proud that his doctrine forced the Japanese army to withdraw from Shanghai,⁴² such an estimation of the effectiveness of the principle of non-recognition was based on a misunderstanding of the Shanghai affair. The purpose of Japanese military activity in Shanghai was different from the intention of the Kwantung army in Manchuria. In the Shanghai affair, the aim of the Japanese army was to secure a quick victory with the approval of the Western nations by protecting not only Japan’s interests but also the interests of the Western nations in the leased territories in Shanghai, although the Kwantung army in Manchuria was determined to establish regional hegemony in the northern part of the Far East, even if other nations did not admit it. Christopher Thorne pointed out that ‘the contrast with the value placed upon Manchuria, and with the aims adopted there, was a distinct one which entirely

⁴¹ Q./Wright/1932/344.

⁴² Stimson/1933/394.

invalidates the later arguments of Cecil and others, ...that Western firmness alone caused the Japanese to withdraw from Shanghai, and could easily have brought about a similar retreat in Manchuria.⁴³ In this sense, Stimson overestimated the effectiveness of his own doctrine as a sanction. On the contrary, the fact is, as McNair said, that 'when a new situation has been produced by force or in violation of a treaty, non-recognition alone not followed by action is a policy of very limited value and effect.'⁴⁴ Therefore, more decisive action was necessary if members of the League wanted to use the principle of non-recognition as a sanction.

Politicians of the Western nations, nevertheless, had no intention of applying Article 16 of the Covenant to Japan with regard to the Manchurian affair, because they worried that economic sanctions against Japan might lead to war between Japan and the Western nations. On the other hand, the policy of non-recognition seemed to the governments of the United Kingdom and the United States to be the more convenient and harmless method of imposing their will on Japan. Ronald Lindsay, British Ambassador to the United States at that time, reported to the British government that '[t]he extreme reluctance of recourse to physical measures merely emphasizes the desire of the United States Government to utilise to the utmost the moral principle, which they regard as one of great efficacy and importance and as destined perhaps to fill a large place in international law.'⁴⁵ Indeed, Henry Stimson himself regarded his note as a substitute for sanctions.⁴⁶ Therefore, there was a reason for Chinese newspapers to think that the Stimson note amounted to wastepaper without any substantial value, since the United States had no intention to save China with actual commitment.⁴⁷ In this sense, as John Moore said, the chief weakness of the doctrine of non-recognition as a sanction 'lies in the fact that those who employ it often must content themselves with futile words or must fight, while the adoption of the latter alternative would

⁴³ Thorne/1973/205-206.

⁴⁴ McNair/1933/71.

⁴⁵ DBFP/1919-1939/2nd/vol.9/no.577/621.

⁴⁶ Stimson/1936/92.

⁴⁷ Shirai/1974/144.

necessarily be a confession of failure.⁴⁸ With regard to the Abyssinian affair, as noted above, the principle of non-recognition was completely disregarded by the League members themselves.⁴⁹ The annexation of Albania by Italy in April, 1939, furthermore, did not force any states, including the United States, to enforce the policy of non-recognition. Therefore, Briggs's statement that 'the policy of non-recognition as practised today is of slight value either as a sanction or as evidence that the rule that conquest confers valid title has been superseded'⁵⁰ is persuasive.

Although it was clear that the principle of non-recognition was insignificant as a sanction, Lauterpacht tried to rescue the normative value of the principle of non-recognition from its ineffectiveness. For him, the principle of non-recognition was the direct result of the principle *ex injuria jus non oritur*:

'Non-recognition is not a sanction in the nature of punishment aiming at bending the will of the wrongdoer by the overwhelming pressure of its immediate effects. Its principal function must more accurately be conceived as an instrument for upholding the challenged authority of international law.'⁵¹

Therefore, the character of non-recognition as sanction was indirect rather than direct in the sense that it is 'one of upholding the authority of international law against successful assertions of illegal force.'⁵² Thus, the argumentation of Lauterpacht in his article *Non-Recognition* moved from the actual crisis in Manchuria to the normative phase of international law. In this sense, it is understandable that Hatsue Shinohara, who studies the American reformers of international law in the inter-war period as represented by Quincy Wright, gains the impression that Lauterpacht and Wright discuss 'law and fact' philosophically, in a metaphysical phase far removed from the actual

⁴⁸ Moore/1937/436.

⁴⁹ See above 2.4.

⁵⁰ Briggs/1940/81.

⁵¹ Lauterpacht/1942/149.

⁵² *Ibid.*/154.

crisis in Manchuria in their book *Legal Problems in the Far Eastern Conflict*.⁵³ Thus, Lauterpacht escaped from the messy actual world to the clean normative world.

3.2.2. THE LEGAL BASIS OF THE PRINCIPLE OF NON-RECOGNITION

While leaving to politicians the actual relevance of the principle of non-recognition to international politics, international lawyers in the 1930s tried to find the normative basis of non-recognition. The International Law Association, for example, declared the Stimson Doctrine as a legal consequence of the breach of the Paris Pact under Article 5 of the Budapest Articles: 'The signatory States are not entitled to recognise as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact.'⁵⁴ Gerald Fitzmaurice as a legal advisor to the Foreign Office also believed non-recognition to be one of the legal results of such multilateral treaties as the Covenant of the League, the Kellogg-Briand Pact and the Nine-Power Treaty. With regard to the Manchurian affair, Fitzmaurice thought that Japan was acting contrary to the obligation of peaceful settlement under Article 12 of the Covenant and under Article 2 of the Kellogg-Briand Pact, 'even assuming that Japan has not technically had "recourse to war" within the meaning of Article 1 of the Pact.'⁵⁵

'Finally Mr. Stimson suggests that the signatories to the above agreements should place it on record that they will not recognise any situation arrived at in violation of Japan's obligation. ...[A]ll he suggested was that the signatories to the Covenant, Kellogg Pact and the Nine Power Treaty should now place on record that they could not regard any situation arrived at in violation of those covenants as valid. It is perfectly clear that assuming a situation in violation of those covenants had been created by Japan, the other signatories to the treaties in question would be entitled to declare that they did not regard it as valid. Moreover, I think that they would in fact be obliged to regard the situation as invalid. No doubt as between each signatory and the

⁵³ Shinohara/2003/236-237.

⁵⁴ RILA/vol.38/1935/67.

⁵⁵ Carty-Smith/2000/117. Also see McNair/1974/109.

offending state the former could, if it pleased, recognise the situation, but such a recognition on the part of the former would, I think, be a violation of its obligations vis-à-vis the other signatories, which would in a sense range it on the side of the offending state as a species of “accessory after the fact”.⁵⁶

However, Lauterpacht did not think so. He doubted that Japan had breached Article 2 of the Pact. He said that ‘as to Article 2 [of the Pact], it must be borne in mind that although measures of force short of war are compulsive means, they are still pacific means.’ He continued as follows:

‘There ought to be no doubt that if the Paris Pact permits without restriction recourse to measures of force short of war, it is open to the same serious objections as the corresponding provisions of the Covenant, and that its purpose may be frequently frustrated by the simple device of abstention from a declaration of war. On the other hand, the total elimination of recourse to force short of war may be difficult of achievement in practice and, probably, in law, so long as the signatories of the Pact are free to refuse to other signatories the benefit of impartial adjudication of their legal claims, and so long as there is no provision for collective enforcement of judicial or arbitral pronouncements. . . . In all these cases [the Chinese Eastern Railway affair between Russia and China, the Manchurian affair and the Leticia affair between Colombia and Peru] one or both parties to the dispute were reminded by other signatories of their obligations under the Pact, but there appears to have been no direct authoritative finding or express governmental assertion on the part of third States that the Pact had been violated.’⁵⁷

Lauterpacht, moreover, thought that the Paris Pact did not impose a legal obligation of non-recognition on states. If the Pact imposes such an obligation, it would mean, according to him, that ‘[a] State signing a treaty does not automatically undertake a legal obligation to contribute to its enforcement by a refusal of recognition or otherwise.’⁵⁸ He thought that such an obligation not to

⁵⁶ Carty-Smith/2000/117-118. Emphasis original.

⁵⁷ Oppenheim-Lauterpacht/1935/156-157.

⁵⁸ Lauterpacht/Recognition/417.

recognise, if existing under the Paris Pact, was a just moral one. In a sense, the Budapest Articles seemed to him to be claiming that 'under the guise of interpretation it aims at supplementing the Treaty by increasing its effectiveness beyond the intention of the Parties.'⁵⁹ Insofar as the principle of non-recognition was concerned, he challenged the Budapest Articles of Interpretation as follows:

'It could be argued that the doctrine of non-recognition follows from the renunciation of war inasmuch as recognition of title acquired as the result of a violation of the Treaty would mean abetting the State violating the Treaty which in turn would be tantamount to a breach of the Pact on the part of the recognising State. There may be some force in such an argument, but the argument is apparently too ingenious to carry conviction on a matter of grave importance.'⁶⁰

His opinion seems to be correct, because there is no evidence that the parties to the Pact had the intention of imposing the obligation of non-recognition on themselves. Rather, France⁶¹ and the United States⁶² had reservations, namely that other parties would be released from their obligation to the Pact if one nation violated its pledge not to engage in war.

On the other hand, Lauterpacht appreciated the statements of the Council and Assembly of the League of Nations. On 16 January 1932, the Council of the League deduced the principle of non-recognition from Article 10 of the Covenant to the effect that 'no infringement of the territorial integrity and no change in the political independence of any member of the League brought about in disregard of this article ought to be recognized as valid and effectual by the members of the League of Nations.' On 11 March 1932, the Assembly of the League adopted the resolution that 'it is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.' According to Lauterpacht, these resolutions were the source of the

⁵⁹ Lauterpacht/1934a/182.

⁶⁰ *Ibid.*/188.

⁶¹ DIA/1928/2.

obligation not to recognise the illegal situation in Manchuria. 'A definite step towards transforming the policy of non-recognition into an obligation of non-recognition was made by the Council and the Assembly of the League of Nations in connection with the invasion of Manchuria by Japan.' Furthermore, he continued that 'the refusal to recognise a conquest accomplished in violation of the Covenant would seem to have constituted the very minimum of the obligation to respect and to preserve the territorial integrity and political independence of other members of the League of Nations.'⁶³ However, if so, the principle of non-recognition would be applied only to the member states of the League. Lauterpacht, therefore, indicated the principle *ex injuria jus non oritur* as the universal legal basis of the principle of non-recognition. 'This construction of non-recognition is based on the view that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer.'⁶⁴ This principle is for Lauterpacht nothing but the general principle of law. Thus, Lauterpacht found the significance of the principle of non-recognition in the normative phase. It is undeniable, nevertheless, that Lauterpacht had to treat the question of the ineffectiveness of the principle as the question of the curability of illegality in the normative phase again.

3.2.3. THE VALIDATION OF ILLEGALITY

Although the principle *ex injuria jus non oritur* is applicable in the international sphere in his view, Lauterpacht also had to admit the limitation of the principle *ex injuria jus non oritur*, because of the lack of authority to enforce the principle. Consequently, the principle *ex factis jus oritur* clashes with the principle *ex injuria jus non oritur*. Lauterpacht did not deny this clash of principles. 'This antimony of law and fact is an abiding problem of jurisprudence.'⁶⁵ However, his normativism allowed him to opt for a balance in favour of the principle *ex injuria jus non oritur*. The principle *ex*

⁶² *Ibid.*/8.

⁶³ Lauterpacht/Recognition/417.

⁶⁴ *Ibid.*/420.

injuria jus non oritur is essentially operative unless the principle *ex factis jus oritur* is applied by prescription, the consent of the injured party and recognition. He stated that ‘unless law is to become a convenient code for malefactors, it must steer a middle course between the law-creating influence of facts and the principle, which is the essence of law, that its validity is impervious to individual act of lawlessness.’⁶⁶ Some lawyers tend to emphasise that Lauterpacht accepted that the illegality and nullity of the original act is curable by the application of the principle *ex factis jus oritur*.⁶⁷ It is true that Lauterpacht examined the three possible ways to cure illegality, namely (a) prescription, (b) the consent of the damaged state and (c) the recognition of third states. It should be noted, however, that he interpreted strictly the validation of illegality by the application of the principle *ex factis jus oritur*.

With regard to prescription, Lauterpacht was reluctant to accept the operation of the rule. He said as follows:

‘[T]he patent illegality of the purported acquisition, combined with continued protests on the part of the dispossessed State, are sufficient to rule out the legalization, in that manner, of the original illegality. Moreover, assuming that the principle of prescription is applicable in any given case, it must comply at least with the requirement of the lapse of a substantial period of time. To invoke the institution of prescription in municipal law as a reason for the immediate recognition or validity of internationally unlawful act is to use the term “prescription” in a sense unknown to any system of law.’

He then concluded that ‘the reference to prescription must be regarded as having been used in a popular rather than a legal sense.’⁶⁸ Lauterpacht, therefore, was too cautious to admit the cure of illegality by prescription.

With regard to the consent of the injured state, it is true that Lauterpacht admitted that the

⁶⁵ Lauterpacht/Recognition/427.

⁶⁶ *Ibid.*

⁶⁷ Hamamoto/1998/71; Dinstein/2001/155. Also see Oppenheim-Jennings/Watts/1992/186-187.

consent of the injured state might validate the illegality as far as a bilateral treaty and a customary rule exclusively concern the interest of the injured state. However, he did not accept that the consent of the injured state can cure the original illegality in the case of a breach of multilateral treaties.⁶⁹ Lauterpacht, therefore, understood the consent of the injured state as being the same as the question of the recognition of third states. The consent of the injured state is different from the question of the recognition of third states from the viewpoint of the waiver of right. It is true that, as the non-recognition of the Western nations to the Russian annexation of the Baltic States shows,⁷⁰ third states do not *de jure* recognise the transfer of territorial sovereignty by disputing the validity of the consent of the injured state on grounds of duress, even if the government of the injured state gives its consent to the aggressor. However, in such a case, the subject of the dispute between the aggressor and the non-recognising states is the validity of the consent of the injured state itself. In this sense, the legal significance of the consent of the injured state is different from that of the recognition of third states, although Lauterpacht did not notice the difference, because he saw the question of the consent of injured states from the viewpoint of recognition.

Insofar as the recognition of other states is concerned, Lauterpacht seems to accept the validation of the illegal act. He described the function of recognition as a quasi-legislative act, which gives 'legal force to a situation which is in the eyes of the law a mere nullity.' He explained it as follows: 'The term "quasi-legislative" is here used because, while there is in the international sphere no legislation in the strict meaning of the term, there are cases in which, because of the absence of a legislature proper, a State or a number of States must fulfil the functions ordinarily reserved to legislation.' Then, he continued:

'There is nothing obnoxious to legal principle in the idea of legalizing in this way the results of wrongful conduct. Such legislation consists, upon analysis, in the waiver by each of the recognising States of its right,

⁶⁸ Lauterpacht/Recognition/428.

⁶⁹ *Ibid.*

⁷⁰ See Hamamoto/1998/74-77.

grounded in customary international law or in a treaty, to treat the new title as invalid.’⁷¹

The observations of Lauterpacht about the function of recognition as ‘a quasi-legislative act’, however, seem to forget the relative nature of recognition, which establishes only the legal relationship between the recognising state and the recognised state. In other words, even if recognition can cure the illegality of the act of the recognised state, the quasi-legislative effect of recognition is limited to the bilateral relationship between the recognising state and the recognised state. Therefore, the quasi-legislative effect of recognition may cause a situation such that an activity of a state is legal to the recognising state, while the activity is still illegal to the non-recognising state. It is so even if the majority of states ‘legalise’ the illegal situation by recognition in the name of the international community as a whole.

It seems to be easy to understand this situation, if the quasi-legislative effect of recognition is explained in terms not of validity but of opposability, though it should be taken into consideration that such a conception did not appear clearly in his theory. Degan explains the concept of opposability as follows:

‘Opposability is a notion which does not imply a duty to an active action of a third State. But it implies at least its duty to respect all legal consequences of such an act passively. On the other hand, it is said that an act is not opposable to a third State, in a situation when it does not contest its validity, but is entitled to decline all its legal effects in its own regard.’⁷²

According to Degan, recognition is a typical unilateral act which should be understood in terms of opposability. He says as follows:

‘If a State recognizes an act of another State which is only partly lawful, or which is unlawful, that act does not

⁷¹ Lauterpacht/Recognition/429.

⁷² Degan/1997/342. Also see Starke/1968-1969; Shearer/1994/80-81.

become legitimized by recognition. Apart from waiver of its own rights, another State, by recognition, only renounces its claim of non-opposability to itself. Such an illegal act becomes by recognition opposable to a recognizing State, and that State becomes bound to respect the consequences of the recognized situation.⁷³

Consequently, recognition does not legalise the activity which is contrary to international law. Rather, recognition is the expression of the will of the recognising state to accept the opposability of the situation, irrespective of the question of legality.

If the concept of opposability is used in the context of the clash between the principle *ex factis jus oritur* and the principle *ex injuria jus non oritur*, it appears that Lauterpacht unintentionally distinguished between the validation of the originally illegal act and the opposability of illegal acts against each state. Indeed, he regarded the legal effect of recognition not to be to legalise the illegal act but to accept the effect of the illegal act. He said, '[t]here is no question here of legalizing the illegal act; the question is one of disregarding the effects of the illegality.'⁷⁴ If recognition as the application of the principle *ex factis jus oritur* is the matter of 'disregarding the effects of the illegality' in terms of opposability, it is not difficult to avoid the normative conflict between the two principles. On the one hand, the principle *ex injuria jus non oritur* is related to the question of the legality that causes universal legal effects to oblige other states to respect the situation without recognition or acquiescence. On the other hand, the application of the principle *ex factis jus oritur* does not create the legal effect of the illegal situation unless other states recognise the situation. In this sense, Lauterpacht considered that '[t]he fundamental principle *ex injuria jus non oritur* is unaffected by the far-reaching qualification expressed in the rival maxim *ex factis jus oritur*.'⁷⁵ Therefore, in Lauterpacht's view, the principle *ex injuria jus non oritur* is always operative in the normative sphere.

This point also explains the reason why Lauterpacht considered the question whether states

⁷³ *Ibid.*/345.

⁷⁴ Lauterpacht/Recognition/429.

⁷⁵ *Ibid.*/426.

should recognise the illegal situation as the question of political decision rather than as the matter of law. The principle *ex injuria jus non oritur* always prevents the wrongdoer from acquiring the legal right in the normative sphere of law:

‘The results of an illegal act are a legal nullity; they are legally non-existent. The wrongdoer acquires no right under it.’⁷⁶

Therefore, the question whether or not a state should recognise the illegal situation seems to Lauterpacht to be a matter of political decision:

‘When they [facts] are unlawful, and in particular when their illegality consists in acts of aggression against the very life of other members of the community in deliberate disregard of fundamental legal obligations of conduct, a heavy and most responsible burden of proof falls upon those embarking upon the legalization of the effects of illegality. Recognition of the effects of illegality may be a wise weapon of international policy or a bitter pill of unavoidable political necessity. Its merits in any particular case are not a matter for legal judgement so long as it is clear that in the opinion of those taking the decision non-recognition of the fruits of lawlessness is and remains an essential principle of law’⁷⁷

Although he criticised the easy policy of the abandonment of non-recognition from the normative viewpoint, it is also seen that Lauterpacht tried to justify even the British breach of the obligation of non-recognition under the resolutions of the League, which he thought obligatory, in the name of the general interest of the international community. Thus, in the context of the British recognition of the Italian annexation of Abyssinia, he stated,

‘The decision of Great Britain and of other countries to recognize, in 1938, the annexation of Abyssinia by

⁷⁶ *Ibid.*/429.

⁷⁷ *Ibid.*/430.

Italy ... must be judged by considerations of this nature. In so far as in the intention of its authors the recognition was contemplated as the first and indispensable condition of pacification of Europe and of the world, it is arguable that such recognition could be regarded as having been conceded in the general interest. It was an act of international policy which, although open to criticism by reference to its political wisdom and to its readiness to assume the probability of a radical change in the future conduct of the State responsible for the original illegality, could be questioned on legal grounds only on account of any disregard of the obligation of non-recognition binding upon members of the League.⁷⁸

However, the policy of the British government with reference to the Abyssinian crisis, including the abandonment of the policy of non-recognition, was to keep British control of the Mediterranean by protecting the British fleet rather than by protecting the general interest of the international community by avoiding a war with Italy. Gathorne-Hardy explained the fear of the British government in the Abyssinian crisis as follows:

'If Italy were faced with defeat, she would rather go down fighting the champions of the League than face the ignominy of a second Adowa, brought about by a shortage of supplies. And, when she turned to look for the League's forces in the field, she would find only those of Great Britain. "We alone have taken these military precautions. There is the British fleet in the Mediterranean, there are the British reinforcements in Egypt, in Malta and Aden. Not a ship, not a machine, not a man has been moved by any member State." The hollow pretence, as Sir Samuel [Hoare] viewed it, of collective resistance would be exposed when the struggle turned into a duel between just two nations.'⁷⁹

Thus, the policy of the British government in the Abyssinian affair was far from Lauterpacht's political justification of the abandonment of the policy of non-recognition in the name of the general interest of the international community. Rather, the United Kingdom intentionally

⁷⁸ *Ibid.*/430/n.1.

⁷⁹ Gathorne-Hardy/1950/414.

abandoned Abyssinia. Such logic which conceals the national interest of the Allied nations in the name of the international community is also seen in the justifiability of the non-belligerency of the United States and in the punishment of war criminals.

3.3. THE JUSTIFIABILITY OF NON-BELLIGERENCY

Before the establishment of the League of Nations, neutral states had been strictly required to comply with the law of neutrality. It functioned as the containment of war between belligerents. However, as war was becoming illegal, the status of neutrality was revisited in the context of the collective security of the League of Nations and the Kellogg-Briand Pact. In other words, although the law of neutrality obliges neutral states to be impartial between belligerents, collective security, at least theoretically, requires all states to join in sanctions against aggressive states. Did neutral states still have an obligation to be impartial between belligerents, even in the case of aggression during the Second World War?

It should be noted that this question is essentially about the justification of non-belligerency. However, in order to discuss this question, we should discuss the Covenant and the Paris Pact separately, because the effects of these treaties are different from each other. With regard to the Covenant, the question is 'the compatibility of neutrality with obligations of assistance in international treaties.'⁸⁰ As Lauterpacht said,

'There is little doubt that international law in the hundred years preceding the Covenant rejected the idea of qualified neutrality. However, rules of neutrality, like other rules of international law, can be modified by agreement. There is nothing to prevent a State from giving up in a treaty some of its rights, including the right to be treated in an impartial manner when engaged in a war undertaken in breach of the terms of the treaty.

The Covenant constitutes such a treaty.'⁸¹

⁸⁰ Lauterpacht/1936a/144.

⁸¹ *Ibid.*/142.

However, on the other hand, he did not consider that the Paris Pact constituted such a treaty which modified the law of neutrality.

‘[T]he Treaty [the Paris Pact] has not directly affected the law of neutrality. It has not imposed upon the signatories the obligation to abandon all or some duties of neutrality to the disadvantage of the State breaking the Treaty. It is controversial whether it has conferred upon them the right to modify the laws of neutrality in that direction.’

Nevertheless, he suggested that the Paris Pact could justify ‘qualified neutrality’ ‘There is room for the view that the degree and the extent of the violation of the Treaty and of the resulting danger to international society at large are relevant factors in a situation in which the parties have failed to make expressive provision for the cogent implications of the Treaty.’⁸²

In a sense, the difference between the Covenant and the Paris Pact with regard to the legal effect on the status of neutrality is that the former changed the obligations of neutral states, while the latter justifies the breach of their obligations as counter-measure. This logical difference between two treaties was surely significant, especially with regard to the actual controversy over the status of neutrality, namely the legality of the non-belligerency of the United States, including the Lend-Lease Act, from September, 1940 to December 8, 1941. The modification of the law of neutrality by the Covenant could not justify the non-belligerency of the United States, which was short of an act of war but clearly a breach of the law of neutrality, because the United States was not a member of the League of Nations. Lauterpacht apparently tried to justify the non-belligerency policy of the United States with Robert Jackson when he visited the United States from October to December 1941. Later, he submitted his memoranda on the non-belligerency of the United States to Stephan Gaselee of the Foreign Office.⁸³

⁸² Oppenheim-Lauterpacht/1952/643-644.

⁸³ FO/371/30678.

Lauterpacht submitted two attempts to justify US non-belligerency. The first one was to treat German U-boat activity as a form of piracy: '[T]his insistence on the piratical nature of the German conduct of hostilities at sea, far from constituting mere abuse of an unfriendly State or mere corruption of legal language, is in accordance with the terminology used by international lawyers and in the governmental and judicial practice of most States, in particular of the United States.' Because German submarine activity amounted to piracy, the United States could exercise 'the traditional right of effective armament against criminal sets of piracy.'⁸⁴ However, this view of Lauterpacht was less persuasive, because he disregarded an important element of piracy, *animus furandi*, which distinguishes between piracy and war.⁸⁵ Gaselee rejected the justification to treat U-boat attacks as piracy on the grounds that '[this memorandum] does I think demonstrate that "animus furandi" is not an essential element in piracy, but I do not feel that it establishes that the word can legitimately be used to describe operations by warship of a recognised belligerent which are conducted in accordance with instruction received from the authorities of the belligerent State.'⁸⁶

Another of Lauterpacht's attempts to justify US non-belligerency defends the address of Robert Jackson, the Attorney General of the United States at that time, in Havana on 27 March 1941 with regard to the Lend-Lease Act. In order to understand his justification, it is necessary to examine Jackson's address and the criticism of Edwin Borchard. In that address, Jackson used three types of justification of the Lend-Lease Act. First, he denied the obligation of neutral states to be absolutely impartial between belligerents from the 17th century to 19th century with the theory of just war: '[T]here has seldom, if ever, been a long period of time during the past three centuries when states, for their own self-defence or from other motives, have been completely impartial in relation to the belligerents.'⁸⁷ In other words, the binomial opposition between absolute neutrality and belligerency seemed to him not to explain state practice in history, rather, 'a third category in

⁸⁴ Lauterpacht/R2b/1942/2.

⁸⁵ See Schmitt/1994/53-54.

⁸⁶ FO/371/30678.

which certain acts of partiality are legal even under the law of neutrality' seemed to him to have existed as 'discriminating, qualified neutrality.'⁸⁸ Moreover, the Paris Pact and other treaties prohibiting aggression seemed to Jackson to have 'destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive war.' Then, Jackson continued to justify the Lend-Lease Act by the application of the principle *ex injuria jus non oritur*:

[The Kellogg-Briand Pact] did not impose upon the signatories *the duty* of discriminating against an aggressor, but it conferred upon them *the right* to act in that manner. This right they are indisputably entitled to exercise as guardians both of their own interests and of the wider international community. It follows that the state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states, unless treaty obligations require different handling of affairs. It derives no rights from its illegality.'⁸⁹

The third type of justification is simply self-defence:

'There can be no doubt that the political, territorial, economic, and cultural integrity of the Western Hemisphere is menaced by totalitarian activities now going on outside this hemisphere. In this situation the principle of self-defence may most properly be invoked, and we in the Americas are invoking it in relation to the facts as we know them and as we, in our best judgement, can foresee them in the future.'⁹⁰

It should be noted, however, that this invocation of self-defence is based on the Monroe doctrine.

Edwin Borchard criticised this address by Jackson. According to Borchard, Jackson could conclude 'either (a) that as a neutral a virtuous state may discriminate against a belligerent whose war the neutral considers unjust, or to use the modern lingo, is an "aggressor," or (b) that as a "non-

⁸⁷ Jackson/1941a/351.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*/354. Emphasis original.

belligerent” it is not bound by the obligations of neutrality which imply certain rules of law, including impartiality and abstention.⁹¹ In either case, the discriminatory neutrality which Jackson claimed seemed to Borchard to be nothing but a political excuse. He said that ‘the legal fact seems to be that non-belligerency is a name used as a modern excuse for violating the laws of neutrality and in the hope that warlike acts can be committed while escaping the consequences of belligerency.’⁹² In other words, Borchard thought that the United States was ‘in a state of limited war.’

Robert Jackson himself did not notice Borchard’s criticism, and he pretended that the criticism did not matter at all even after he knew: ‘I have just read the Borchard article. So far as I am personally concerned, it does not worry me, for it is the sort of job that will not stand the test of time.’⁹³ However, Lauterpacht was very concerned about Borchard’s criticism, because he had assisted in the preparation of Jackson’s address.⁹⁴ In the memorandum submitted to Jackson, Lauterpacht simply repeated the justification of the non-belligerent policy of the United States as the punishment of piracy, self-defence and counter-measure in the style of the refutation of Borchard’s view. However, it is still useful to read the third memorandum, because of Lauterpacht’s conception of ‘qualified neutrality.’

In that memorandum, Lauterpacht found that ‘[t]hat practice of qualified neutrality, i.e., of assistance to one belligerent, in pursuance of a treaty of defensive alliance, was a distinguishing feature of the eighteenth century.’⁹⁵ This point shows why Lauterpacht did not use the term ‘non-belligerency,’ because he wanted to link the non-belligerency of the United States to traditional state practice known as qualified neutrality. However, he should have distinguished between non-belligerency and qualified neutrality. Ake Hammarskjöld, for example, used the term ‘non-belligerency’ in order to emphasise that ‘the status of non-belligerency under the Kellogg-Briand

⁹⁰ *Ibid.*/357.

⁹¹ Borchard/1941/621.

⁹² *Ibid.*/624.

⁹³ Jackson/1941b.

⁹⁴ Lauterpacht/R2a/1942/4/para.6.

Pact is not necessarily identical with the status of neutrality in pre-war international law.⁹⁶ Stephan Neff also thinks that 'imperfect neutrality' is the status which allows neutral states 'to fulfil pre-war aid arrangements to belligerents without forfeiting their neutral status,' while non-belligerency in the Second World War was just a voluntary policy of neutral states in the sense that it was not instituted pursuant to pre-war legal obligation.⁹⁷ Lauterpacht must also have understood the difference between qualified (or imperfect) neutrality and non-belligerency, because he noted that while the Covenant changed the obligations of neutral states in so far as they were members of the League, the Pact did not change the obligations of neutral states which were parties to the Pact. The Pact could justify the non-belligerency policy of the United States against Germany as the counter-measure to the breach of the Pact. However, it is a different justification from the qualified neutrality that neutral states are obliged to assist one belligerent under a pre-war treaty.

It should be noted that the conception of qualified neutrality for Lauterpacht is based on the right of neutrals. In the memorandum submitted to Jackson, he said that 'every State has a right to find that a violation of the law has taken place and to resort to or insist on such measures of redress and retaliation as international law permits' unless a judicial organ decides the problem.⁹⁸ Lauterpacht once more repeated the thesis of qualified neutrality as Grotian Tradition. He defended 'the right of neutrals to form a judgement on the legal justice of the war waged by belligerents and to adopt discriminatory treatment in accordance with that judgement.'⁹⁹ These statements show that Lauterpacht considered the question of qualified neutrality as a kind of collective security within a decentralised world. In the situation where no central authority with a right to decide on the legality of war exists, every neutral state should have the function to decide which belligerent is just. Otherwise, the just-war theory would not work in the sense that it cannot be determined which belligerent is right or wrong, and the concept of war would revert to the era of the non-

⁹⁵ Lauterpacht/R2d/1942/13.

⁹⁶ RILA/vol.38/1935/31.

⁹⁷ Neff/2000/188.

⁹⁸ Lauterpacht/R2d/1942/15.

⁹⁹ Lauterpacht/1946b/CP-II/351.

discriminative war.

It is not surprising, therefore, that Lauterpacht considered such a right to decide as having not only a legal character but also a moral nature:

‘There is no merit in the suggestion that moral judgement can proceed only from persons or collectivities saintly and immaculate in their past or present conduct. Neither is it possible to acquiesce in the view that there is about international relations a mystical quality of fatalism and inscrutability and infinite complication which renders them impervious to ethical judgement and intelligence. These are not considerations alien to the subject under discussion or international law in general. For ultimately international law must be based on the moral judgement and moral responsibility.’¹⁰⁰

Thus, his theory of qualified neutrality clearly proves the correctness of Kennan’s explanation that legalistic ideas are inevitably associated with moralistic ones.¹⁰¹ This problem of legalism appears more clearly in the context of the next section on the punishment of war criminals.

3.4. THE PUNISHMENT OF WAR CRIMINALS

3.4.1. GENERAL OBSERVATIONS

As the atrocities committed by Nazi Germany in occupied territory became clear, the Allied nations decided the punishment of government officials of the Third Reich after the end of the war. In November 1943, the three main powers of the Allied nations, the United Kingdom, the United States and the Soviet Union, issued the Moscow Declaration that ‘those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their

¹⁰⁰ Lauterpacht/R2d/1942/16.

¹⁰¹ Kennan/1951/100.

abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein.' If Nazism was understood as 'the reversion of enlightened civilization to barbarism in reality,'¹⁰² the determination to punish Nazis no doubt seemed to the Allied nations to be the reaction of modern civilisation. The Opening Address of François de Menthon in the Nuremberg Trial clearly indicated this belief commonly held by the Allied nations:

'As Mr. Justice Jackson said so eloquently at the opening of this trial: "Civilisation would not survive if these crimes were to be committed again," and he added: "The true plaintiff in this Court is civilisation." Civilisation requires from you, after this unleashing of barbarism, a verdict which will also be a sort of supreme warning at the hour when humanity appears still, at times, to enter the path of the organisation of peace only with apprehension and hesitation'¹⁰³

This Opening Address of de Menthon shows that international law applied to the Nuremberg Trial was for the Allied nations nothing but the legal expression of modern civilisation. It should be noted, however, that such a concept of international law as 'civilisation' is understood from the viewpoint of the legal school of international lawyers. The traditional diplomatic school of international lawyers was unable to understand what kind of 'international law' which the prosecutors at Nuremberg and Tokyo argued about. Edwin Borchard, for example, said about the Nuremberg Trial as follows:

'[I]t was not an old or a new international law which was applied, but a new municipal law, a criminal law which was not theretofore known. . . . It must be, therefore, that the victors have simply availed themselves of their power as victors to judge the vanquished, and for that reason it seems unlikely, in spite of Justice Jackson's predictions, that the judgement, however just, will commend itself as an authority in international

¹⁰² Horkheimer-Adorno/2002/xix.

¹⁰³ TGMWC/Part 4/377.

law.¹⁰⁴

In this sense, no case demonstrates better than the Nuremberg and Tokyo Trials the characteristics and limitations of legalism in international relations. With regard to this point, Judith Shklar said:

‘If one sees law and politics not as divorced but as parts of a single continuum, one can see how high a degree of legalism the [Nuremberg] Trial involved if measured on a scale of degrees of legalism. It did this because of its inner structure and its aim. What makes the Nuremberg Trial so remarkable is that, in the absence of strict legal justification, it was a great legalistic act, the most legalistic of all possible policies, and, as such, a powerful inspiration to the legalistic ethos.’¹⁰⁵

However, even the legal school found it less than easy to pursue their policy of justice. There were too many obstacles to the punishment of the government officials of the Third Reich and Japan as war criminals, even from the viewpoint of legalism. It is true that as war was made illegal after the First World War, the concept of war crimes began to include breaches of *jus contra bellum*. The attempt to accuse William II of ‘the supreme offence against international morality and the sanctity of treaties’ is one example of the conceptual expansion of war crimes and international criminal responsibility, although the Allied nations were unable to punish him, since the Dutch government refused to extradite him to the Allied nations because ‘the crimes of which he was accused were not contemplated in the Dutch Constitution.’¹⁰⁶ It should be noted, nevertheless, that the crimes against peace were not the automatic result of the outlawry of war.

First, the Kellogg-Briand Pact neither defines aggression nor mentions the criminality of the aggressive war. It is because Kellogg rejected the French suggestion that the Paris Pact should provide only for the renunciation of wars of aggression. For Kellogg, the definition of aggression

¹⁰⁴ Borchard/1947/107.

¹⁰⁵ Shklar/1964/170.

¹⁰⁶ Cassese/2003/328.

was too difficult to be satisfactory, and abuse of the term may result from an unsatisfactory definition of aggression. In this sense, Kellogg agreed with Austen Chamberlain, the British Foreign Secretary at that time, who said, 'I therefore remain opposed to this attempt to define the aggressor because I believe that it will be a trap for the innocent and a signpost for the guilty.'¹⁰⁷ However, the fact still remains that the absence of a definition of aggression is fatal for any attempt to attribute the crime against peace to the Kellogg-Briand Pact, even if the Pact condemns 'recourse to war for the solution of international controversies' and renounces 'it as an instrument of national policy.' As Schmitt pointed out, the mere renunciation of war is not naturally the criminalisation of the situation of war.¹⁰⁸ The definition of crime is necessary to punish the person who is thought to commit the crime. If the contracting parties to the Pact gave up defining aggression, it would naturally follow that they had no intention to criminalise aggression at the time of signature.

Second, the Kellogg-Briand Pact does not mention individual responsibility for aggressive war at all. Therefore, it was legally impossible to draw individual responsibility from the Pact. Ipsen stated as follows:

'With regard to the Pact of Paris, resort to war was illegal in international law at that time. Such a breach was – and could only be – committed by the state resorting to war, and this state, as a subject of international law, was responsible under this law for the wrongful act. At the time of the Tokyo trial, this international responsibility was clearly a state responsibility, not an individual responsibility.'¹⁰⁹

Yasuaki Onuma also mentions the following:

'It is true that one of these, the illegality of war, had been established in international law by the time of the outbreak of the war. However, this is not true in the case of leader's responsibility. Therefore, crimes against

¹⁰⁷ Kellogg/1928/259.

¹⁰⁸ Schmitt/1994/44.

¹⁰⁹ Ipsen/1986/40.

peace, which is a synthesis of these two, must be considered a new category of crime that came into existence only at the end of World War II.¹¹⁰

The legal difficulty of new types of war crime was not only restricted to the crime against peace. The crime against humanity was also a new concept of international crime,¹¹¹ although the Allied nations pretended that crimes against humanity had existed as well as crimes against peace before the outbreak of the Second World War. One of the American representatives on the United Nations War Crimes Commission claimed 'the application of laws of humanity' stipulated in the Martens clause of the Fourth Hague Convention on Land Warfare.¹¹² Furthermore, the term 'crimes against humanity,' according to the United Nations War Crimes Commission, had been used in declarations by the governments of France, the United Kingdom and Russia with regard to the massacres of the Armenian population in Turkey for describing 'inhuman acts committed by a government against its own subjects' in a non-technical sense.¹¹³ Nevertheless, the history of 'the Road to Nuremberg' itself shows that the crime against humanity was created in order to accuse the Nazis of the Holocaust. It does not mean, of course, that Nazis such as Julius Streicher, who was sentenced to death by hanging only for crimes against humanity, should have been acquitted due to the principle *nullum crimen sine lege*. The Holocaust is morally evil enough to be punished. However, even the wickedness of the Nazis with regard to the Holocaust cannot conceal the fact that the concept of crimes against humanity was created in order to punish them during the Second World War. As noted below, even Lauterpacht admitted that the crime against humanity is of a novel character.¹¹⁴

It was necessary, therefore, for the Allied nations to fill gaps between existing law and their policy by making new law in order to proceed to the Nuremberg and Tokyo Trials. It is noteworthy

¹¹⁰ Onuma/1986/47.

¹¹¹ Cassese/2003/70-72.

¹¹² UNWCC/175.

¹¹³ *Ibid.*/25-36/and/189.

¹¹⁴ Lauterpacht/R3/1942/2.

that Lauterpacht contributed to this gap-filling process and the Nuremberg Trial itself, though it is true that 'the full story of Lauterpacht's role in Nuremberg remains untold.'¹¹⁵ It is partly because his contribution was rather unofficial and supportive. Robert Jackson personally consulted Lauterpacht about international law. As mentioned above, Lauterpacht prepared Jackson's address in Havana on the non-belligerency of the United States. Moreover, Lauterpacht made a draft for Jackson to refute the criticism of Borchard with regard to that address, although Jackson himself hesitated to publish it. Jackson is furthermore said to have deepened his belief that aggressive war is illegal after talking to Lauterpacht.¹¹⁶ It is also said that it was Lauterpacht who inspired Jackson to incorporate three types of crimes into Article 6 of the London Charter, including the term 'crime against humanity.'¹¹⁷ Indeed, Lauterpacht is thought to be 'a standard authority' of international law which Jackson mentioned in his report to the President of the United States.¹¹⁸ These instances indicate that the influence of Lauterpacht over Jackson, who was one of the most influential figures in the Nuremberg Trial as a representative of the United States in the drafting conference of London Charter and as the American chief prosecutor in the Nuremberg Trial, was too great to be negligible. It is also true that Lauterpacht certainly served for the British War Crimes Executive from 1945 to 1946. However, his role in the BWCE too seems to have been supportive rather than leading. Lauterpacht prepared for the legal aspect of the first draft of the Opening Speech for Shawcross as the British chief prosecutor in the Nuremberg,¹¹⁹ but Lauterpacht himself did not appear on the

¹¹⁵ Koskenniemi/2001/389.

¹¹⁶ Tusa-Tusa/1983/82.

¹¹⁷ Robinson/1972/3; Tusa-Tusa/1983/87; Bassiouni/1992/17.

¹¹⁸ Feinberg/1968/340. In his report to the President of the United States, Jackson said as follows: 'But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." This, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just and unjust war – the war of defense and the war of aggression.' Jackson/1945/187.

¹¹⁹ Shawcross expressed his gratitude to Lauterpacht in a book which he dedicated to Lauterpacht as follows: 'To Professor Lauterpacht, who helped so greatly in the composition of the speeches which are recorded here in, and as a mark of esteem from Hartley Shawcross.' Also see Tusa-Tusa/1983/422.

stage of the Nuremberg Trial. Nevertheless, it is possible to trace, to a certain degree, his contribution to the Nuremberg Trial. It may now be proper for us to discuss the International Commission for Penal Reconstruction and Development, which is sometimes called the Cambridge group.

3.4.2. THE ROAD TO NUREMBERG

On 14 November 1941, the Department of Criminal Science at Cambridge University held a conference with jurists from other countries, appointed by their governments. It was the International Commission for Penal Reconstruction and Development. The Commission itself was established as an academic study group. However, because some members came from the Nine Powers, the British government later approved the funding of the Commission as a semi-official group. In a sense, the Commission is the first step on 'the Road to Nuremberg.' The United Nations War Crimes Commission testifies that '[i]t also contributed to the creation in official and semi-official circles of an atmosphere favourable to the conception of the punishment of war criminals.'¹²⁰ Lauterpacht no doubt contributed to creating such an atmosphere.

At that conference in November, 1941, the Commission set up a committee for the study of principles and rules of 'Crimes against International Public Order' under the chairmanship of Arnold McNair. Lauterpacht played an important role in 'the Committee concerned with Crimes against International Public Order.' By 15 July 1942, the Committee reached three conclusions. First, it is appropriate to establish the international criminal court, though the majority of war criminals would come within the jurisdiction of municipal courts. Second, the Armistice terms should contain stipulations concerning the surrender of war criminals. The third conclusion was that the Allied nations should publicly warn neutral states of the inadvisability of granting asylum to war criminals.¹²¹ The Committee then established three sub-committees for the further study as

¹²⁰ UNWCC/99.

¹²¹ *Ibid.*/96.

follows: (1) the scope of war crimes, how far they come within the competence of municipal courts, and what crimes could not be covered by such courts, (2) the plea of superior orders, and (3) the problem of the extradition of war criminals.¹²² Lauterpacht joined the first and second sub-committees. The Commission itself did not produce any definite recommendation. However, the main research carried out by Lauterpacht on the Committee was published as *The Law of Nations and the Punishment of War Crimes* in 1944.¹²³ Moreover, the Public Record Office keeps a memorandum by Lauterpacht, which seems to have been submitted to the first sub-committee, with regard to the note of de Bear, President of the Military Court of Belgium at that time.¹²⁴ Therefore, it is possible to find his Committee works among these papers.

3.4.1.1. THE DEFINITION OF WAR CRIMES AND CRIMES AGAINST HUMANITY

One of Lauterpacht's contributions to the Committee was to make clear the definition of war crimes: 'War crimes may properly be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness and their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.'¹²⁵ This definition was approved as the basis of future discussion by the Committee, which means the definition became the basis of a further survey of the issue of the punishment of war criminals.

In the context of the definition of war crimes, Lauterpacht proposed the original idea of crimes against humanity as the 'Ordering of and participation by officials in measures of racial segregation and extermination against the Jewish section of the population.' He continued to comment on this

¹²² *Ibid.*

¹²³ He said that '[t]his article has grown out of a Memorandum submitted in July 1942 to the Committee concerned with Crimes against International Public Order.' Lauterpacht/1944b/58/n.1.

¹²⁴ Lauterpacht/R3.

¹²⁵ UNWCC/95. Lauterpacht/1944b/79.

new type of war crime.

‘This particular war crime is of a novel character. But so is in the annals of military occupation the deliberate and proclaimed policy of Germany to achieve through segregation, accompanied by denial of adequate food and medical services, the extermination of the Jewish population in the territories under her control. For this reason the policy of racial segregation directed against the Jews appears as a specific war crime in the memoranda submitted by the various members of the Committee. The number of persons associated with the policy of extermination to a degree sufficient to warrant prosecution before tribunals must necessarily be limited. However, the cruelty and the moral and physical suffering inflicted upon a substantial section of the population of the occupied territories as the result of that policy of extermination are [*sic*] such that its execution ought to be specifically branded as a war crime so serious as to justify inclusion among the crimes in respect of which the handing over of the principal persons responsible must be insisted upon as a condition of the armistice.’¹²⁶

Lauterpacht’s memorandum showed that the original idea of crimes against humanity was discussed in the context of war crimes.

Thus, Article 6 (c) of the London Charter defines crimes against humanity in the context of war crimes as follows:

‘Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such

¹²⁶ Lauterpacht/R3/2.

plan.’

It should be noted that the terms ‘in connection with any crime within the jurisdiction of the Tribunal’ in Article 6 (c) allowed the Nuremberg Tribunal to declare that it ‘cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the [London] Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity.’¹²⁷ In a sense, the Tribunal followed the original idea of crimes against humanity.¹²⁸ However, it is also undeniable that the judgement demolished the *raison d’être* of Article 6 (c), as Donnedieu de Vabres, the French Justice of the Nuremberg Tribunal, later confessed that ‘the category of crimes against humanity which the Charter had let enter by a very small door evaporated by virtue of the Tribunal’s judgement.’¹²⁹ Therefore, it is understandable that the Control Council for Germany deleted the terms from its Law No.10.¹³⁰

3.4.1.2. THE PLEA OF SUPERIOR ORDER

Another important contribution by Lauterpacht to ‘the Road to Nuremberg’ is his revision of the plea of superior order, which could have become the most effective defence for the defendants, for the preparation for the punishment of war criminals. Even Lord Wright, Chairman of the United Nations War Crimes Commission, admitted that the plea of superior order would have made it meaningless to punish the government officials of the Third Reich as war criminals, if the plea was accepted as well as the defence of the immunity of heads of states.¹³¹ One of the reasons those

¹²⁷ ADR/vol.13/1946/213.

¹²⁸ See Schwelb/1946/207.

¹²⁹ Cited from Arendt/1994/257.

¹³⁰ The text of Law No.10 is as follows: ‘Crimes against Humanity: atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.’

¹³¹ Lord/Wright/1946/45.

concerned with the Nuremberg Trial were worried about the plea of superior order was the acceptance of this plea by the British Manual of Military Law and the United States Rules of Land Warfare. The British Manual mentioned that '[i]t is important to note that members of the armed forces who commit violations of the recognised rules of warfare such as are ordered by their Government, or by their commanders, are not war criminals and cannot therefore be punished by the enemy.'¹³² The American Manual (para.347) also said that '[i]ndividuals of the armed forces will not be punished for these offences (i.e. violations of the laws of war) in case they are committed under the orders or sanctions of their government or commanders.'¹³³ With regard to the British Manual, this stipulation was inserted by Lassa Oppenheim, who wrote in his treatise as follows:

'Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and may not be punished by the enemy... In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.'¹³⁴

However, the fact is that it was already proven at the end of the First World War that Oppenheim's remark about the plea of superior order was backed up by no evidence at all. Morgan, who was vice-chairman of the British Government War Crimes Committee of 1918-1919 known as the Birkenhead Committee, said about the plea of superior order:

'I examined exhaustively all the authorities in English, American, French, and German Law, both "civil" and military, and, what is more important, all the leading textbooks of those four countries on International Law.

¹³² War/Office/1914/302/para.443.

¹³³ Cited from UNWCC/95.

¹³⁴ Oppenheim/1912b/310. Emphasis original.

The only "authority" I could find was Professor Oppenheim's own book on "International Law." ... I was able to report to the [Birkenhead] Committee in my "Opinion" that I could find nothing in them which would give the slightest support to Professor Oppenheim's contention. That "Opinion" was adopted by the Committee who unanimously reported that "the statement (by Professor Oppenheim) in the 'Manual of Military Law' *lacks authority*" and that "We cannot accept the doctrine that it is the duty of a soldier never to question an order which he receives." They also unanimously recommend that no plea of superior order should be accepted in the trial of German war criminals if it could be proved that "the act charged was flagrantly and obviously contrary to the laws and customs of war".¹³⁵

In 1922, Lord Cave also denied the authority of the plea of superior order in the Manual.¹³⁶

Nevertheless, the statement of the plea of superior order remained in the British Manual of Military Law and in *Oppenheim's* even after the First World War. Consequently, the Supreme Court of Germany in Leipzig, which had to punish German war criminals instead of surrendering the German accused to the Allied nations under Articles 228-230 of the Treaty of Versailles, accepted, by referring to the British Manual, the plea of superior order in the *Dover Castle* case, where the accused was charged with the torpedo-attack against the English hospital ship *Dover Castle*.

'It is a military principle that the subordinate is bound to obey the orders of his superiors...Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible...It also accords with the legal principles of all other civilised states (see, for example, as regards *England, the Manual of Military Law (1914), chapter XIV, Art.443...*)...So far as he did that, he was free from criminal responsibility.'¹³⁷

¹³⁵ Morgan/1948/12-13. Emphasis original.

¹³⁶ Lord/Cave/1922/xxiii.

¹³⁷ AD/vol.2/1923-1924/430. Emphasis added.

The same situation could have happened at Nuremberg, because any defendants had been thought to claim that they acted under the orders of Hitler, and in fact they claimed so. Therefore, it is not so surprising that Lauterpacht paid much attention to the question of the plea of superior order in the paper submitted to 'the Committee concerned with Crimes against International Public Order.' However, Lauterpacht himself had not amended the statement of the plea of superior order in the fifth edition of *Oppenheim's*, although he maintained the footnote added by McNair that '[i]t is difficult to say that recent events have qualified it [the plea of superior order] as a rule of customary International Law.'¹³⁸ In this sense, it is not so admirable for him to say that 'writers on international law have almost universally rejected the doctrine of superior order as an absolute justification of war crimes' by referring to his own sixth edition of *Oppenheim's* in 1940.¹³⁹

With regard to the reformulation of the plea of superior order, Lauterpacht followed the judgement of the German Supreme Court in the *Llandovery Castle* case, where two subordinate officers in a German submarine were charged with firing on people who had escaped from the English hospital ship *Llandovery Castle*, attacked by the submarine. In this case, the German Supreme Court maintained that the plea of superior order is inapplicable 'if such an order is universally known to everybody, including the accused, to be without any doubt whatever against the law.'¹⁴⁰ Lauterpacht adopted the existence of *mens rea* as the condition of responsibility:

'[T]here can be no accountability, or there must be diminished liability, if the accused acted in the legitimate belief that he was proceeding in accordance with law, both municipal and international. ... [T]he clear illegal nature of the orders -- illegal by reference to generally acknowledged principles of international law so identified with cogent dictates of humanity as to be obvious to any person of ordinary understanding -- renders the fact of superior order irrelevant.'

¹³⁸ *Oppenheim-Lauterpacht/1935/454/n.1.*

¹³⁹ *Lauterpacht/1944b/73.*

¹⁴⁰ *AD/vol.2/1923-1924/437.*

He then continued that ‘such a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to immediate danger of death as the result of a refusal to obey an order excludes *pro tanto* the accountability of the accused – unless, indeed, we adopted the view, which cannot lightly be dismissed, that the person threatened with such summary punishment is not entitled to save his own life at the expense of the victim or, in particular, of many victims.’ Consequently, according to Lauterpacht, judges are able to reject the plea of superior order against ‘a person obeying an obviously unlawful order, the refusal to obey which would not put him in immediate jeopardy,’ though applying the plea to ‘a person obeying, in an isolated case, an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of summary military discipline.’¹⁴¹

His above reformulation of the defence of superior order was persuasive enough to make the United Kingdom and the United States change their own military law manuals, as the United Nations War Crimes Commission acknowledged.¹⁴² The Allied nations, furthermore, adopted his formulation as the basis of Article 8 of the London Charter that ‘[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.’ In fact, the Nuremberg Tribunal dealt strictly with the plea of superior order as a justification of the mitigation:

‘That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, ... the order may be urged in mitigation of the punishment. The true test, which is found in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible...’¹⁴³

¹⁴¹ Lauterpacht/1944b/73.

¹⁴² UNWCC/276/n.1.

¹⁴³ ADR/vol.13/1946/222.

3.4.3. THE LEGITIMACY OF THE INTERNATIONAL MILITARY TRIBUNALS

The efforts of Allied lawyers, including Lauterpacht, to make the Nuremberg Trials as far as possible a genuine judicial procedure surely shows their legalistic policy which attempts to judge the justness of war as the expression of the sovereignty of states with international law. Lauterpacht said:

‘[W]e shall be justified in giving – and bound to give – full weight to any possible legal limitations upon the right of the victor to punish enemy nationals accused of war crimes and to any safeguards calculated to ensure the proper exercise of that right. For the cause of international law demands not only the punishment of persons guilty of war crimes. It requires that such punishment shall take place in accordance with international law.’¹⁴⁴

Indeed, considering the fact that most accused who sentenced by the Tribunal at Nuremberg ‘were found guilty, in addition to other crimes, of ordinary war crimes as defined in the Charter in full conformity with existing law,’ Lauterpacht interpreted the Nuremberg Trial as follows:

‘In the light of that fact the International Military Tribunal at Nuremberg must be viewed primarily as a tribunal constituted for the punishment of war crimes proper. This was done through the joint exercise, by the four States which established the Tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with International Law.’¹⁴⁵

Nevertheless, there remain two problems with regard to the legitimacy of the International Military Tribunals at Nuremberg and Tokyo. The first is the question on the power of the Allied nations to

¹⁴⁴ Lauterpacht/1944b/59.

¹⁴⁵ Oppenheim-Lauterpacht/1952/579-581.

punish war criminals. The second question concerns the applicability of the principle *nullum crimen sine lege, nulla poena sine lege*.

3.4.3.1. THE RIGHT OF VICTORIOUS BELLIGERENTS TO PUNISH WAR CRIMINALS

With regard to the power of the Allied nations to punish war criminals, Lauterpacht accepted the right of belligerents under international law by saying that 'a belligerent is entitled to punish for war crimes those members of the armed forces of the opponent who fall into his hands.'¹⁴⁶ Later, in his seventh edition of *Oppenheim's*, Lauterpacht justified the right of victorious belligerents as follows:

'The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognised principle of International Law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in a position to occupy. For in both cases the accused are, in effect, in his power. And although normally the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of International Law prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice of the Peace Treaty, to surrender for trial persons accused of war crimes. In this, as in other matter, the will of the victor is the law of the Treaty. It is not to be expected that he will concede to the defeated State the corresponding right to punish any war criminals of the victorious belligerent.'¹⁴⁷

In this sense, Lauterpacht admitted that it is the victor's justice that the victorious belligerent be allowed in law to punish war criminals of the defeated belligerent.

¹⁴⁶ Lauterpacht/1944b/61.

¹⁴⁷ Oppenheim-Lauterpacht/1952/587-588.

It is understandable that Lauterpacht emphasised the sovereign powers of the Allied nations as opposed to Germany. Indeed, the International Military Tribunal at Nuremberg declared that '[t]he making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.'¹⁴⁸

However, the more dangerous this reasoning is, the more the Tribunal emphasised the sovereign power of a nation in the occupied territories, because it made it possible for German officers to justify what they did in the occupied territories. If the Allied nations were permitted to do so by their sovereign powers in their occupied territories, why would Germany not have been allowed to do in the occupied territories as the Allies were doing? It should be noted that when he said that '[t]he victor will always be the judge, and the vanquished the accused,' Goering simply 'implicitly argued that Allied leaders would too be in the dock if they had lost instead.'¹⁴⁹ The danger of this reasoning shows that such a sovereign power of the belligerents cannot legitimate the law made by the belligerents, because the power in the time of war is simply military capacity, which 'means destroying an enemy physically or subordinating him to one's will by the threat of destruction.'¹⁵⁰ The authority of the International Military Tribunals at Nuremberg and Tokyo, thus, cannot be legitimised by the mere fact that the Allied nations occupied Germany as the victorious belligerent. In his dissenting opinion which was individually published after the Tokyo Trial, Justice Pal of the IMT at Tokyo said as follows:

'It is obvious that mere conquest, defeat and surrender, conditional or unconditional, do not vest the conqueror with any sovereignty of the defeated state. The legal position of the victor prior to subjugation is the same as that of a military occupant. Whatever he does in respect of the vanquished state he does so in the capacity of a

¹⁴⁸ ADR/vol.13/1946/207.

¹⁴⁹ Bass/2002/15.

¹⁵⁰ Shklar/1964/125.

military occupant. A military occupant is not a sovereign of the occupied territory.¹⁵¹

It seems inevitable, therefore, that the IMT at Nuremberg should continue in order to distinguish itself from the exercise of the power of Nazi Germany in the occupied territories as follows:

‘The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.’¹⁵²

Thus, the IMT at Nuremberg tried to legitimise its authority by reference to international law.

Lauterpacht also needed to move his attention away from the sovereign power of the Allies to the way they exercised their power in accordance with law. This movement of his attention is seen in his last edition of the second volume of *Oppenheim’s*. Lauterpacht suggested the creation of the International Criminal Court from the viewpoint of the legitimacy of military tribunals:

‘The inadequacy, partly unavoidable, of purely national tribunals as an organ for the punishment of war crimes as well as the objections to an international or quasi-international tribunal set by the victors, who consider themselves immune from the jurisdiction of the court thus established, necessarily raise and prompt an affirmative answer to the question of the desirability of an impartial international organ, constituted in advance, for the trial, after the cessation of hostilities, of persons accused of war crimes.’¹⁵³

However, even he knew that his proposal was too utopian. Consequently, Lauterpacht hoped that ‘the victorious belligerent may achieve a substantial approximation to justice by making full provision for a fair Trial of the surrendered enemy nationals, and by offering to try before his

¹⁵¹ Pal/1953/28-29.

¹⁵² ADR/vol.13/1946/207.

¹⁵³ Oppenheim-Lauterpacht/1952/584-585.

tribunals such members of his own armed forces as are accused of war crimes.¹⁵⁴ In other words, he thought that the authority of the military tribunal would be legitimate insofar as it complied with procedural rules with regard to the punishment of enemy nationals, and if the Allied nations furthermore punished the soldiers of their countries. It is enough to point out, however, that the Allied nations neither punished their military men and politicians, nor felt guilty, with regard to the mass killing of civilians by air-targeted bombardment of major German and Japanese cities,¹⁵⁵ including the use of the atomic bombs.¹⁵⁶ After indicating that Kaiser Wilhelm II's policy of indiscriminate murder to shorten the First World War had been considered to be a crime, Justice Pal at IMT in the Far East said as follows:

'It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused [of Tokyo Trial].'¹⁵⁷

Thus, the fact that the Allied nations did not punish their own soldiers casts sufficient doubt on the legitimacy of the right of victorious belligerents to punish the war criminals of their enemies.

3.4.3.2. THE PRINCIPLE *nullum crimen sine lege, nulla poena sine lege*

Due process is necessary for tribunals to legitimise their own authority. Without due process, a judicial trial would become a political trial. It is, therefore, understandable that Lauterpacht was

¹⁵⁴ *Ibid.*/588.

¹⁵⁵ On the question of the legality of target-area bombardment, see ADR/vol.15/1948/660-661.

¹⁵⁶ On the question of the legality of the use of the atomic bomb in Hiroshima, see *Shimoda* case. JAIL/vol.8/1964/212-252; Oda-Sogawa/1991/525-533.

¹⁵⁷ Pal/1953/621.

careful to devote much attention to 'a fair Trial of the surrendered enemy nationals.' The compliance with judicial procedure is the crux of the legitimacy of International Military Tribunals. This attitude, however, is the typical attitude of lawyers criticised by Shklar:

'Formal justice can, moreover, render such laws respectable in the eyes of liberals anxious to avoid conflict. "He had his day in court; he was not *really* persecuted," they can argue, and congratulate themselves on the procedural perfection of formal justice.'¹⁵⁸

The difficulty of Lauterpacht's legalism is shown by the problem of the principle *nullum crimen sine lege* in the context of due process, which casts doubt on the legitimacy of Military Tribunals.

While admitting that the principle *nullum crimen sine lege* is 'not a limitation of sovereignty, but is in general a principle of justice,' the Nuremberg Tribunal declared that 'the maxim has no application to the present facts.' According to the judgement, it is because 'in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.'¹⁵⁹ However, it should be noted that the Tribunal confused the question whether or not the notion of crimes legally exists and the question whether the accused had acknowledged the unjustness of the impugned activity. Whether or not the accused acknowledged the immoral nature of the activity, the question is whether or not international law at that time stipulated aggression as international crime, the result of which is the criminal responsibility of the government officials.

There is some evidence that aggression had not been regarded as an international crime under positive international law before the Allies decided to punish the government officials of Nazi Germany and of Imperial Japan. It should be noted that the British government was reluctant to

¹⁵⁸ Shklar/1964/146. Emphasis original.

¹⁵⁹ ADR/vol.13/1946/208. The Tokyo Tribunal also followed the Nuremberg judgement: 'In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinion of the Nuremberg Tribunal...' ADR/vol.15/1948/363.

agree to the proposal of the United States concerning the military trials. One of the reasons the British government was opposed to the proposal of the United States was that the British government did not think that aggression was an international crime in the *aide mémoire* which the British government submitted to Rosenman, Jackson's predecessor for the negotiation with the governments concerned.

'Reference has been made above to Hitler's conduct leading up to the war as one of the crimes on which the Allies would rely. They should be included in this the unprovoked attacks which, since the original declaration of war, he has made on various countries. These are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law. These would, however, necessarily have to be part of the charge and if the tribunal had – as presumably they would have – to proceed according to international law, an argument, which might be a formidable argument, would be open to the accused that this part of the indictment should be struck out. It may well be thought by some that these acts ought to be regarded as crimes under international law. Under the procedure suggested this would be a matter for the tribunal, and would at any rate give the accused the opportunity of basing arguments on what has happened in the past and what has been done by various countries in declaring war which resulted in acquiring new territory, which certainly were not regarded at the time as crimes against international law.'¹⁶⁰

The preparatory works of the London Charter, moreover, prove that the legal definition of crimes did not exist at least at the outbreak of the Second World War. At the London Conference, André Gros, who was a member of the French Delegation and later became a Judge of the ICJ, confessed his opinion as follows:

'[D]eclaring those acts are criminal violations of international law, which is shocking. It is creation by four people who are just four individuals – defined by those four people as criminal violation of international law.

¹⁶⁰ Cited from Shawcross/1969/101.

Those acts have been known for years before and have not been declared criminal violations of international law. It is *ex post facto* legislation.¹⁶¹

It should be noted, furthermore, that it was Gros's view which prevailed at the time. In 1936, for example, John Fischer Williams said:

'We can conceive – learned and humane men have done so – that it may be just to amend the law by making punishable the conduct of individuals who in places of authority have been responsible for the entry of their nation on a war that is illegal, but international law does not at present admit – and it is devoutly to be hoped that it never will admit – the idea of the punishment of a nation. Collective *penal* responsibility for misdoing is a tenet of primitive law for which international law, even if it be a young law, has no place.'¹⁶²

Therefore, the doubt whether or not the Nuremberg and Tokyo Military Tribunals violated the principle *nullum crimen sine lege* is surely the Achilles heel for lawyers wishing to legitimise the authority of these Tribunals.

Indeed, lawyers who deny the authority of the International Military Tribunals adhere to one question whether or not the Tribunals did violate the principle *nullum crimen sine lege*. They presume that the principle *nullum crimen sine lege* is so absolute that it is the breach of the principle that deprives International Military Tribunals of their legitimacy. Helmut Quartisch, for example, says:

'To deprive, however, him [the culprit as loser] of the protection of the principle "nullum crimen" hands him over the arbitrariness of the victors, because the victor describes the new crime and determines the new punishment. The claimed "justice" cannot be then "general" justice which the illegal consciousness of the defeated one is also included to; that presupposed the existence, approval or at least acceptance of the full

¹⁶¹ <http://www.yale.edu/lawweb/avalon/imt/jackson/jack44.htm>

¹⁶² Fisher/Williams/1936/133.

element of a crime before the deed ahead. That “justice” is only *die Gerechtigkeit des Siegers* [the Justice of the Victor (in German)], “victor’s justice” [in English].¹⁶³

However, the appropriate formulation of the question of the legitimacy of the Tribunals at Nuremberg and Tokyo seems to be rather how the Tribunals could legally justify the inapplicability of the principle *nullum crimen sine*. Despite not being a lawyer, Hannah Arendt, in the context of the Eichmann Trial, incisively pointed out this question as follows:

‘The question is not whether these laws were retroactive, which, of course, they had to be, but whether they were adequate, that is, whether they applied only to crimes previously unknown. This prerequisite for retroactive legislation had been seriously marred in the Charter..., and it may be for this reason that the discussion of these matters has remained somewhat confused.’¹⁶⁴

The real problem is whether or not it is still possible to justify the breach of the principle *nullum crimen sine lege*, even though the Nuremberg Tribunal breached the principle.

If it is necessary to reformulate Arendt’s remark in legal terminology, the following remark of Lon Fuller would be appropriate:

‘If...we are to appraise retroactive laws intelligently, we must place them in the context of a system of rules that are generally prospective. Curiously, in this context situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality. Like every other human undertaking, the effort to meet the often complex demands of the internal morality of law

¹⁶³ Translated by the author. The original text is as follows: “Ihm aber den Schutz des Prinzips „nullum crimen“ zu entziehen, liefert ihn der Willkür des Siegers aus, weil der Sieger das neue Verbrechen beschreibt und die neue Strafe festsetzt. Die beanspruchte „Gerechtigkeit“ kann dann keine „allgemeine“, auch des Unrechtsbewußtsein des Besiegten einschließende Gerechtigkeit sein; das setzte Existenz, Billigung oder doch wenigstens Hinnahme des vollen Straftatbestandes vor der Tat voraus. Die „Gerechtigkeit“ ist nur die Gerechtigkeit des Siegers, ‘victor’s justice’.” Quaritsch/Nachwort/Schmitt/1994/169.

may suffer various kinds of shipwreck. It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.’¹⁶⁵

After admitting that the Tokyo Tribunal applied retroactive law, Bert Röling, a Justice of the IMT at Tokyo, also pointed out:

‘The prohibition of *ex post facto* law has two aspects, one related to the principle of *liberty* and another related to the principle of *justice*. ... [I]f the law failed to prohibit an act because the legislator had made a mistake, or was not in a position to imagine specific events which later occurred, the situation should be quite different. ... Was it unjust to punish those scoundrels, even with the penalty of death? They had been well aware of the hideousness of their behaviour. They could not claim that criminal prosecution and severe punishment would violate rules of *justice*.’¹⁶⁶

Therefore, Röling concluded that the London and Tokyo Charters were legitimised from the viewpoint of ‘justice’ even if they were *ex post facto* law.¹⁶⁷

Lauterpacht, however, seems not to have been bothered by such a question at all. The International Military Trial was legitimate for him from the very outset of ‘the Road to Nuremberg.’ It was too natural for him to deny that government officials should be responsible for their own actives in the name of sovereign states. Consequently, he had no reason to doubt the official statement of the Nuremberg Tribunal. But, this point itself shows that Lauterpacht made the same mistake as traditional positivists did. He and the latter assumed that the prohibition of retroactive law was the decisive question for evaluating the Nuremberg Trial since legality is always politically legitimate. Consequently, for Lauterpacht and the traditional positivists, whether

¹⁶⁴ Arendt/1994/254-255.

¹⁶⁵ Fuller/1969/53.

¹⁶⁶ Röling-Cassese/1993/68-69.

for or against the Nuremberg Trial, the discussion only dealt with the issue whether or not the Tribunal had breached the principle *nullum crimen sine lege*. Such a debate between them is pointless and futile. On the one hand, the argument of lawyers who deny that the Tribunal breached the principle *nullum crimen sine lege* is deceptive with reference to the history of the preparatory works of the International Military Tribunals. Lawyers who reject the legitimacy of the IMT due to the breach of the principle *nullum crimen sine lege*, on the other hand, fail to grasp the flexibility of the principles of legality.

In a sense, Lauterpacht's commitment to the Nuremberg Trial is a good example of his legal-moralism. The Nuremberg Trial meant to him no more than the resurrection of human rationality. The criminal responsibility of individuals is surely the key concept of legalisation of international politics. Lauterpacht again and again claimed that international law would be ineffective unless government officials were held responsible for acts carried out on behalf of states. After the Nuremberg Trial, Lauterpacht confidently declared:

'[I]t is futile to maintain that if a cabinet minister, fully endowed with government authority, orders the massacre of the nationals of a foreign State, the subject of international responsibility is his States only, and not he himself. The futility of that attitude has often been emphasised by the parallel doctrine that States, because of their sovereignty, cannot be subject to criminal responsibility. Both these views must now be regarded as exploded.'¹⁶⁸

However, if the Nuremberg Trial is viewed thus, it should be noted that there are more serious defects of Lauterpacht's ideal than the shortcomings of the Nuremberg Trials which positivists argue. First, the judgements of International Military Tribunals at Nuremberg and Tokyo had been unable to have any effect on the realisation of Lauterpacht's ideal for moralising international politics through law. It is surely true that these judgements became the starting point of the

¹⁶⁷ *Ibid.*/85-89. Also see Cassese/2003/71-72.

¹⁶⁸ Lauterpacht/ILHR/43.

codification work of the United Nations such as the Nuremberg Principles and the 1948 Genocide Convention. It is certainly wrong to underestimate such codification works. However, it is also a mistake to overestimate the effectiveness of these norms. The international community had been satisfied with the creation of legal norms, which is just a starting point for the moralising of international politics through law. Indeed, there had been no international criminal trial for nearly forty-five years after the International Military Trials at Nuremberg and Tokyo, despite the fact that armed conflicts happened everywhere and that millions of civilians suffered from inhumane violence. It was only after the tremendous humanitarian catastrophes in the former Yugoslavia and Rwanda that Lauterpacht's forgotten ideal was resurrected.

Second, Lauterpacht's ideal, as far as the punishment of war crimes is concerned, suffers from the limitation that it is possible only if the punishment of war criminals is in conformity with, or at least not contrary to, the interests of states who try to punish them. The United States, for example, is extremely reluctant to punish its own soldiers, even if they commit war crimes. This point is shown not only by the fact that the United States government was reluctant to punish Lieutenant Calley and Captain Medina with regard to the My Lai massacre in the Vietnamese War, but also by its ambivalent attitude to the International Criminal Court. With regard to the My Lai case,¹⁶⁹ although it is true that Lieutenant Calley and Captain Medina were punished by the American Military Court,¹⁷⁰ President Nixon granted them amnesty.¹⁷¹ With regard to the policy of the United States against the International Criminal Court, suffices it to note that the United States forces other nations to admit that the ICC has no jurisdiction for the war crimes of American soldiers.¹⁷² *American Servicemembers' Protection Act*,¹⁷³ which prohibits any cooperation of the United States government and its judiciary with the ICC, is the manifestation of the will of the United States which does not allow their officials to be punished as war criminals. Considering the apparent

¹⁶⁹ On the general story of the My Lai case, see Bilton-Sim/1992.

¹⁷⁰ See Goldstein-Marshall-Schwartz/1976.

¹⁷¹ Fujita/1995/177.

¹⁷² Fujiwara/2002/188-189.

¹⁷³ <http://www.usaforicc.org/ASPA.htm>

reluctance of the United States to punish its soldiers as war criminals and the positive policy of the United States to punish its enemies, it is difficult to deny the allegation that the United States uses international criminal law only for protecting and enhancing its own interest. This point indicates a limitation of legalism which claims the Rule of Law in the unorganised international community in which powers are distributed to sovereign states who favour their own interests. As Bull said,

‘The world after the First World War heard about the war guilt of the Kaiser, and after the Second World War witnessed the trial and punishment of German and Japanese leaders and soldiers for war crimes and crimes against the peace. It did not witness the trial and punishment of American, British and Soviet leaders and soldiers who *prima facie* might have been as much or as little guilty of disregarding their human obligations ... This is not to say that the idea of the trial and punishment of war criminals by international procedure is an unjust or unwise one, only that it operates in a selective way. That these men and not others were brought to trial by the victors was an accident of power politics.’¹⁷⁴

This limitation of the punishment of war criminals may be inevitable, but is enough to expose the naivety of international legalism, which claims that the punishment of war criminals is the victory of law over arbitrary politics in the name of the international community.

¹⁷⁴ Bull/1995/85-86.

4. THE RECONSTRUCTION OF THE INTERNATIONAL COMMUNITY AS *Civitas Maxima* AFTER THE SECOND WORLD WAR

Needless to say, the Second World War damaged the League of Nations system and the authority of international law. The League of Nations could not prevent the Second World War. The belligerents, whether the Allies or the Axis Powers, did not fully comply with the rules of the laws of war. However, as the victory of the Allied nations became clear, international lawyers started to discuss how the international community should be reconstructed after the end of hostilities. Lauterpacht was also concerned about questions on the reconstruction of the international community.

This chapter discusses Lauterpacht's hope for international law to assert its authority, and considers the kind of new post-war world order he proposed. With regard to the question of the authority of international law, the chapter explicates the discussion between the schools of power politics, such as the international legal theory school of the Axis nations and political realism, and his antagonism to political realism. Being opposed to the schools of power politics, on the other hand, Lauterpacht tried to re-construct his liberal theory as the Grotian tradition of international law. Concerning the new world order, Lauterpacht proposed the concept of the international community as *civitas maxima*, which is the association of democratic nations with the international protection of human rights. The section is divided into two subsections. The first subsection examines the association of democratic states. In the section, I discuss his functional theory of states as organs of the international community in the context of recognition, and the problem of Kantian republicanism. Finally, I examine his proposal of the international protection of human rights in the context of the international community as *civitas maxima*.

4.1. THE SHADOW OF POWER POLITICS

From the collapse of the League of Nations in the late 1930s to the Second World War, Lauterpacht could not help but face the challenge of power politics to liberal legalism. The international lawyers of the Axis nations claimed their own international legal theories which justified the foreign policy of their nations. Although the international legal theories of the Axis nations were swept away after their defeat, part of these theories was inherited by political realists. Lauterpacht thought that these new theories of power politics were contrary to the progressive development of human history. Nor did he conceal his displeasure at the theories of power politics.

His belief in the progressiveness of human history is one of the characteristics of his theory of international law. Lauterpacht believed that human rationality expressed as international law would finally defeat such irrationality as totalitarianism. Here, his legalism was nothing but the result of this belief in the human progress. As Shklar pointed out, '[t]he faith in progress as a law of history is, indeed, the last of the many fatal contributions of liberalism to legalistic ideology.'¹ In this sense, it is no wonder that the 'Spirit of Geneva' was still the ideal for Lauterpacht. Indeed, he re-interpreted the history of international law, showing his liberalism, in the Grotian tradition of international law.

4.1.1. THE INTERNATIONAL LEGAL THEORIES OF THE AXIS NATIONS

As the international community disintegrated, the paradigm of international legal studies was seriously confused from the late inter-war period to World War II. On the one hand, there was the legal school of international lawyers, including Lauterpacht, who tried to protect the authority of the League of Nations, and on the other a group antagonistic to international legalism composed of Axis international lawyers who were hostile to the League of Nations. They tried to establish the international legal theory which justified their nations' policy. The notorious example of the international legal theory of the Axis nations is the Nazi theory of international law.² Generally

¹ Shklar/1964/139.

² See Preuss/1935; Gott/1938; Herz/1939; Nussbaum/1947/278-280; Vagts/1990;

speaking, German lawyers even in the period of the Weimar Republic were more or less hostile to the League of Nations, as they generally tended to view the Versailles system as legitimising the Anglo-French domination of the world at the cost of Germany.³ However, it was after Hitler acquired power that German international legal theory became definitively hostile to the international law of Geneva. It was transformed to the National Socialist theory which justified Nazism after the Nazi party had started to influence the management of German universities, among its priorities the purging of liberal theorists and Jewish lawyers.⁴

Carl Schmitt may represent such a movement of German international lawyers in the inter-war period. It is true that Schmitt was hostile to the League of Nations from the outset of the Weimar Republic, due to his own friend/foe theory of 'the political.'⁵ However, he had been just as authoritative and conservative a lawyer before the Nazi party gained power. Indeed, he had been opposed to Nazism prior to 1933. It was only after becoming a member of the Nazi party in May 1933 that he inclined towards Nazi philosophy. A story often cited to show his inclination to Nazism concerns Schmitt, alone among the staff of the law faculty, not signing the protest against the purge of Hans Kelsen from the University of Cologne. From that period, Schmitt wrote almost forty articles on Nazi jurisprudence. These articles, worthy of the notorious nickname 'The Crown Lawyer of the Third Reich,' certainly show his definitive inclination to Nazism.⁶ However, by the end of 1936 at the latest, Schmitt had lost his influence within the Nazi party, because of S.S. criticism of him in an S.S. journal. From then, he confined himself to the problem of international law in order to protect himself from the Nazis. Schmitt developed his own *Grossraum* (greater region) theory, not only as his academic activity but also as a justification of Nazi domination of Europe.⁷

Fassbender/2002.

³ Koskenniemi/2001/236-238.

⁴ On professors of international law purged by the Nazi government, see Vagts/1990/703-702/Appendix-A.

⁵ Schmitt/1996/55-57.

⁶ See Schmitt/2000.

⁷ See Scheurman/1999/141-173; Balakrishnan/2000/226-251; Carty/1995/and/2001; Stirk/1999;

Japanese international lawyers also tried to create an international legal theory which aimed at justifying Japanese domination in the Far East.⁸ In 1941, the Japanese Association of International Law established study groups to look at international legal problems which would occur in 'the Great East Asia Co-Prosperity Sphere.' Kaoru Yasui, Assistant Professor at The Imperial University of Tokyo at time, was the typical figure of international legal theory of the Great East Asia Co-Prosperity Sphere. He argued that the traditional international law of East Asia, which had been established from the European perspective, should be completely criticised from the viewpoint of the liberation of Asian peoples from European domination, and that the new international law of the Great East Asia would govern the internal and external relations of the Great East Asia Co-Prosperity Sphere of which Japan was at the centre as the leading nation.⁹ Under the auspices of the Japanese Association of International Law, in order to establish the new theory of international law of Great East Asia, Yasui studied Schmitt's *Grossraum* theory, for which he had considerable appreciation,¹⁰ and the Nazi racial theory of international law as expounded by Friedrich Giese and Eberhard Menzel, who seemed even to Yasui to be academically shallow.¹¹

It is not certain whether or not Lauterpacht knew the international legal theories of the Axis nations. It seems to be appropriate here to disregard the question whether he was aware of the Japanese theories of international law of the Great East Asia, because first of all Japanese lawyers did not publish their international legal theories in English, nor in other European languages, including German, during the Second World War, and secondly there is no evidence that Lauterpacht could read Japanese. However, it is a different story when we attend to Nazi international law theory. German, at least, was one of his native languages. Indeed, Lauterpacht wrote many reviews of German books on international law before 1939. He must, however, have disregarded the Nazi theory of international law. In a lecture at the meeting of the Royal Institute of

Gattini/2002.

⁸ See Matsui/2002/and/2003.

⁹ Yasui/1942/2-3.

¹⁰ *Ibid.*/4.

¹¹ *Ibid.*/121.

International Affairs on 27 May 1941, he emphasised that the decade preceding the Second World War should be regarded as a period of retrogression, and warned of the Nazi jurisprudence of international law as follows:

‘Neither ought we to exhibit undue haste in adapting international law to some of the manifestations of totalitarian and dictatorial régimes. It is too early to assume their permanency in their present form; and it is an excess of optimism to believe that in case of their survival international law will be able to develop at all.’¹²

Lauterpacht’s prediction was correct, because such theories held by Axis international lawyers were completely swept away by the defeat of the Axis nations in the Second World War. After the War, almost all Nazi legal theorists were expelled from German academia. It was true of Schmitt. He was in an American military gaol from 1945 to 1947. Even after his release, Schmitt was prohibited from teaching at German universities.¹³ Yasui was also forced to resign Tokyo University because of his voluntary assistance to Japanese militarism. Although he became a professor at a private university in Tokyo, concentrating on the development of Marx-Leninism theory of international law after his ideological conversion, Yasui completely lost his influence over Japanese academics in the field of international law, and is still criticised as an ideological lawyer who lost the neutral spirit of a lawyer’s professional ethics.¹⁴

4.1.2. POLITICAL REALISM

It is undeniable, nevertheless, that the original works of Carl Schmitt exerted influence over a second group of scholars opposed to the legal school of international lawyers. As William Scheurman pointed out, there is a similarity between Schmitt and political (classical) realists such

¹² Lauterpacht/1941a/CP-II/36.

¹³ Balakrishnan/2000/260.

¹⁴ Murase/1997/737-738.

as Edward Carr and Hans Morgenthau.¹⁵ Although there was no academic connection between Schmitt and Carr, Morgenthau admitted that his theory of power politics was influenced by Schmitt¹⁶ and Carr.¹⁷

The basic assumption of political realism is that the task of government is to protect the national interest. If legalism damages national interest by making diplomacy inflexible, it is enough reason for political realists to reject legalism,¹⁸ because, in their view, it is more moralistic for government officials to protect the national interest than to comply with international obligations in the case that obligations are contrary to national interest. As Carr said,

'The first obligation of the modern national government, which no other obligation will be allowed to override, is to its own people. It would be absurd to lament this state of affairs as proof of increased human wickedness; it might equally well be regarded as proof of a sharpened social conscience. But whatever view we take of it, it would be folly to neglect the overwhelming evidence that modern national governments cannot and will not observe international treaties or rules of international law when these become burdensome or dangerous to the welfare or security of their own nation.'¹⁹

In the view of political realists, it is the professional ethics of government officials to protect national interest. George Kennan also says,

'Government is an agent, not a principal. Its primary obligation is to the *interests* of the national society it represents, not to the moral impulses that individual elements of that society may experience. No more than the attorney vis-à-vis the client, nor the doctor vis-à-vis the patient, can government attempt to insert itself into

¹⁵ Scheurman/1999/152. See Pichler/1998; Koskenniemi/2000/17-34/and/2001/413-474.

¹⁶ Morgenthau/1978/67-68.

¹⁷ Boyle/1985/299/n.37.

¹⁸ Morgenthau/1993/13-16.

¹⁹ Carr/1945b/31.

the conscience of those interests it represents.²⁰

Therefore, political realists saw international law from the viewpoint of government officials who serve national interest. From such a viewpoint, although it was natural for them to deny legalism because it dissolves politics into law, they did not reject international law itself.²¹ Carr explicated the weakness of legal utopianism in his *Twenty Years' Crisis*. However, he did not reject international law. What he rejected was 'a strong inclination to treat law as something independent of, and ethically superior to, politics.'²² Morgenthau also did not deny the usefulness of international law. What Morgenthau denied was the international lawyers 'who would substitute for power politics another type of foreign policy based on international law and which consequently would replace the "old" diplomacy by a "new" one, the diplomat of national power by the advocate of international law.'²³ George Kennan also affirms international law insofar as it is confined to 'the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest.'²⁴ Their common element was that they tried to protect diplomacy from the interference of legalism.

Among political realists, Carr in particular severely criticised Lauterpacht for his legalism. Carr, for example, disapproved of Lauterpacht as a typical person of '*pacta-sunt-servanda*-ism', which regards the sanctity of treaties as supreme.²⁵ Carr's criticism of Lauterpacht looks somewhat pointless from the viewpoint of international legal studies, because the remark made by Lauterpacht to which Carr referred was, in fact, the view of Anzilotti.²⁶ Lauterpacht proposed the *maxim voluntas civitatis maximae est servanda* as the initial hypothesis of international law instead of the principle *pacta sunt servanda*, because he found a vestige of voluntarism in the principle

²⁰ Kennan/1985/206. Emphasis original.

²¹ Alderson-Hurrell/2000b/35.

²² Carr/1945a/159.

²³ Morgenthau/1946b/1067.

²⁴ Kennan/1951/54.

²⁵ Carr/1946b/176/n.1.

²⁶ Lauterpacht/Function/418.

pacta sunt servanda.²⁷ However, it is undeniable that Lauterpacht's attitude to the sanctity of international treaties was a kind of '*pacta-sunt-servanda*-ism.' Insofar as Lauterpacht emphasised the sanctity of treaties within the framework of Kelsenian normativism, there is no difference between the principle *pacta sunt servanda* and the maxim *voluntas civitatis maximae est servanda* with regard to what Carr criticised as '*pacta-sunt-servanda*-ism.' The only difference is that, in Lauterpacht's view, the maxim *voluntas civitatis maximae est servanda* can avoid the misunderstanding that the foundation of international law only refers to the agreement of states. However, such a difference did not matter to Carr.

Carr also criticised Lauterpacht's belief that 'conflicts of interests are due, not to economic necessities, but to the imperfections of international legal organisation.'²⁸ In Carr's view, Lauterpacht's opinion avoided 'the fallacy, implicit in the Geneva Protocol and the General Act, that an international legal order based on the recognition, interpretation and enforcement of existing rights is an adequate provision for the peaceful settlement of international disputes,' However, Carr thought that Lauterpacht was guilty of a far graver error:

'Perceiving that provision must be made for the modification of existing rights, they [Lauterpacht and Kelsen] force this essentially political function into a legal mould and entrust its exercise to a tribunal. Unwilling to recognize the political basis of every legal system, they dissolve politics into law.'²⁹

Carr's criticism of Lauterpacht's legalism is also encountered in the context of peaceful change. Lauterpacht was of the opinion that peaceful change as an effective institution of international law means 'the acceptance by States of a legal duty to acquiesce in changes in the law decreed by a competent international organ.'³⁰ In other words, peaceful change was nothing but the problem of international legislation to Lauterpacht. Lauterpacht's view, however, seemed to Carr unrealistic in

²⁷ *Ibid.*/420-422.

²⁸ *Ibid.*/250.

²⁹ Carr/1946a/186.

the sense that Lauterpacht expected that the hypothetical 'world super-state' would solve actual problems. Carr emphasised diplomacy or negotiation, instead of international legislation, for solving the actual problem of peaceful change:

'The legislative process, though recognizing the role of power and well adapted to meet many demands for change in national politics, is inapplicable to international demands for change, since it presupposes the existence of a legislative authority whose decrees are binding on all members of the community without their specific assent. There remains the bargaining process, which is applied to some demands for change within the state and is alone applicable to demands for international change, since states . . . insist on the ultimate right to accept or reject any solution offered.'³¹

Although he did not forget the role of morality in peaceful change, Carr emphasised a greater role played by power than morality, since it is inescapable that diplomacy reflects the relation of power between states. Thus, the purpose of political realism is to revive the notion of power in international relations, which legalism deleted through law in the name of peace. In this sense, political realists' image of international law is more traditional than the legal school's image of international law. Morgenthau, for example, clearly sympathised with the tradition theory of international law before 1919, when he said that '[t]he relationship between the balance of power and international law, which was known to many of the classical writers of international law and was still emphasised in the first editions of Oppenheim's treatise, has again found its deserved place in a theory of international politics.'³² Indeed, in *Politics among Nations*, Morgenthau said,

'International law owes its existence and operation to two factors, both decentralized in character: identical or complementary interests of individual states and the distribution of power among them. Where there is

³⁰ Lauterpacht/1937a/141.

³¹ Carr/1946a/198.

³² Morgenthau/1967/xii.

neither community of interest nor balance of power, there is no international law.³³

Thus, the essence of the international legal theory of Morgenthau is the revival of Oppenheim's first and second moral principles which Lauterpacht deleted from his editions of *Oppenheim's*. As discussed above, Oppenheim thought that the balance of power and the national interest were essential to international law.

'The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a central political authority above the Sovereign States that could enforce the rules of Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent. The history of the times of Louis XIV. and Napoleon I. shows clearly the soundness of this principle.'³⁴

Oppenheim continued,

'The second moral is that International Law can develop progressively only when international politics, especially intervention, are made on the basis of real State interests. Dynastic wars belong to the past, as do interventions in favour of legitimacy. It is neither to be feared, nor to be hoped, that they should occur again in the future. But if they did, they would hamper the development of the Law of Nations in the future as they have done in the past.'³⁵

In a sense, the disagreement between Lauterpacht and Morgenthau symbolises the internal tension

³³ Morgenthau/1993/255-256.

³⁴ Oppenheim/1912a/80.

³⁵ *Ibid.*/80-81

in the international legal theory of Oppenheim. Though maintaining the balance of power and the quest for national interest as the first and second moral principles of international law, Oppenheim named 'the victory everywhere of constitutional government over autocratic government, or, what is the same thing, of democracy over autocracy' as the third moral principle of the progress of international law in the third edition of his textbook.³⁶ Although Roxburgh edited the third edition of *Oppenheim's*, it is generally thought that Oppenheim introduced this moral principle into the third edition.³⁷ The internal tension between power politics and liberal democracy clearly featured in Oppenheim's international legal theory. On the one hand, the principle of liberal democracy was developed by Lauterpacht who replaced the principles of power politics with the victory of liberal democracy over autocracy as the first moral principle of international law in his fifth edition of *Oppenheim's*.³⁸ As Lauterpacht changed the substance of *Oppenheim's* by deleting the element of power politics, international lawyers started to abandon Oppenheim's original paradigm. On the other hand, Morgenthau succeeded to the principles of power politics in international law from Oppenheim. In this sense, it is no coincidence that, as Kingsbury indicates, 'Oppenheim's approach is still prevalent in a strong realist strand of international relations theory.'³⁹ Thus, political realists as represented by Carr, Morgenthau, and Kennan, on the one hand, and the legal school as represented by Lauterpacht were irreconcilable with regard to the concept of international law. This point is also seen in Lauterpacht's criticism of political realism.

4.1.3. LAUTERPACHT'S REFUTATION OF POLITICAL REALISM

Lauterpacht had noticed that he was criticised by political realists. In particular, it is clear that he read Carr's *Twenty Years' Crisis*, because he left a refutation note of Carr's realism, though he did not published it at that particular time. However, Lauterpacht did not try to refute the criticism

³⁶ Oppenheim-Roxburgh/1920/95.

³⁷ Schmoeckel/2000/704; Kingsbury/2002/414/n.54.

³⁸ Oppenheim-Lauterpacht/1937/80.

levelled at Carr on the matter of international law. Essentially he refuted Carr's conception of international morality expressed in Chapter 9 of his *Twenty Years' Crisis*.⁴⁰ In Chapter 9 of *Twenty Years' Crisis*, Carr claimed that international morality is the morality of states as opposed to the morality of individuals. Lauterpacht believed that the advocacy of state morality amounts to the denial of morality applicable to states. He said that 'there is very little difference between denying that there exists an international morality and maintaining that there exists an international morality different from private morality.'⁴¹ The advocacy of the morality of state seemed to Lauterpacht to be no more than *raison d'état*, which was most easily defined by Harold Nicolson as '[t]he diplomatic and political theory under which the interests of the State take precedence over all private morality.'⁴²

However, Lauterpacht's criticism of Carr's conception of international morality is ineffective, because he criticised Carr from the viewpoint of 'critical morality,' though Carr essentially discussed international 'positive morality.' It is useful to refer to the distinction between 'positive morality' and 'critical morality' which is explained by Hart. According to Hart, positive morality is 'the morality actually accepted and shared by a given social group.' On the other hand, he described critical morality as 'the general moral principles used in the criticism of actual social institutions including positive morality.'⁴³ This distinction is useful in order to ponder Lauterpacht's criticism of Carr's conception of international morality.

Carr's concept of international morality is positive rather than critical. Carr explained the necessity to observe international positive morality by saying that 'he [the student of international politics] will be well advised to keep his feet on the ground and rigorously maintain contact between his ambitions for the future and the realities of the present.' Carr continued as follows:

³⁹ Kingsbury/2002/415.

⁴⁰ Lauterpacht/1941b/CP-II/67-92.

⁴¹ *Ibid.*/77.

⁴² Nicolson/1950/241.

⁴³ Hart/1963/20. Also see MacCormick/1981/45-54.

'The anthropologist who investigates the moral codes and behaviour of a cannibal tribe probably starts from the presupposition that cannibalism is undesirable, and is conscious of the desire that it should be abolished. But he may well be sceptical of the value of denunciations of cannibalism, and will in any case not mistake such denunciations for a scientific study of the subject. The same clarity of thought has not always distinguished students of international morality, who have generally preferred the role of the missionary to that of the scientist.'⁴⁴

Carr then described how ordinary people actually think about international morality. In his view, 'most people, while believing that states ought to act morally, do not expect of them the same kind of moral behaviour which they expect of themselves and one another.'⁴⁵ It is because the primary function of the state is to protect the interests of nationals and of the state. Consequently, '[t]he good of the state comes more easily to be regarded as a moral end in itself.'⁴⁶ Thus, Carr described *raison d'état* as positive morality without criticising it in *Twenty Years' Crisis*.

On the other hand, Lauterpacht's morality is critical rather than positive. It is true that he denied the positive character of the morality of state when he said that 'a survey of the foreign policy of modern States will show that the immorality of international conduct is something in the nature of a myth.'⁴⁷ However, the reason Lauterpacht denied state morality is his conviction that *raison d'état* is immoral:

'A moral person does not use the screen of the association as a justification of immoral conduct. An immoral person may do it and often does it, but there is no reason to regard him as the typical phenomenon or – still worse – to picture it as the normal incident of the existence of groups.'⁴⁸

⁴⁴ Carr/1945a/136.

⁴⁵ *Ibid.*/143.

⁴⁶ *Ibid.*/145-146.

⁴⁷ Lauterpacht/1941b/CP-II/73.

⁴⁸ *Ibid.*/81.

This passage shows that Lauterpacht condemned the concept of the morality of states from his viewpoint of critical morality, because he *a priori* distinguished between a moral person and an immoral person without referring to the standard of positive morality. In other words, Lauterpacht criticised the justifiability of *raison d'état* in the normative phase.

As the victory of the Allied nations became apparent, Lauterpacht believed that the successful claim of *raison d'état* was temporary and short-lived:

'There was a feeling of embarrassment at the thought that during a transient period of retrogression so many should have yielded so readily to the temporary triumphs of force as to embrace or treat seriously a recrudescence of realism which political science and ethics had agreed with regarding as utterly discredited. In the second year of the Second World War this kind of realism had become largely a matter of the past.'⁴⁹

However, his prediction was too optimistic. At a meeting of the Carlyle Club on 10 October 1953, Lauterpacht again had to refute the criticism aimed at liberalism by political realists. Although he refrained from publishing his refutation of Carr's concept of morality, Lauterpacht did not this time conceal his displeasure at political realism. He accused political realists of being intellectually dishonest:

'For what is the method of the typical realist who confronts us in argument? He says: "I am a realist; I am a sound person; I am a practical man; I look to realities; I see things as they are and not as I would like them to be." To his opponents he says: "You are a Utopian; you are a dreamer; you see people and events as what you think they ought to be and not as what they are." That attitude of the realist is upon analysis an exclusive claim to wisdom. It is an assertion of victory even before the argument has started. It is an attempt to reduce the opponent, at the very outset, to a lower intellectual status and to gain the confidence of the others.'⁵⁰

⁴⁹ Lauterpacht/BR38/1941/CP-III/593.

⁵⁰ Lauterpacht/1953c/CP-II/53.

The disagreement between Lauterpacht and political realists is fundamental, because their disagreements stem from their different interpretations of the image of human nature.⁵¹ Lauterpacht criticised the pessimistic attitude of political realists with regard to the progress of human rationality:

‘He [a political realist] has no faith in the capacity of human beings when acting collectively, especially in relation to other collectivities, to act intelligently and to learn from experience... In this sphere he questions the power of man to learn from experience and to advance to progress.’⁵²

However, being an optimistic believer in human rationality, Lauterpacht could not understand why political realists are ‘despairing liberals all.’⁵³ Neither could he have recognised that the image of law and politics held by political realists is the scanty image of his legalism. It is no wonder, therefore, that Lauterpacht was embarrassed at ‘a recrudescence of realism’ even eight years after the end of the Second World War. However, it was Lauterpacht’s weakness that he failed to understand why political realists such as Morgenthau abandoned international law, because his lack of understanding of political realism made Lauterpacht’s international legal theory more utopian and unrealistic in the Cold War period. Without understanding the relationship between power politics and international law, Lauterpacht followed Hugo Grotius, whom Immanuel Kant described as one of the ‘sorry comforters as they are.’⁵⁴

4.2. THE MANIFESTO OF THE GROTIAN TRADITION IN INTERNATIONAL LAW

There was certainly a reason why Lauterpacht regarded *The Grotian Tradition in International Law*

⁵¹ Morgenthau/1952/961-962.

⁵² Lauterpacht/1953c/CP-II/61.

⁵³ Shklar/1964/125.

⁵⁴ In Kant’s view, Grotius was quoted in justification of military aggression, even though his philosophically or diplomatically formulated codes did not and could not have the slightest legal

as his most important article,⁵⁵ because the universal authority of international law had already been damaged by World War II. Power politics again emerged. Therefore, Lauterpacht felt necessary to re-establish the authority of the international law which he knew and believed in. Lauterpacht chose Grotius as the basis of his universal international law. Indeed, all the pivots of Lauterpacht's theory of international law are seen in *The Grotian Tradition*. He described the following eleven principles as Grotian tradition: (1) the subjection of the totality of international relations to the rule of law, (2) the acceptance of the Law of Nature as an independent source, (3) the affirmation of the social nature of man as the basis of the law of nature, (4) the recognition of the essential identity of States and individuals, (5) the rejection of 'reason of States', (6) the distinction between just and unjust war, (7) the doctrine of qualified neutrality, (8) the binding force of promises, (9) the fundamental rights and freedoms of the individual, (10) the idea of peace, and (11) the tradition of idealism and progress.

These principles are the crux of Lauterpacht's theory, sometimes called 'Neo-Grotian theory,'⁵⁶ rather than the theory of Grotius. Indeed, Lauterpacht is often criticised for his misreading of Grotius. Yasuaki Onuma, for example, says that '[a]mong these [eleven principles], some principles are clearly inappropriate in understanding Grotius, such as the essential identity of states and individuals, and the fundamental rights and freedoms of the individuals.'⁵⁷ This point is especially shown by the fourth principle of 'the recognition of the essential identity of States and individuals.' Lauterpacht explained this principle as follows:

'This analogy of States and individuals has proved a beneficent weapon in the armoury of international progress. It is not the result of any anthropomorphic or organic conception of the State as being – biologically, as it were – assimilated to individuals, as being an individual person "writ large." The analogy – nay, the essential identity – of rules governing the conduct of States and of individuals is not asserted for the reason

force. Pufendorf and Vattel were also described as 'sorry comforters.' Kant/1991/ 103.

⁵⁵ McNair/1961b/379; Elihu/Lauterpacht/Note/CP-II/307.

⁵⁶ Rosenne/1961/829; Bull/2000/95-124; Hussain/1984/126-134.

that States are like individuals; it is due to the fact that States are composed of individual human beings; it results from the fact that behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical State there are the actual subjects of the rights and duties, namely, individual human beings.’⁵⁸

However, this explanation of the fourth principle is misleading as an interpretation of Grotius, because the notion of state in Grotius’s theory is very different from the conception of state which Lauterpacht held. Masaharu Yanagihara explains Grotius’s conception of state as follows:

‘Grotius’s conception of association is multi-layered, consisting of marriages, households, private bodies (*collegia*), cities, provinces, municipalities, states, alliances, and the society of nations. Even the state, which Grotius considers the most perfect society, is definitely not the modern sovereign state, with which independent powers with the authority to rule over others and the means of enforcement cannot in theory coexist. The power of a head of a household over his wife, children, and slaves is called *imperium*, as is the *imperium* of a state over its subjects. The distinction between the various associations mentioned is not an essential one, but is only a matter of degree.’⁵⁹

In other words, Grotius could not have held the modernistic view of states, although Lauterpacht, looking at the matter in his own modern way, misunderstood Grotius’s concept of the state. Monarchs were regarded as states themselves in the 17th century from the patrimonial point of view. As Benedict Kingsbury says, ‘he [Grotius] does not systematically distinguish the legal personality of the sovereign state from that of the ruler or other governing power within the state.’⁶⁰ In this sense, the modern concept of state as social organisation did not exist in the 17th century. Lauterpacht intentionally disregarded the change in the concept of states from patrimonial in the

⁵⁷ Onuma/1993c/362.

⁵⁸ Lauterpacht/1946b/CP-II/336.

⁵⁹ Yanagihara/1993/157.

17th century to social organisation in the 20th century, when he said that ‘whatever may be the form of the government of the State, those who rule it and act on its behalf are individual human beings, and it is to them only that, upon final analysis, rules of law are addressed.’⁶¹

The fourth principle is just one example of the problems of Lauterpacht’s interpretation of Grotius; the same attitude is also seen in *The Grotian Tradition* as a whole. The major problem of Lauterpacht’s interpretation of Grotius is that Lauterpacht seems not to have paid much attention to differences between historical periods and changes evident in such terminology as ‘state,’ ‘society,’ or ‘war,’ used in the modern era as well as in the times of Grotius. Lauterpacht’s adherence to the Grotian Tradition, therefore, avoids with difficulty being criticised as no more than ‘facile references to Grotius.’⁶² As far as Lauterpacht is concerned, nevertheless, the problem is not whether or not his interpretation of Grotius is correct, but how he interpreted Grotius in order to propose a prescription for the era of crisis. In this sense, the above eleven principles are still interesting for an understanding of his own theory of international law rather than of the theory of Grotius itself.

It should be pointed out that Lauterpacht’s interpretation of Grotius is generally coloured by his reconciliation of Kelsenian normativism with the English tradition; there is a similarity between Lauterpacht’s explanation of the fourth principle of Grotian Tradition and Kelsenian normativism. The view of Kelsen on this point is as follows:

‘The state, which represents the specific subject of international law, is, insofar as its behavior is the substance of rights and duties, a being no different from individuals, the specific subjects of national law. Only individuals can have rights and duties, for the substance of rights and duties can only be the behavior of individuals. The fact that international law obligates and authorizes states does not mean that it does not obligate and authorize individuals, but only that it obligates and authorizes individuals whose acts are

⁶⁰ Kingsbury/1996/48.

⁶¹ Lauterpacht/1946b/CP-II/338.

⁶² T/Tanaka/1993/307.

interpreted as the acts of a state.’⁶³

As already noted, the same point is also seen in Westlake’s teaching that ‘those towards whom it is taken are also men like ourselves, though they may be veiled from our eyes by the interposition of another artificial entity.’⁶⁴ From his early academic career, Lauterpacht claimed that ‘behind the personified institutions called States there are in every case individual human beings to whom the precepts of international law are addressed.’⁶⁵ In this sense, Lauterpacht’s effort to revive Grotian Tradition is not the resurrection of Grotius himself. It should be understood as the evangelistic manifesto of Lauterpacht to moralise international relations. The following remark of Lauterpacht clearly shows his intention:

‘What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code. To many, indeed, it may appear that *De Jure Belli ac Pacis* is more a system of ethics applied to States than a system of law. This would not inevitably imply a condemnation of the work. For it may be held that at that time – as, indeed, at any time – it was important that the relations of States should be conceived and taught as part of ethics as well as part of law. Grotius’s great merit is that he performed both tasks in one work.’⁶⁶

The problem, however, is whether it is practically possible for Lauterpacht to claim a universal moral code in the international community in the mid-20th century as Grotius did in the mid-17th century. It is because the preconditions of the universal moral code, which, in the opinion of Lauterpacht, Grotius discussed, had already disappeared even before the Second World War. The universal moral conduct of Grotius was in fact based on the universalism of Christianity. It is sometimes forgotten, but should be remembered, that Hugo Grotius was a pious Protestant who

⁶³ Kelsen/1942/83.

⁶⁴ Westlake/1914/411.

⁶⁵ Lauterpacht/Analogies/306.

wished to reunify Christian churches.⁶⁷ At the time of the Reformation, the Pope was criticised as the Antichrist by Protestants, because Luther and Calvin described him so.⁶⁸ Despite being a Protestant, however, Grotius tried to prove that the Pope was not Antichrist, since he thought that the prevalent view of Protestants to see the Pope as Antichrist prevented the reunion of Christianity between Protestants and Catholic Church.⁶⁹ He did not stop publishing religious works, even though he knew that such religious activity could compromise his position in Holland, as well as impeding his qualification as Swedish Ambassador to France.⁷⁰ When Grotius claimed the universal moral code, the moral code in Europe was essentially Christianity, even though the society of European nations was becoming secularised. Needless to say, such religious universality of Christianity, which Grotius desired at the cost of his diplomatic career, could not be expected in world politics of the mid-20th century.

It should be noted, moreover, that there was the aristocratic solidarity of European nations in the 17th century, along with the secularisation process of European society. If monarchs were states themselves, international morality was nothing but 'the concern of a personal sovereign.' Morgenthau described the basis of the universal moral code of European sovereigns as follows:

'The prince and the aristocratic rulers of a particular nation were in constant, intimate contact with the princes and aristocratic rulers of other nations. They were joined together by family ties, a common language (French), common cultural values, a common style of life, and common moral convictions about what a gentleman was and was not allowed to do in his relations with another gentleman, whether of his own or of a foreign nation. The princes competing for power considered themselves to be competitors in a game whose rules were accepted by all the other competitors. The members of their diplomatic and military services looked upon themselves as employees who served their employer either by virtue of the accident of birth or

⁶⁶ Lauterpacht/1946b/CP-II/363.

⁶⁷ Nussbaum/1947/105; Haggemacher/1985/151.

⁶⁸ Van/den/Berg/1994/170-171.

⁶⁹ Yanagihara/2000/86-89.

⁷⁰ Nellen/1994/134-142.

because of the promise of pay, influence, and glory.⁷¹

The aristocratic solidarity of Europe is shown by the fact that it was not unusual for a person to work for a foreign nation as a diplomat or a politician. Just as Bismarck was asked to serve in the Russian diplomatic service by Czar Alexander I in 1862 when he became Prime Minister of Prussia, Grotius also received offers from the Danish and Spanish Kings, and, in 1634, finally accepted the offer to be Swedish Ambassador to France from Oxenstierna, Prime Minister of Sweden at that time, in accordance with the will of the late King Gustavus Adolphus.⁷² However, when Lauterpacht wrote *The Grotian Tradition*, such aristocratic solidarity had disappeared as European dynasties declined after World War I. Today government officials are 'legally and morally responsible for their official acts, not to a monarch (that is, a specific individual), but to a collectivity (that is, a parliamentary majority, or the people as a whole).'⁷³ Thus, as the concept of states transformed from the patrimonial concept of monarchs to the artificial concept of social organisation, the aristocratic basis of international morality disappeared. Morgenthau continued as follows:

'When we say that George III of England was subject to certain moral restraints in his dealings with Louis XVI of France or Catherine the Great of Russia, we are referring to something real, something that can be identified with the conscience and the action of certain specific individuals. When we say that the British Commonwealth of Nations, or even Great Britain alone, has moral obligations toward the United States or France, we are making use of a fiction. By virtue of this fiction international law deals with nations as though they were individual persons, but nothing in the sphere of moral obligations corresponds to this legal concept.'⁷⁴

⁷¹ Morgenthau/1993/236.

⁷² Nussbaum/1947/100.

⁷³ Morgenthau/1993/237.

Therefore, it is impossible to return to the universalism of Grotius's theory in modern times when the basis of his universalism has disappeared. Thus when he tried to construct his universalism as Grotian Tradition, it became clear that Lauterpacht needed something as the universal basis of international law and morality. For him it was the solidarity of liberal democratic countries. Indeed, Lauterpacht tried to re-construct the international community as *civitas maxima* on the basis of liberal democracy and human rights. This point will be discussed in the next section.

4.3. THE INTERNATIONAL COMMUNITY AS *CIVITAS MAXIMA*

Even during the Second World War, Lauterpacht had developed his idea on how the international community should be organised after the League of Nations. In the early spring of 1940, he discussed a plan of possible world federation.⁷⁵ In that paper, he pointed out the two indispensable elements of World Federation. The first element was abandonment of sovereignty of the member states of the world federation. However, he thought that it was impractical to urge states to renounce their sovereignty. He rather emphasised the regulation of the sovereign power of states under international law. Indeed, it was possible for Lauterpacht to re-construct the role of sovereign state as an organ of the international community. Insofar as the state functioned as an organ of the international community, he preferred a plan of a new international organisation to a plan of a world federation. The second element, namely the recognition of the legal capacity of individuals under the law of federation, seemed to him to be more important than the first element of world federation. These two characteristics were essential in that they were central to his perspective of the international organisations. It is, therefore, important to discuss these elements in order to understand his criticism of the United Nations.

⁷⁴ *Ibid.*/238.

⁷⁵ The paper bears no date. However Elihu Lauterpacht suggests that it was prepared in the early spring of 1940. Elihu/Lauterpacht/Note/CP-III/5.

4.3.1. THE ASSOCIATION OF DEMOCRATIC STATES

With regard to the first element, it should be noted that the sovereignty of states is not absolute for Lauterpacht. He understood sovereignty from the normative point of view, namely that sovereignty is nothing but 'a delegated bundle of rights' under international law. Consequently, it seemed to him not to be legally impossible for states to abandon their sovereignty as 'a power which is derived from a higher source and therefore divisible, modifiable and elastic.' Indeed, the abandonment of the sovereign rights of the member states is indispensable to the formation of federation. Otherwise, the organisation would be a confederation of states rather than a federal state. Therefore, he pointed out that 'the phenomenon of federation has done almost as much to displace sovereignty from the high seat of exclusive and indivisible authority.'⁷⁶

Nevertheless, Lauterpacht considered it impractical to force states to renounce their sovereignty and to become equal, despite differences in power, though he admitted that it is necessary to regulate the sovereign right of states:

'In so far as international sovereignty of States has proved incompatible with other essential postulates of that civilization...it is rational and imperative to urge its further drastic limitation. But the facile dichotomy expressed in such a phrase as "unless the State destroys sovereignty, sovereignty will destroy the State," does not do justice to the realities and the complexities of the case. The abolition of the international personality and of the concomitant rights of sovereignty of States is impracticable not only for the fully adequate reason that, within the foreseeable future, it is not likely to prove acceptable to the overwhelming majority of persons within the State in question.'⁷⁷

Therefore, he rejected the proposal for a world federation. He preferred a confederation of states to a world federation insofar as the regulation of state sovereignty is possible from the viewpoint of

⁷⁶ Lauterpacht/1940a/CP-III/9.

⁷⁷ *Ibid.*/13.

the international community. In this sense, Lauterpacht was not a denier of state sovereignty. The problem for him was not whether state sovereignty can be abolished, but how states function as organs of international law. This point is well identified in the context of the recognition of state or government.

4.3.1.1. THE FUNCTION OF THE STATE AS THE ORGAN OF THE INTERNATIONAL COMMUNITY IN THE CONTEXT OF RECOGNITION IN INTERNATIONAL LAW

4.3.1.1.1. THE LEGALISTIC THEORY OF RECOGNITION

Lauterpacht viewed sovereign states from the perspective of the international community. In his view, a sovereign state should be regarded as an organ of the international community which creates and applies international law. This view is here referred to as the decentralisation theory of the international community. This theory is one feature of Kelsenian normativism. It explains how international law is created, applied and enforced systematically even in the undeveloped or primitive structure of the international community. It is useful to refer to Kelsen's explanation of the decentralisation theory of the international community in order to understand Lauterpacht's theory.

Hans Kelsen used the concept of measuring the degree of the institutionalisation of society in two ways, namely in a static sense and a dynamic sense. The centralisation/decentralisation in a static sense, on the one hand, is concerned with 'the territorial sphere of validity of the norms that constitute a legal order', which is 'the territorial extent throughout which the norm is valid.'⁷⁸ In other words, the territorial sphere of law is nothing but the sphere of legal validity. Therefore, the static concept of the centralisation/decentralisation explains the relationship between the sphere of the validity of general law and the sphere of the validity of particular law. In the case of international law, it explains the relationship between general international law and particular

⁷⁸ Kelsen/1942/107.

international law, which amounts to the relationship between central law and local law in the sphere of national law.

On the other hand, centralisation/decentralisation in a dynamic sense concerns 'the methods of norm-making, especially with the organs creating and executing the norms.'⁷⁹ The theory which sees the state as the organ of the international community is decentralisation in a dynamic sense. The typical example is seen in the remark that 'a state which, authorized by international law, applies against another state which has violated international law the sanction provided by international law – in other words resorts to reprisals or wages war – acts as an organ of the international legal community.' Kelsen continued,

'Put in another way, it is the international legal community itself that reacts against the violator of the law through the medium of the state resorting to reprisals or waging a just war. If forcible interference in the sphere of interests of a subject is permitted by the order only as a reaction against a delict, then the use of force is reserved to the community, is a monopoly of the community.'⁸⁰

States act as organs of the international community not only in the sanction process, but also in the norm-creating process or the norm-application process. Thus, Kelsen viewed this aspect of international law from the point of view of the international community. It is undeniable that the decentralised structure of the international community is very 'primitive' in the sense that it is unorganised.⁸¹ However, it is still a legal order making states act as its organ. In Kelsen's view, therefore, the decentralisation theory of the international community guarantees the legal nature of international law by considering states as the organs of the international community.

Although refuting Kelsen's view of the international community as being similar to a

⁷⁹ *Ibid.*/109.

⁸⁰ *Ibid.*/57-58.

⁸¹ See Campbell/1988.

primitive society,⁸² Lauterpacht followed Kelsen with reference to the decentralisation theory of the international community.⁸³ In *Recognition*, Lauterpacht tried to conceive the function of states to recognise state or government⁸⁴ as the function of the organs of the international community by connecting the three elements of recognition, namely the duty of the recognising state, the discretion of recognising states and the legal effect of state recognition. The fact that a political authority exists in a certain area produces a legal obligation for other states to recognise the authority as a state. However, the determination of the fact itself is within the discretion of recognising states. The discretion is not a political but a judicial one regulated by the legal obligation to recognise the territorial authority as a state.⁸⁵ The legal effect of the recognition of states, furthermore, is to give a recognised state international legal personality. In this sense, Lauterpacht tried to synthesise the declaratory theory and the constitutive one: 'Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood.'⁸⁶ The recognising state which has legal discretion to decide whether or not it should recognise a political territorial entity as a sovereign state, functions as an organ of the international community by connecting the legal obligation of the recognition of states under the declaratory theory with its legal effect of creating international legal personality of the recognised state under the constitutive theory.

But Lauterpacht was not satisfied even with the duty of recognition, because he understood the reality of a state often using recognition to protect its own national interest under the guise of the

⁸² Lauterpacht/Function/433-434.

⁸³ See Lauterpacht/Recognition/172/n.1.

⁸⁴ It is true that Lauterpacht distinguished between the recognition of state and the recognition of government. However, as Warbrick explained, the distinction between them depends on the view that the legal effect of recognition of states is constitutive. Warbrick/1981b/569. The discussion on recognition in this section is not about the legal effect of recognition, but the decentralised function of states as organs of the international community, whatever the legal effect of recognition. Therefore, there is no reason to distinguish between the recognition of state and the recognition of government in this section.

⁸⁵ Lauterpacht/Recognition/24.

⁸⁶ *Ibid.*/6.

international community. As John Dugard points out, the duty of recognition was 'an interim measure, pending the collectivization of recognition'⁸⁷ for Lauterpacht. Thus, in order to solve the problem of politics in recognition with finality, Lauterpacht proposed the collectivisation of the recognition process:

'Situations will arise in which a State may see in the manner of the exercise of the function of recognition an opportunity for securing for itself benefits from the parent State or from the community asking for recognition. The consideration of such benefits cannot be regarded as legitimate, but it cannot always be absent from the decision of the recognizing State. It would be futile to deny either the existence of this aspect of the problem or the fact that it is due to an obvious imperfection of international organization. The solution, which is equally obvious, of that difficulty would seem to lie in transferring that function to an international organ not impeded by a conflict between interest and duty.'⁸⁸

Thus, his proposal for the collectivisation of the recognition process shows that Lauterpacht discussed the problem of recognition in the context of the institutionalisation of the international community.

It is arguable whether Lauterpacht's observation of recognition was not *lex lata* but *lex ferenda*. Josef Kunz, who thought the recognising state had no legal obligation other than discretion of recognition, claimed that Lauterpacht's view of recognition was nothing but his 'ethical consideration' from the viewpoint of Kelsenian normativism.⁸⁹ Kunz's argument is persuasive, because Lauterpacht's theory of recognition typified his normativism in the sense that the act of recognition should be regarded only as the creation or application of international law on behalf of the international community. Lauterpacht did not admit the political character of recognition at all. This point is reflected by his claim of the duty of recognition. It is again useful to refer to Kelsen's

⁸⁷ Dugard/1987/10.

⁸⁸ Lauterpacht/Recognition/67.

⁸⁹ Kunz/1950/713-715.

view of recognition in order to understand the implication of Lauterpacht's argumentation of the duty of recognition, because Kelsen also constructed the theory of recognition from the viewpoint of the decentralisation theory of the international community.

'The decision whether in a concrete instance a state – a "new" state – has come into existence or not, whether an old state has ceased to exist or not – the decision of these questions general international law leaves to the state themselves, that is, to the organs representing them, the governments which are interested in the decisions. That is the legal import of the acts called "recognition" of a government. In them the decentralization of the application of the law so characteristic of international law is expressed most significantly.'⁹⁰

However, Kelsen, unlike Lauterpacht, did not deny that sovereign states pursue their own national interests in the context of recognition. Kelsen distinguished between the political act of recognition and the legal act of recognition. On the one hand, the political act of recognition is that 'the recognizing state is willing to enter into political and other relations with the recognized state or government, relations of the kind which normally exist between members of the family of nations,' although the political act of recognition, in Kelsen's view, is declaratory in the sense that it does not have the legal effect of creating an international legal personality for the recognised state.⁹¹ On the other hand, the legal act of recognition is explained from the viewpoint of the decentralisation theory of the international community. It is the legal act of the state as the organ of the international community to establish a fact. By the legal act of recognition, a community becomes a 'state' *vis-à-vis* the recognising state. However, Kelsen did not admit the duty of recognition. He said,

'Existing states are only empowered – they are not obliged – to perform the act of recognition. Refusal to recognize the existence of a new state is no violation of general international law and thus constitutes no

⁹⁰ Kelsen/1942/119.

⁹¹ Kelsen/1941/605-606.

violation of the right of any other community.⁹²

Thus, Kelsen constructed the legal rules of recognition as the power-conferring rule.⁹³ Lauterpacht also interpreted the legal rules of recognition as the power-conferring rule, because the recognition of a state creates the international legal personality of the recognized state. However, the difference between Kelsen and Lauterpacht lies in whether or not they consider the recognising states to be obliged to exercise the power of creating an international legal personality or of ascertaining the fact that a government is effective, which is given by the international community. In this sense, the duty of recognition is the key to understanding the difference between them.

The significance of the duty of recognition is to delete any political consideration from the sphere of recognition. Kelsen admitted the role of political considerations in the theory of recognition by separating the political act of recognition from the legal act of recognition. However, Lauterpacht went too far even from Kelsen. After re-constructing Kelsen's theory of recognition from only the viewpoint of the legal act of recognition, Lauterpacht tried to eliminate the political aspect of recognition. The following remark shows how Lauterpacht wished to delete political considerations in recognition process from his pure legal theory of recognition. 'The dual position of the recognising State as an organ administering international law and as a guardian of its own interest must reveal itself in a disturbing fashion whenever there is an occasion for successfully using the weapon of recognition for the purpose of achieving political advantages.'⁹⁴ By creating the legal duty of recognition, Lauterpacht rejected the state as 'as a guardian of its own interest' in the highly political sphere that sovereign states have to decide whether they should establish an official relationship, including diplomatic relations, with a recognised state or a recognised government.

The essential problem of his legalistic theory of recognition is that Lauterpacht assumed that

⁹² *Ibid*/610.

⁹³ In Hart's view, Kelsen's general theory of law is to unify the legal system by conceiving all legal rules as power-conferring rule. Hart/1994/35-38.

political considerations could be eliminated completely from the recognition process. This assumption is related not only to the duty of recognition that many lawyers denied,⁹⁵ but also to the collectivisation of recognition. It is certainly difficult to deny that there is a merit in the collectivisation of recognition process. The collectivisation of recognition process would avoid the relative nature of recognition which Crawford regards as one of the difficulties with the constitutive theory.⁹⁶ It is also desirable for states to have a common policy of recognition in order to deal with international crises such as the disintegration of a state. However, the problem is that it is impractical to expect that states would abandon their power of recognition at the cost of their interests. Although some lawyers claim that admission to membership of the United Nations should be regarded as the collective recognition of states,⁹⁷ the act which may be regarded as the recognition of state or government is neither the recommendation of the Security Council nor the General Assembly resolution, but the individual voting attitude of a member state.⁹⁸ In a sense, Lauterpacht pursued the impractical goal of eliminating political considerations from the recognition process for the legal purity of recognition by claiming the duty of recognition, and by the proposal of creating an international organisation for the recognition process.

The second problem is that his legalistic theory necessarily narrows the margin of appreciation of the recognising state by deleting considerations indispensable to recognition other than legal ones. This point is shown by the change of British policy on the recognition of governments in 1980. It is well known that the Foreign Office of the United Kingdom was influenced by Lauterpacht's theory of the duty of recognising effective governments.⁹⁹ Indeed, in his review of Lauterpacht's *Recognition*, William Eric Beckett, the Legal Advisor to the Foreign Office at that time, said as follows:

⁹⁴ Lauterpacht/*Recognition*/67.

⁹⁵ Cohn/1948/406; Kunz/1950/718; Mugerwa/1968/277; Jessup/1971/217; Warbrick/1981a/241.

⁹⁶ Crawford/1979a/19-20.

⁹⁷ Dugard/1987; Hillgruber/1998.

⁹⁸ Warbrick/2003/252.

'In the reviewer's opinion Professor Lauterpacht makes a very fair case for showing that the law *is* in accordance with this thesis. The reviewer also think that, taking a broad view, the acceptance of Professor Lauterpacht's thesis relieves governments of far more political embarrassments than it creates.'¹⁰⁰

It is no wonder, thus, that the Foreign Office asked Lauterpacht to write a short article about the British *de jure* recognition of the communist government of China in *The Times*,¹⁰¹ when the British government granted *de jure* recognition to the communist government of China in 1950. Then, in 1951, Herbert Morrison, the British Foreign Secretary at that time, announced:

'The question of the recognition of a State or Government should be distinguished from the question of entering into diplomatic relations with it, which is entirely discretionary. On the other hand, it is international law which defines the conditions under which a Government should be recognised *de jure* or *de facto* and it is a matter of judgment in each particular case whether a regime fulfils the conditions. The conditions under international law for the recognition of a new régime as the *de facto* Government of a State are that the new régime has in fact effective control over most of the State's territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the *de jure* Government of a State are that the new regime should not merely have effective control over most of the State's territory, but that it should, in fact, be firmly established. His Majesty's Government consider that recognition should be accorded when the conditions specified by international law are, in fact, fulfilled and that recognition should not be given when these considerations are not fulfilled. The recognition of Government *de jure* or *de facto* should not depend on whether the character of the régime is such as to command His Majesty's Government's approval.'¹⁰²

⁹⁹ Jessup/1971/217; Warbrick/1981b/570-571; Dugard/1987/2/n.5; Talmon/1992/239.

¹⁰⁰ E./1947/508. Emphasis original. Also see Fitzmaurice-Vallat/1968/285.

¹⁰¹ Lauterpacht/1950j/CP-III; see Elihu/Lauterpacht/Note/CPIII/115. Akehurst considered that the reason the British government adopted 'the Lauterpacht doctrine' was because 'it was useful means of fending off criticism from the USA about British recognition of communist governments in China and elsewhere.' Akehurst/1987/63.

¹⁰² Commons/vol.485/cols.2410-2411.

Since then, the British government has recognised effective governments 'despite the constitutional illegitimacy of their coming power and the political antipathy with which they were regarded.'¹⁰³ However, the problem of the recognition of Ghana's government in 1979 forced the British government to reconsider its policy of recognition of government.¹⁰⁴ As it became clear that the Khmer Rouge government had embarked on a brutal reconstruction programme in which more than two million Cambodians were killed, the British government was criticised for its recognition of that government.¹⁰⁵ Consequently, the Britain abandoned the policy of recognition of governments in 1980. Lord Carrington, the Foreign Secretary of the Thatcher cabinet, announced:

'Following the undertaking of my right honourable friend the Lord Privy Seal in another place on 18th June last we have conducted a re-examination of British policy and practice concerning the recognition of Governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided that we shall no longer accord recognition to Governments. The British Government recognise States in accordance with common international doctrine.

Where an unconstitutional change of régime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally "recognising" the new Government.

This practice has sometimes been misunderstood, and, despite explanations to the contrary, our "recognition" interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new régime, or the manner in which it achieved power, it has not sufficed to say that an announcement of "recognition" is simply a neutral formality.

¹⁰³ Warbrick/1981b/571.

¹⁰⁴ Commons/vol.968/col.920.

¹⁰⁵ Commons/vol.975/cols.709-761.

We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealing with régime which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.¹⁰⁶

This change in the British policy of recognition of governments was inevitable, because the legalistic theory of recognition was too inflexible to adapt itself to the actual situation, which requires some considerations of international and domestic politics. The notion of the duty of the recognition of government forced Britain to consider that the recognition of government meant the automatic application of international law, and did not allow the British government to consider the political aspect of recognition, such as the political desirability of the recognised government from the viewpoint of British policy or the avoidance of criticism due to public misapprehension of the British recognition of an illegitimate government as political approval of the recognised government. While there are other reasons for the British government to abandon the old policy of recognition of government, one of the reasons is definitively the inflexibility of the legalistic policy of recognition.¹⁰⁷

It seems undeniable that Lauterpacht was one of those responsible for the confusion of British policy on recognition, because his analysis of the opinions of the Law Officers of the Crown, which seems to be the main reason why the British government followed his opinion, was distorted, from the outset of his examination, by his adherence to Kelsenian normativism, especially in the decentralisation theory of the international community. As Riesenfeld pointed out that 'in defining the field of inquiry of the student of international law, Professor Lauterpacht still wears the blinders

¹⁰⁶ Lords/vol.408/cols.1121-1122; Commons/vol.983/written-answer/cols.278-279; Lords/vol.448/cols.343-344.

¹⁰⁷ Warbrick/1981b/575-576; Talmon/1992/241-243.

of the Vienna school,¹⁰⁸ Lauterpacht's adherence to Kelsenian normativism is observed in the following statement with regard to the lawyers' task:

'The preceding examination of the practice of States and of pronouncements of governments showing the acknowledgement of the duty of recognition whenever there exist the requisite conditions of fact is open to the retort that in deducing a legal rule from the practice of States we must not look to the professions of governments but to their motives. Any such retort is probably unsound. Official pronouncements of governments express what in their view are the correct legal rules and principles capable of general application. It is with these alone that the jurist is concerned.'¹⁰⁹

Lauterpacht then warned other lawyers not to probe 'the motives which have induced governments to express their obligation to act upon a legal rule.' For him, it is the work of 'the historian and the sociologist.' In his view, lawyers should be concerned with 'the legal rule upon which governments profess to act.'¹¹⁰ Thus, Lauterpacht's studied removal of political elements from the opinions of the Law Officers of the Crown distorted somewhat the real meanings of the opinions. However, it was necessary to refer to 'a fuller statement of the facts and circumstances to which they [the opinions of the Law Officers] relate, coupled on occasion with an indication of the Foreign Office minutes or action taken on them'¹¹¹ for an understanding of the real meaning of the opinions. The words of the Law Officers taken out of context were moulded into the framework of Kelsenian normativism. The duty of recognition was 'found' in the practice of the United Kingdom and the United States by Lauterpacht from his own perspective of the decentralisation theory. Thus, the United States and the United Kingdom were regarded by Lauterpacht as organs of the international community. Although it is skilful in using the fiction that it represents the international community against its enemies, the United States rejects the role of the organ of the international community in the

¹⁰⁸ Risenfeld/1948/587.

¹⁰⁹ Lauterpacht/Recognition/25.

¹¹⁰ *Ibid.*

context of recognition.¹¹² The British government, on the other hand, has conducted itself as the organ of the international community in the context of recognition. However, it also finally found that '[o]ur criteria for recognition have placed us in considerable difficulties.'¹¹³

4.3.1.1.2. THE LEGITIMACY OF GOVERNMENTS IN RECOGNITION

Lauterpacht did not find any qualification of recognised states other than 'external independence and effective internal government within a reasonably well-defined territory.' These conditions of statehood were definitive and exhaustive in his view. Therefore, he continued,

'They [the conditions of statehood] have nothing to do with the degree of civilization of the new State, with the legitimacy of its origin, with its religion, or with its political system. Once considerations of that nature are introduced as condition of recognition, the clear path of law is abandoned and the door wide open to arbitrariness, to attempts at extortion, and to intervention at the very threshold of statehood.'¹¹⁴

From such a viewpoint, Lauterpacht denied the principle of dynastic legitimacy as a legal condition of the recognition of governments.¹¹⁵ However, it should be noted that the reason he rejected the principle of legitimacy (constitutionality) is because he felt that international law could not regulate the problem of revolution. It is only in this sense that Lauterpacht preferred the effectiveness of government to its constitutionality. The question of the constitutionality of government seemed to Lauterpacht to belong to the political sphere not to the legal one. However, this does not mean that he disregarded the question of the legitimacy of governance. Indeed, he expressed his hope as follows:

¹¹¹ E/1947/510.

¹¹² Talmon/1992/244-246.

¹¹³ Commons/vol.968/col.920.

¹¹⁴ Lauterpacht/Recognition/31.

¹¹⁵ *Ibid.*/26-27.

‘International society would be entitled to discourage revolutions by wielding the weapon of non-recognition if at the same time it provided methods guaranteeing and ensuring individual rights and government by consent within the territories of all States. When that consummation comes to pass, revolutions will be subject to suppression as being subversive of the constitution of the international commonwealth. Until this happens, international law must be satisfied with a different function, namely that of ensuring a measure of continuity – otherwise radically broken – between the revolutionary and the old order.’¹¹⁶

Moreover, Lauterpacht did not abandon the subsequent legitimatisation of the government by popular vote as the test of the effectiveness of government. It is true that he noticed that the subsequent legitimatisation of the government by popular consent often became a matter of mere form, because revolutionary governments often did not allow citizens to express their free will. Although he expected that the test of subsequent legitimation would remain deficient in its operation unless the freedom of popular vote was internationally supervised, Lauterpacht believed that subsequent legitimation was essentially correct. Indeed, he said that ‘[the test of subsequent legitimation’s] re-emergence, when accompanied by appropriate international safeguards, must be regarded as a rational development deeply rooted in history.’¹¹⁷

In this sense, as Wilfred Jenks pointed out, there was a natural link between the question of recognition and the international protection of human rights in the problem of legitimacy of government.¹¹⁸ Indeed, Lauterpacht believed that the international community could not develop without the democratic legitimacy of governments. In his proposal of a confederation of states, Lauterpacht hoped that the member states of the new international organisation would be democratic and would protect human rights. The federation should be ‘a world in which the fundamental rights of the individual under the rule of law are protected by organized international

¹¹⁶ *Ibid.*/106.

¹¹⁷ *Ibid.*/138.

¹¹⁸ Wilfred/Jenks/1960/51.

society'¹¹⁹ Therefore, even if sovereign states are sustained in the international community, they should be democratic in that they protect human rights:

'The principal reason why the League was contemplated as democratic was that neither peace nor international law, whose firm establishment was described as one of the principal objects of the League, can become a reality until we have recognized the individual human being as the ultimate beneficiary of the law and the ultimate unit of human progress, to be protected by international action, if necessary, from the power of the State.'¹²⁰

It is his concept of the international community as *civitas maxima*: the world where the individual is protected by law, which is governed by judges, from the arbitrary power of state sovereignty. It is very clear that he tried to transfer the ideal of legality and democracy in a domestic society to the international community. Lauterpacht, for example, agreed with Lowenstein that 'the right to government by consent [should] be elevated to the dignity of a fundamental human right fully guaranteed by international law.'¹²¹ Unfortunately, however, this domestic analogy of the legal school of international lawyers was a cause of trouble in international relations as a paradoxical problem of Kantian Republicanism.

4.3.1.2. THE PARADOX OF KANTIAN REPUBLICANISM

It was inevitable that Lauterpacht, who adopted Kelsenian normativism as the basis of his understanding of law, should have been influenced by Neo-Kantian epistemology which affected Kelsen's Pure Theory of Law.¹²² Although the influence of Kant over Lauterpacht is not so clear in the writings of Lauterpacht, apart from the international protection of human rights, Lauterpacht

¹¹⁹ Lauterpacht/1940a/CP-III/19.

¹²⁰ *Ibid.*/20.

¹²¹ Lauterpacht/BR70/1946/511.

clearly expressed his sympathy with Kantian republicanism in his paper on the world federation. He said that '[w]hen in 1795 Kant formulated the articles of a federation of peoples for the mutual guarantee of independence and the preservation of peace, he regarded it as essential that the member States should possess a democratic constitution.'¹²³

Despite adopting Kant's project of perpetual peace, Lauterpacht seems not to have followed Kant's notion of republicanism and democracy. For Kant, whether a state is republican or despotic is a question relative to the form of government, while whether a state is autocratic, aristocratic or democratic is a question of sovereignty. Kant defined a republican state as follows:

'A *republican constitution* is founded upon three principles: firstly, the principle of *freedom* for all members of a society (as men); secondly, the principle of the *dependence* of everyone upon a single common legislation (as subjects); thirdly, the principle of legal *equality* for everyone (as citizens). It is the only constitution which can be derived from the idea of an original contract, upon which all rightful legislation of a people must be founded.'¹²⁴

On the other hand, in the opinion of Kant, democracy necessarily becomes despotic, because there is no separation of powers in a democratic country:

'We can therefore say that the smaller the number of ruling persons in a state and the greater their powers of representation, the more the constitution will approximate to its republican potentiality, which it may hope to realise eventually by gradual reforms. For this reason, it is more difficult in an aristocracy than in a monarchy to reach this one and only perfectly lawful kind of constitution, while it is possible in a democracy only by means of violent revolution.'¹²⁵

¹²² Kunz/1933-1934/372-373; Freeman/1994/271/n.3; Paulson/1992.

¹²³ Lauterpacht/1940a/CP-III/19.

¹²⁴ Kant/1991/100. Emphasis original.

Therefore, it is more important for Kant that a state is republican rather than democratic in the sense that the executive power is separated from the legislative power. In Kant's view, there was no collision between enlightened autocracy and liberal republicanism.

However, Lauterpacht clearly used the term 'democracy' in the meaning of 'republicanism' in *Perpetual Peace*. Democracy for Lauterpacht was the republican form of governance whereby human rights are protected from the arbitrary power of sovereign states. In other words, he did not care about the question of who is sovereign in Kantian sense. The United Kingdom, though a monarchy, clearly seemed to him to be 'democratic.' The important question for him was not the form of sovereignty but the form of governance. Therefore, when he started to argue for the international protection of human rights, his claim that the states should be 'democratic' meant nothing but his adherence to the Kantian theory of republicanism. This point shows that his 'neo-Grotian' concept of the international community includes Kantian republicanism. The confederation of democratic states which protects human rights is 'the idea of the *civitas maxima* of the federation of the world.'¹²⁶

Thus, Lauterpacht incorporated Kantian republicanism into his international legal theory, which is clearly shown by his eighth principle of the new international organisation after the Second World War:

'The international recognition and effective protection of fundamental human rights either through an International Bill of the Rights of Man forming part of the constitution of the society of nations or in some other manner, is an important condition of international peace, of social progress upon which peace depends, and of the moral authority of international organisation and law.'¹²⁷

Considering that his first principle of the new international organisation is that '[a] universal

¹²⁵ *Ibid.*/101.

¹²⁶ Lauterpacht/1940a/CP-III/24.

¹²⁷ Lauterpacht/1943/CP-III/497.

international organization is one which all States are compelled to join and from which no withdrawal is legally possible,¹²⁸ there is no doubt that Lauterpacht implied that all states should accept his eighth principle of international organisation cited above. It follows that all member states of the new international organisation should become republican in the Kantian sense that 'observance of human rights is a primary requirement to join the community of civilised nations under international law.' According to Tésón, it is the crux of Kantian republicanism:

'It follows that there cannot be federation or peace alliance with tyrannical state. If the international community constituted by the law of nations is going to preserve peace, it cannot accept tyrants among its members. Domestic freedom is a primary credential required from any state for it to become a legitimate member of the international community.'¹²⁹

Even though critical of Tésón's interpretation of Kant's international legal theory, Patrick Capps admitted that 'the best interpretation of the meaning of the term republicanism in Kant's work is by way of the notion of a constitutional democracy.'¹³⁰

However, even apart from the question whether or not Kantian republicanism is metaphysically true, Kantian republicanism has some inherent problems in realising its own ideals. First, there is a question whether or not republicanism is really universally acceptable among nations. In reality, all nations are not necessarily republican or democratic. Indeed, the project of Kantian republicanism has been seriously challenged from the viewpoint of communism during the Cold War era, and from the viewpoint of multiculturalism in the Post Cold War era.¹³¹ Kantian republicanism seems to critics of liberalism to be the very expression of Western liberalism or, worse, Eurocentrism. In this sense, the universality of Kantian republicanism is not as self-evident as Lauterpacht thought it was.

¹²⁸ *Ibid.*/467.

¹²⁹ Tésón/1998/7.

¹³⁰ Capps/2001/1006.

Even if Kantian republicanism is politically acceptable as political ideology among all nations, the second problem still remains whether and how Kantian republicanism deals with non-liberal states which grossly and systematically violate human rights. It should be noted that, in Kant's view, there is no peace, but a hostile situation as potential war, between republican states and tyrannical ones. Although some international relations scholars contrast Kantian republicanism with a Hobbesian state of nature with regard to the understanding of international relations,¹³² this contraposition between them is misleading,¹³³ because Kant's conception of the state of nature is clearly influenced by Hobbes.¹³⁴ In *The Metaphysics of Morals*, Kant said that 'a state, as a moral person, is considered as living in relation to another state in the condition of natural freedom and therefore in a condition of war.'¹³⁵ The description of the state of war as the state of nature is also seen in *The Perpetual Peace*:

'A state of peace among men living together is not the same as the state of nature, which is rather a state of war. For even if it does not involve active hostilities, it involves a constant threat of their breaking out. Thus the state of peace must be formally instituted, for a suspension of hostilities is not in itself a guarantee of peace. And unless one neighbour gives a guarantee to the other at his request (which can happen only in a lawful state), the latter may treat him as an enemy.'¹³⁶

If a federation of states consists only of republican states, non-republican states would be in a state of war, instead of being allowed to enjoy 'perpetual peace' within the federation. The state of war between republican states and non-republican ones, of course, is not necessarily the real situation of war, but it is no wonder that actual hostilities take place any time between them, because states have a right to go to war in the sense that 'a state is permitted to prosecute its right against another state,

¹³¹ See Onuma/1993d.

¹³² Wight/1968b; Bull/1995/23-26.

¹³³ Williams-Booth/1996/71-72; Laberge/1998/83.

¹³⁴ See Tuck/1999/207-225.

¹³⁵ Kant/1996/114.

namely by its own *force*, when it believes it has been wronged by the other state.¹³⁷

Thirdly, Kant put forward the idea of an 'unjust enemy' which is 'an enemy whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible, and instead, a state of nature [namely a state of war] would be perpetuated.' All republican nations whose freedom is threatened by an unjust enemy, which for example violates public contracts, are called to unite against the misconduct of the state as an unjust enemy in order to deprive it of the power to violate public contracts and to force the people of the unjust enemy to adopt a new constitution opposed to war, although even republican states are not allowed to make the unjust enemy disappear from the earth.¹³⁸ This means that Kantian republicanism implicitly presupposes a state of war between republican states and non-republican states, even though it desires 'perpetual peace' between republican states within an international federation.¹³⁹

It should be noted, moreover, that the problem of Kantian republicanism is not only that it presupposes a state of war between republican states and non-liberal states, but also that in such a state of nature there is the possibility of 'a war of extermination, in which both parties and right itself might all be simultaneously annihilated.' Although it is true that he ethically rejected war of annihilation, Kant noticed the possibility that war of annihilation could build 'perpetual peace' on 'the vast graveyard of the human race.'¹⁴⁰ This point is more clearly explained by Carl Schmitt who regarded the political as the ever-present possibility of war between friends and enemies. Schmitt explained the possibility how the 'final' war of peace-lovers for 'perpetual peace' paradoxically becomes a crucial war of extermination:

'If pacifist hostility toward war were so strong as to drive pacifists into a war against nonpacifists, in a war

¹³⁶ Kant/1991/98.

¹³⁷ Kant/1996/116.

¹³⁸ *Ibid.*/118-119.

¹³⁹ See Marks/1997/472.

¹⁴⁰ Kant/1991/96.

against war, that would prove the pacifism truly possesses political energy because it is sufficiently strong to group men according to friend and enemy. If, in fact, the will to abolish war is so strong that it no longer shuns war, then it has become a political motive, i.e., it affirms, even if only as an extreme possibility, war and even the reason for war. Presently this appears to be a peculiar way of justifying wars. The war is then considered to constitute the absolute war of humanity. Such a war is necessarily unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed.¹⁴¹

Indeed, Schmitt noticed that Kant's idea of an unjust enemy was more dangerous than its appearance. Schmitt said,

'The intensity of a just war is increased even more, and the emphasis is shifted from the fact of the matter to the person of the unjust enemy. If St. Augustine says that the idea of war would be still more depressing if filtered through the idea of a just war, then the concept of an unjust enemy can increase this depression, because it does not have the act, but rather the perpetrator in view. If it is difficult for people to distinguish between a just enemy and a felon, how can they view an unjust enemy as anything other than the most grievous criminal? And in what sense does he remain an antagonist in a war circumscribed by international law? In the final analysis, identification of enemy and criminal also must remove the limits Kant places on the just victor, since he does not allow for the disappearance of a state or for the fact that a people might be robbed of their constituent power.'¹⁴²

Lauterpacht seems not to have paid great attention to these problems of Kantian republicanism. Indeed, he deleted the internal tension between power politics and liberal democracy from Oppenheim's international legal theory. The replacement of the first moral principle of international law from the principles of power politics with the principle of democracy means first of all that

¹⁴¹ Schmitt/1996/36.

¹⁴² Schmitt/2003/170-171.

against war, that would prove the pacifism truly possesses political energy because it is sufficiently strong to group men according to friend and enemy. If, in fact, the will to abolish war is so strong that it no longer shuns war, then it has become a political motive, i.e., it affirms, even if only as an extreme possibility, war and even the reason for war. Presently this appears to be a peculiar way of justifying wars. The war is then considered to constitute the absolute war of humanity. Such a war is necessarily unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed.¹⁴¹

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¹⁴¹ Schmitt/1996/36.

¹⁴² Schmitt/2003/170-171.

Lauterpacht seems not to have cast any doubt on the universal acceptance of Kantian republicanism. It means, moreover, that Lauterpacht tried to eliminate the element of power politics from the international plane. However, the elimination of the element of power from international politics naturally fails, because of the inherent contradiction of Kantian republicanism that republic states need to prepare for the war against non-republic or totalitarian states, although the purpose of Kantian republicanism is perpetual peace within the world federation of republican states. In other words, the victory of liberal democracy expressed as Kantian republicanism does not necessarily mean that liberal states no longer need their military powers. In this sense, Lauterpacht held the inherent paradox of Kantian republicanism that confronts war in the name of perpetual peace.

The destructive character of Lauterpacht's argument in favour of 'international peace' is seen in his statement with regard to the use of nuclear weapons. It is true that Lauterpacht thought that the use of nuclear weapons might be contrary to the principle of the protection of civilians and the principle of humanity. Nevertheless, he found it difficult to think that the use of nuclear weapons was absolutely prohibited. Thus, Lauterpacht said that '[i]n any case, so long as the production of the atomic bomb has not been prevented in practice by international agreement and supervision, there must be envisaged the possibility of its being resorted to in contingencies not amounting to a breach of International Law.' Then, he continued that the use of atomic bombs is justifiable not only as 'a reprisal for its actual prior use by the enemy or his allies,' but also as 'a deterrent instrument of punishment' against 'an enemy who violates rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion.'¹⁴³ Moreover, he said in the footnote as follows:

'[A]s laws are made not only for the protection of human life but also for the preservation of ultimate values of society, it is possible that should those values be imperilled by an aggressor intent upon dominating the world the nations thus threatened might consider themselves bound to assume the responsibility of exercising the

¹⁴³ Oppenheim-Lauterpacht/1952/351.

supreme right of self-preservation in a manner which, while contrary to a specific prohibition of International Law, they alone deem to be decisive for the ultimate vindication of the law of nations.¹⁴⁴

Thus, as Schmitt indicated, Lauterpacht had fallen into the trap of Kantian republicanism which makes a war against war cruel in the name of 'perpetual peace.'

Lauterpacht may have had a chance to notice the inherent paradox of Kantian republicanism, when he said that 'so much power was required for asserting the triumph of justice and of the dignity of man that power has begun to be viewed not as an instrument to a greater end, but as an end itself' in his lecture at the Hebrew University of Jerusalem in March, 1950.¹⁴⁵ However, he refused to admit the paradox of Kantian republicanism by attributing this problem to political realism:

'With that feature of the post-war period has been connected the cognate tendency to a realism which confuses immediate success with the ultimate aim and which does not therefore seriously attempt to grapple with what it considers to be the irreducible fact in international life, namely, the power of Great Powers. That realism has found expression in the main aspects of the new political organization of mankind as embodied in the Charter of the United Nations. It was responsible for that aspect of the Charter of the United Nations which is based on the assumption of permanent unanimity among the permanent Members of the Security Council – an assumption not justified either by experience or by a wise anticipation of probabilities or by an accurate assessment of the main political purpose of a general organization of States.'¹⁴⁶

Thus, Lauterpacht criticised the vetoes of the Permanent Members of the Security Council by saying that 'the veneration of power has found expression in a form of shortcut which, by reducing the basic problem of the United Nations to the rigid requirement of the unanimity of the Great

¹⁴⁴ *Ibid.*/351/n.2.

¹⁴⁵ Lauterpacht/1950b/CP-II/162.

¹⁴⁶ *Ibid.*/162-163.

Powers, has tented, to a large extent, to make unreal both the political organization of mankind and the normal functioning of international law upon which it depends.’¹⁴⁷ However, what Lauterpacht wanted to disregard was the fact that the malfunction of the Security Council in the era of the Cold War was essentially not due to the legal system of the veto of the Permanent Members, but to the political antagonism between the United States and the Soviet Union. Had the veto system not existed, there would have been a danger of the Security Council, which consisted of the United States and its Allies, transforming the Cold War into a Third World War in the name of the enforcement of international law against communist countries. The top priority in the Cold War, especially from the late 1940s to the early 1950s, was the avoidance of a Third World War even at the cost of limited armed conflicts in some regions. Lauterpacht should have known the actual danger of *fiat justitia, pereat mundus* which is inherent in Kantian republicanism. The modern era of nuclear weapons is different from the times when Kant optimistically said that ‘[t]he world will certainly not come to an end if there are fewer bad men.’¹⁴⁸

Only one month after his lecture at the Hebrew University of Jerusalem, the Korean War began. Lauterpacht appreciated the use of force by the United States and its Allies under Security Council resolution 83 as the enforcement of international law, saying,

‘Thus when in 1950 the forces of the United Nations were engaged, in pursuance of a decision of the Security Council, in repelling the invasion of South Korea by North Korea, there was no disposition on the part either of the United Nations as a whole or of the participating States to treat as war in the formal sense of the word what Chapter VII of the Charter describes as enforcement action. . . . It is consonant with the dignity and the purpose of the collective enforcement of the basic instrument of organised international society that it should rank in a category different from war as traditionally understood in International Law. The object of the latter – whether it be lawful or unlawful and whether it be aggressive or defensive – is to secure the interests of the individual State. The object of the former is comparable, in the municipal sphere, to the enforcement of the

¹⁴⁷ *Ibid.*/163.

¹⁴⁸ Kant/1991/123.

law against the law-breakers.’¹⁴⁹

These remarks clearly show that what Lauterpacht was concerned with was not the abolition of war, but the justifiability of the use of force. However, whatever the armed conflict in the Korean peninsula was legally categorised as, it is clear that the Korean War was the clash between the two camps dividing the world at that time, after the United States and the Soviet Union had expelled the dominating influence of Japan from the Korean peninsula at the end of the Second World War.¹⁵⁰ Thus, Lauterpacht confronted the paradox of Kantian republicanism. It is somewhat curious that insofar as the use of force is legally justified as the enforcement of international law, Lauterpacht, who really wanted Peace through Law, was more bellicose than political realists he disliked, such as Kennan, who was later to come out against the use of force by the United States in Vietnam and Cambodia in favour of national interest.¹⁵¹ In other words, Lauterpacht hated illegal violence too much to notice the actual violence performed by the nations who claim that they have the right of punishment in their hands. It may be because he was too idealistic to be sensitive to the actual niceties of international politics. His unwillingness to admit the political aspect of international relations is also seen in the context of the international protection of human rights.

4.3.2. THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

From his early academic career, Lauterpacht adopted the view that the individual is the subject of international law. As noted above, the final passage in *Analogies* states that ‘behind the personified institutions called States there are in every case individual human beings to whom the precepts of international law are addressed.’¹⁵² This passage itself means that he followed the view of Westlake that ‘[t]he duties and rights of states are only the duties and rights of the men who compose

¹⁴⁹ Oppenheim-Lauterpacht/1952/224.

¹⁵⁰ Kennan/1951/51-52; Morgenthau/1993/294.

¹⁵¹ Stephanson/1989/172.

them.¹⁵³ Lauterpacht noted that the individual working for governments was the subject of international obligations, so it was not difficult for him to accept the view that the individual had an international legal capacity. However, mainstream international legal studies at that time did not accept the view that the individual is the subject of international law. Even Fisher Williams, who is sometimes thought to belong to the Neo-Grotian school,¹⁵⁴ stated,

‘A new school of international lawyers claims that the individual also is a subject of international law, and that it is proper to speak of the relations of an alien to a State as being regulated by international law. If our object is to know what the province of international law is at the present time, not what may or might or ought to become the province in the future, the answer can hardly be doubtful. There is no general recognition of individuals, in their relations to States of which they are not nationals, and still less in their relations to States of which they are nationals, as being subjects of international law.’¹⁵⁵

Consequently, Lauterpacht had to start his argumentation from denying the traditional view that only the sovereign state was the subject of international law. In order to refute the traditional theory, he separated the question whether the individual is the subject of international law from the question of the procedural capacity of the individual:

‘The faculty to enforce rights is not identical with the quality of a subject of law or of a beneficiary of its provisions. A person may be in a possession of a plenitude of rights without at the same time being able to enforce them in his own name.’¹⁵⁶

He then discussed the possibility of giving the procedural capacity to the individual:

¹⁵² Lauterpacht/Analogies/306.

¹⁵³ Westlake/1914/78.

¹⁵⁴ Grewe/2000/604.

¹⁵⁵ Fisher/Williams/1929/6.

¹⁵⁶ Lauterpacht/1937-IV/CP-I/286-287.

‘[T]he rule preventing individuals from enforcing their rights before international tribunals is a piece of international machinery adopted for reasons of convenience. It is not a fundamental principle. There is nothing to prevent Governments, if they so wish, from altering the rule.’¹⁵⁷

However, the purpose of his argument was to deny the traditional view that only the state was the subject of international law; and less an exercise to prove the view that the individual is really the subject of international law. The international legal capacity of the individual is still dependent on the will of states. It is true that in the *Jurisdiction of the Courts of Danzig* case, the Permanent Court declared that ‘it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.’¹⁵⁸ However, the Permanent Court discussed the creation of the rights of individuals as the interpretation of international agreement. It did not declare the legal capacity of the individual under general international law. Furthermore, it is not the international enforceability but the domestic enforceability of the rights of individuals that was created by the Danzig-Polish Agreement as discussed by the Permanent Court. Even Lauterpacht admitted that ‘[t]he case of the Danzig officials is not really an example of direct enforceability, in the *international sphere*, of individual rights.’¹⁵⁹ In this sense, there is no doubt that his view that the individual was the subject of international law was more *lex ferenda* than *lex lata*.

However, if so, why did Lauterpacht adhere to the view that the individual is the subject of international law? It is because Lauterpacht deeply believed that the purpose of all law, including international law, is to protect the freedom and interest of individuals. In his lecture at The Hague, Lauterpacht said that ‘whatever may be the theory about the subject of international law, there

¹⁵⁷ *Ibid.*/287.

¹⁵⁸ PCIJ/B/No.15/17-18.

¹⁵⁹ Lauterpacht/1937-IV/CP-I/289. Emphasis original.

ought to be no doubt that the individual human being must be the ultimate object of protection of all law, national or international.¹⁶⁰ This conviction is expressed very coherently in his writings. In the context of the laws of war, he also said that '[t]he well-being of the individual is the ultimate object of all law, and whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness.'¹⁶¹ In other words, law for him was norm for human activity. In this sense, there was no difference between law and morality. Nor was there a difference between international law and domestic law. Law and morality, whether international or domestic, regulate human activity. Indeed, Lauterpacht said that 'it is scientifically wrong and practically undesirable to divorce International Law from the general principles of law and morality which underlie the main system of municipal jurisprudence regulating the conduct of human beings.'¹⁶² Lauterpacht endeavoured to re-construct the international legal system from a human-orientated perspective. This human-orientated perspective of international law expresses itself as the proposal for the international protection of human rights.

When he delivered his address *The Law of Nations, the Law of Nature and the Rights of Man*¹⁶³ at the meeting of the Grotius Society on 7 December 1942, his approach in proposing the international protection of human rights was to place the idea of human rights in the tradition of international law. Insofar as the majority of English international lawyers at that time felt unfamiliar with human rights in international law, Lauterpacht had to persuade his colleagues that the problem of human rights was not a new question, but a traditional political one.¹⁶⁴ Indeed, he discussed the idea of human rights from the Athena year. It should be noted, however, that Lauterpacht interpreted political history with a clear intention of justifying the protection of human rights in the historical context. Even Socrates was discussed from the viewpoint of the social contract theory,

¹⁶⁰ *Ibid.*/301.

¹⁶¹ Oppenheim-Lauterpacht/1935/viii.

¹⁶² Oppenheim-Lauterpacht/1955/20.

¹⁶³ Lauterpacht/1944a.

¹⁶⁴ See Brian/Simpson/2003/68.

although there had clearly been no such a theory when Socrates lived:

‘When, in the *Crito*, Socrates, ... gives reason for his duty of obedience to the unjust sentence of the State, he bases that obligation not on the absolute claim of the State to obedience, but on an implicit contract – a contract which, in turn, presupposes the duty of the State to allow freedom of speech and the right to emigrate.’¹⁶⁵

Such a teleological interpretation of history is also seen in his interpretation of Grotius. Lauterpacht, for example, insisted that fundamental human rights belong to the Grotian Tradition.¹⁶⁶ However, such an interpretation is so purposive that it can be argued that it is far from the real intention of Grotius, since Grotius could be interpreted as a supporter for state sovereignty. Vincent said as follows:

‘There are then difficulties for those who wish to uphold Grotius as a father of human rights as well as of international law, especially because of his attitude to the right of resistance. Acknowledging this, Hersch Lauterpacht fell back not on the hackneyed explanation based on Grotius’ being a pensioner of the King of France ..., nor on the number of exceptions he entertained to the rule of non-resistance, but on the centrality of the individual human being in Grotius’ system. Lauterpacht thus connected Grotius through Locke to the liberal revolutions of the eighteenth century. But this nevertheless begs the question of the weight which we are to give to the individual as against the state, and it is the ambiguity on this issue in Grotius’ work which allows him to be called up in support of both the positivist doctrine of state sovereignty and the naturalist notion of the rights of individuals.’¹⁶⁷

The teleological interpretation of history shows Lauterpacht intending to re-write political

¹⁶⁵ *Ibid.*/3-4.

¹⁶⁶ Lauterpacht/1946b/CP-II/354-358.

¹⁶⁷ Vincent/1990/246.

history from the viewpoint of the legitimacy of sovereign states. Indeed, at the beginning of his address in Grotius Society, Lauterpacht claimed the idea that 'the State, however widely its object may be constructed, has no justification and no valid claim to obedience except as an instrument for securing the welfare of the individual human being.'¹⁶⁸ From such a viewpoint, it is the natural law theory and international law which legitimise state sovereignty. He said that '[t]he rights of man cannot, in the long run, be effectively secured except by the twin operation of the law of nature and the law of nations – both conceived as a power superior to the supreme power of the State.'¹⁶⁹

However, Lauterpacht also noticed the limitation of natural law theory. Although one of the functions of natural law is to legitimise law and states, it was also clear to him that natural law itself cannot construct effective mechanisms for the protection of human rights.¹⁷⁰ In this sense, his proposal for the International Bill of Rights of Man purported to render the idea of human rights more effective. He thus proposed the International Bill of Rights not as political declaration, but as legal document. The main reason lies in his belief that respect for human rights is ineffective unless it becomes legally binding. On the other hand, he accepted the broad discretion of sovereign states to protect human rights, because states should primarily be responsible for the protection of human rights. The same approach is found in his theory that the Charter of the United Nations has a legal obligation to protect human rights under Articles 55 and 56. Lauterpacht interpreted these articles as leaving it to the discretion of member states as to how to promote the protection of human rights.¹⁷¹ Therefore, he intentionally left the substance of human rights in general in his International Bill. By so doing, he postponed dealing with the problem of the substance of human rights.¹⁷²

From the viewpoint of effective protection, Lauterpacht proposed administrative supervision as the compliance procedure of human rights. Article 21 of his Bill stipulates the establishment of the Human Rights Council, which should be 'entrusted with the international supervision and

¹⁶⁸ Lauterpacht/1944a/2.

¹⁶⁹ *Ibid.*/11.

¹⁷⁰ *Ibid.*/31.

¹⁷¹ Lauterpacht/1947-I/13-17.

¹⁷² See Brian/Simpson/2001/355.

implementation of the Bill of Rights.¹⁷³ It is because questions on human rights are so politically sensitive that the judicial process cannot suitably propose a compromise between petitioners and the accused states, especially with regard to social and economic rights.¹⁷⁴ It does not mean, of course, that he denied the relevance of international courts in dealing with human rights. He proposed the power of the Human Rights Council to ask advisory opinions of the ICJ and, furthermore, the establishment of the International Court of Human Rights under Article 24 of the International Bill.¹⁷⁵

It is true that the procedural aspects of human rights are essential for the international protection of human rights. However, without a consensus regarding the value of human rights, such a process itself becomes the forum for international politics. In other words, the limitation of Lauterpacht's project is that human rights became the topics of power politics shown by the controversy between the United States and the Soviet Union until the Helsinki Final Act of 1975. This problem existed not only in the Cold War era, but still exists even in the post-Cold War period. It is clearly the problem which typifies Kantian republicanism. The effective protection of human rights should be based on a multilateral treaty régime such as the European Convention of Human Rights. However, these member states had to reach a consensus as to what human rights were before establishing the treaty régime. It was politically appropriate, therefore, for member states to make the Universal Declaration not a legal document but a political one. In this sense, Lauterpacht's dissatisfaction with the Declaration is due to the fact that he was too idealistic to admit the sensitiveness of the issue itself. In other words, contrary to his expectation, the universality of the value of human rights was not self-evident. Be that as it may, Lauterpacht sustained this point by adopting a progressive interpretation of political history. The problem concerning respect for human rights when no political consensus about human rights had been reached became the more sensitive political question touching upon the domestic régime of

¹⁷³ Lauterpacht/ILJIR/374.

¹⁷⁴ *Ibid.*/376-377.

¹⁷⁵ *Ibid.*/381-387.

member states. This point is clearly shown by the *Interpretation of Peace Treaties* case, the crux of which is to show to what extent the United Nations could impose the ideal of Kantian republicanism on non-republican states.¹⁷⁶

It should be noted, furthermore, that Lauterpacht's project, as seen in the International Bill, came to fruition as the European Convention on Human Rights.¹⁷⁷ There is no need to mention that the Council of Europe system provides the most, and maybe the only, successful régime of protection of human rights anywhere in the world. Lauterpacht hoped that such a regional system would develop to the world-wide system and finally the World Federation. He said,

'In so far as regional experience is a stage in the evolution towards the more complex integration of international society, such recognition and protection of human rights may in itself become a significant contributory factor in the consummation of the organised *civitas maxima*, with the individual human being in the very centre of the constitution of the world.'¹⁷⁸

However, we have not had the world-wide effective protection system of human rights which Lauterpacht hoped for, though the United Nations has successfully produced many human rights treaty systems from the viewpoint of functionalism. The reality of the world seems to indicate that his ideal in fact is European rather than universal.¹⁷⁹ In this sense, the problem of his project on human rights may be to claim the universality of his ideal without knowing its Euro-character.

¹⁷⁶ ICJReps/1950/65; ICJReps/1950/221.

¹⁷⁷ Brian/Simpson/2001/481.

¹⁷⁸ Lauterpacht/ILHR/462.

¹⁷⁹ See Lytton/1946.

5. THE CODIFICATION PROCESS OF INTERNATIONAL LAW FROM THE VIEWPOINT OF THE RULE OF LAW

This chapter discusses how Lauterpacht contributed to the codification and progressive development of international law. Before commenting upon his works, it should be noted that this chapter essentially explicates his work with regard to the International Law Commission. Lauterpacht, of course, did not disregard the importance of the academic codification of international law, such as that practised by the International Law Association and the Institute of International Law. Indeed, he enthusiastically joined the academic associations of international codification, playing a leading role as rapporteur at the session of human rights at the Prague¹ and the Brussels Conferences² of the ILA. At the Institute, he also submitted the report as rapporteur on the interpretation of treaties,³ and the report on the revision of the law of war with Coudert and François.⁴ In addition to these reports, Lauterpacht wrote his observations on some reports of other members of the Institute.⁵ Nevertheless, he emphasised the inter-governmental codification work more than the private codification:

‘[T]he codification of international law can have but little justification and but slender chances of success, in terms of eventual acceptance by States, if it is confined to purely private effort, however scholarly and throughout. Mere academic restatement of the law, however competent and impartial, cannot hope to answer the real need.’⁶

This chapter, therefore, discusses his work with regard to the Commission due to the importance of

¹ Lauterpacht/1947d.

² Lauterpacht/1948a/and/1948b.

³ Lauterpacht/1950a/1952d/and/1954c.

⁴ Lauterpacht/1954d.

⁵ Lauterpacht/1950d/1952c/1954e/and/1954f.

⁶ Lauterpacht/1955/CP-II/288.

the codification and progressive development of international law.

5.1. THE GENERAL PURPOSE OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

The codification process of international law is essential to the project of the legal school of international lawyers,⁷ because judges are required to use discretionary power if international law is uncertain. However, judicial discretion tends to be accused of political choice rather than objective interpretation of law. Consequently, the effort to explicate customary law is required as a law-making process. The codification process, thus, is recognised not only as desirable but also as indispensable to international relations from the viewpoint of the legal school, which pursues the Rule of Law in international relations. In this sense, it is no coincidence that the Advisory Committee of Jurists, which prepared the PCIJ Statute, adopted a resolution⁸ calling for ‘the methodical continuation of the work commenced by the first Hague Conferences for the advancement of international law.’⁹

Lauterpacht paid much attention to the codification of customary law even in the inter-war era. In his general course at the *Hague Academy*, for example, he said that ‘[c]odification of international law, conceived as the laying down of relatively detailed rules and principles in various branches of international law in general conventions binding upon a considerable number of States on the analogy of codes within States, is certainly useful.’¹⁰ It is, however, after the Second World War that we see his principal contribution to the codification and progressive development of international law. The Codification Division of the Office of Legal Affairs of the United Nations asked Lauterpacht to research the question as to how the International Law Commission should proceed to codify international law. In 1948, Lauterpacht completed his *Survey of International*

⁷ Dhokalia/1970/3-143; AJIL/Supplement/vol.41/1947/29.

⁸ Procès-Verbaux/747-748.

⁹ *Ibid.*/754.

Law in Relation to the Work of the International Commission, approved by the General Assembly in February 1949. This report formed the basis of the discussion at the first session of the ILC on its codification.

The essential proposition of *Survey* is that 'there are only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification.'¹¹ Consequently, Lauterpacht admitted the legislative effort of the ILC as its proper task. Indeed, he warned that '[a]n International Law Commission which limits its function to that of a research institute for the collection of material and for registering either existing agreement or, perhaps, more frequently, the absence of agreement, would not be fulfilling the purpose assigned to it by its Statute.'¹² Moreover he made the following statement:

'If ... the absence of agreement and the existence of disagreement is [*sic*] a recommendation for codification, then the latter would approach a legislative process for the success of which there is no warrant in international society as at present constituted. For the more urgent the regulation of a subject appears to be having regard to the continued adherence of States to divergent practices, the more difficult it may be to remove effectively such divergencies by means of codification expressed in binding conventions and not falling within the purview of "development of international law".'¹³

Thus, he saw the work of the ILC as 'bringing about agreement where so far there exists only conflict of views and practice.'¹⁴

From this viewpoint of progressivism, Lauterpacht underlined the need for codification more than the ripeness of customary law, because the ripeness of customary law does not mean that it is

¹⁰ Lauterpacht/1937-IV/CP-I/258.

¹¹ Lauterpacht/R6/1949/CP-I/455.

¹² *Ibid.*/459.

¹³ *Ibid.*/462-463.

¹⁴ Lauterpacht/1955/CP-II/278.

easy for the Commission to codify the topic. He said that ‘the affirmative criterion of “ripeness” as eventually acted upon seemed to have been not the ease with which the subject could be codified, but the difficulty, as expressed in existing divergences and in the need for regulation, of regulating it by way of codification.’¹⁵ Therefore, Lauterpacht selected the topics not from the viewpoint of the ripeness of customary law, but from the viewpoint of what he thought necessary for the Rule of Law. It was natural for him to consider that the ultimate object of the ILC is ‘the eventual codification of the entirety of international law.’¹⁶ Lauterpacht chose general topics of international law such as the subject of international law, the source of international law, and the relation of international and municipal law, which are also seen in his articles. The selection of general problems of international law that he had dealt with before as topics for the work of the ILC, implies that he extended his academic interest to the codification process of customary law.

However, Lauterpacht’s scheme of the codification of international law was too academic and idealistic to answer the practical needs of codification. It is true that the ILC adopted fifteen topics among his twenty-two topics at its first session, and produced some results, including model rules or draft articles, in twelve topics.¹⁷ It is also true, nevertheless, that some topics which Lauterpacht considered essential were not selected by the Commission. The topics which the Commission rejected are as follows: (1) the subject of international law,¹⁸ (2) sources of international law,¹⁹ (3) the obligation of international law in relation to law of the state,²⁰ (4) recognition of acts of foreign states,²¹ (5) obligations of territorial jurisdiction,²² (6) the territorial domain of states,²³ and (7)

¹⁵ Lauterpacht/R6/1949/CP-I/460.

¹⁶ *Ibid.*/463.

¹⁷ Anderson-Boyle-Lowe-Wickermasinghe/1998/Appendix3/Table1/151-156.

¹⁸ Members of the ILC who were against this topic were as follows: Spiropoulos, Brierly, Sandstrom, François, and Hus. Those supporting the topic were: Scelle, Córdova and Alfaro. YBILC/1949/35-36.

¹⁹ The members who were against this topic were: Brierly and Spiropoulos. Alfaro expressed his approval of this topic. *Ibid.*/36.

²⁰ The members who were against this topic were: Hudson, Spiropoulos, Sandstrom and Brierly. Alfaro approved of this topic. *Ibid.*/36-37.

²¹ The members who were against this topic were: Spiropoulos and Alfaro. Sandstrom approved of this topic. *Ibid.*/40.

²² The members who disapproved of this topic were: Brierly, Spiropoulos, Sandstrom and Alfaro.

extradition.²⁴ In addition to them, there are three topics selected but not taken up by the ILC: (a) recognition of states, (b) jurisdiction with regard to crimes committed outside national territory, (c) the right of asylum. Therefore, it is appropriate for Sinclair to point out that the Commission favoured an empirical approach rather than a selection based upon Lauterpacht's general plan of codification.²⁵ In this sense, Lauterpacht's project concerning the codification process was not so successful from the very early period of the ILC. This situation has not changed at all, even in the 1990s. The British Study Group, which reviewed the work of the ILC, declares that 'its [*Survey*]'s ambitious project to codify the entire corpus of international law was no longer appropriate.'²⁶

Summing up, Lauterpacht seems to have overestimated the potential of international law scholars in the inter-governmental codification process of international law. There would have been no problem if his project had been applied to the private codification of international law such as the Harvard Research of International Law, the International Law Association or the Institute of International Law. Lawyers essentially concentrate on pure 'scientific research' in the private codification organisation without considering whether or not states accept the restatement of customary law. However, such an academic method which does not take the acceptability of states into consideration is not useful in the inter-governmental codification of international law, because as Brierly pointed out, the codification of international law was necessarily the law creation process 'requiring first and foremost an agreement between the nations as to the substance of the rules that the code is to contain.' Brierly continued as follows:

'We are tempted to think of codification as a cheap method of establishing international order, as something that lawyers could easily do for the world if only they could be brought to see how badly it needs doing. But that is a complete delusion. The responsibility cannot be shifted in this light hearted way on the shoulders of

Ibid./41.

²³ The members who were against this topic were: Alfaro and Spiropoulos. *Ibid.*/42.

²⁴ The members who disapproved of this topic were: François and Brierly. *Ibid.*/47.

²⁵ Sinclair/1987/21.

²⁶ Anderson-Boyle-Lowe-Wickermasinghe/1998/xvii/and/7-8/para.10.

the lawyers. Lawyers can help; they can do the donkey work, but the responsibility belongs to all of us, and of course particularly to the leaders of our nations. For international law can only be codified if and so far as sovereign nations will agree among themselves on what the lawyers are to put into the code, and we have only too much evidence of the difficulty of getting agreements of that kind.²⁷

Although he avoided mentioning Brierly's view,²⁸ Lauterpacht seems to have been opposed to it, because he emphasised the role of lawyers in the codification process of international law.

It was well known that Cecil Hurst also expressed the same concern as Brierly. Inter-governmental codification necessarily becomes legislative, because 'the moment the government delegates assemble and decide to conclude a Convention to render the rules so defined binding on States, their efforts are directed to laying down the law as it ought to be and not as it is.'²⁹ Consequently, the inter-governmental codification seemed to Hurst to be fated to fail, because '[t]he needs of the various States were too often in opposition for it to be possible to find a satisfactory compromise.'³⁰ It is clear that, as McNair, who also preferred the restatement of customary law to conventions, pointed out, the kind of codification which Hurst supported was 'an unofficial Restatement'³¹ as '[t]he formulation and systematization of the existing rules of international law, with liberty to make recommendations (clearly stated as such) for the removal of uncertainties and the filling up of gaps.'³²

Charles de Visscher, whose textbook dismayed Lauterpacht,³³ also held the opinion that the inter-governmental codification of international law was 'to replace divergent practices with some

²⁷ Brierly/1958/340.

²⁸ Lauterpacht/1955-1956/CP-II/443.

²⁹ Hurst/1950/143.

³⁰ *Ibid.*/146.

³¹ McNair/1974/272.

³² *Ibid.*/265-266.

³³ 'Lauterpacht would sometimes summon me for an afternoon walk in the country round Cambridge. ... At times he would want to talk about something that had upset him. One such occasion followed the publication of Charles de Visscher's *Théories et réalités en droit international public* in 1953. ... It seems to Lauterpacht to be a mischievous and subversive work ...' Jennings/1997/302.

unity in the interpretation and application of the law.' It is not the task accomplished by lawyers who restate the existing rules of law with formal technique. It is essentially 'a political task which governments take up and support only when driven to it by practical and tangible interests.' Thus, the codification would necessarily fail if it were done from the viewpoint of academic interest without the conviction of governments that 'the task to be done was one of immediate interest.' The danger of this kind of codification of international law was clear for de Visscher:

'The arguments that these provoke give currency among the delegates to the fatal notion that the obligatory force of the rules under discussion depends in the last analysis on nothing more than the decision of the governments which they represent and the instructions received from them. Thus there is danger of weakling and unsettling the law which codification was to clarify and consolidate. The risk is increased by the search for compromises that will win unanimity and that expose progressive States to the danger of aligning their positions with those of more conservative or less advanced States.'³⁴

Lauterpacht tried to refute those views opposed to the inter-governmental codification.³⁵ Indeed, he overestimated the authority of the Commission when he said,

'Sir Cecil had suggested the setting up of a body of such high juridical standing as would confer on it decisive influence and enable it to do authoritative work, so that in due course the international community would not need to depend entirely on rules framed in conventional form. That was an important aspect, which must always be kept in mind, and was the reason why he deprecated the General Assembly's tendency to treat the International Law Commission as just another body of experts. The Commission, which indeed had been created by the General Assembly, was more than that. It was a group of specialists of recognized standing whose decisions had weight in virtue of the personal authority of members.'³⁶

³⁴ De/Visscher/1968/151.

³⁵ Lauterpacht/1955/CP-II/288-292.

³⁶ YBILC/1953/vol.1/121-122.

However, the failure of the Draft Articles on Arbitral Procedure proved that the concern of the lawyers whom Lauterpacht was opposed to was correct. It was too optimistic to think that the Commission could persuade governments to accept draft articles which they considered inappropriate from the point of view of their national interest. This optimism of Lauterpacht was one of the reasons Julius Stone so severely criticised him with regard to his idea of the inter-governmental codification of international law.

‘When he [Lauterpacht] insists that governments consist of human beings who can be influenced by the merits of codifiers’ proposals, he is only able to make his position sound reasonable by directing a lecture (if not a sermon) at foreign offices concerning their need to mend their ways towards drafts submitted to them for comment and approval. It may indeed yield much moral satisfaction to draftsmen to assure a foreign office that to change its attitude will in no way impair the dignity, sovereignty, or vital interests of its State. Yet the question whether foreign offices will change their attitude in such circumstances remains separate.’³⁷

Although sending a letter to Stone that Lauterpacht thought that he and Stone ‘did not disagree fundamentally, both favouring a widely conceived attempt at private codification, whether or not this was an end in itself,’³⁸ Lauterpacht seems not to have understood Stone’s view with regard to the codification of international law, because the crux of Stone’s argument was to reject Lauterpacht’s theory of the inter-governmental codification of international law completely. What Stone condemned Lauterpacht for was his optimistic underestimation of the unwillingness of states to accept the draft articles prepared by the Commission from the viewpoint of legal idealism. Indeed, Stone’s criticism seems correct if it is concerned with Lauterpacht’s commitment to the work of the ILC, in particular the 1953 Draft Articles on Arbitral Procedure,³⁹ and in the Draft

³⁷ J/Stone/1957/42.

³⁸ Star/1992/149.

³⁹ Rosenne/1960/151.

Conventions on the Future Statelessness.⁴⁰

5.2. LAUTERPACHT'S QUEST FOR THE RULE OF LAW AT THE INTERNATIONAL LAW COMMISSION

Although his general scheme of codification did not succeed so well even at the beginning of the Commission's work, Lauterpacht still had a chance to realise his ideal of the Rule of Law with regard to the codification process of international customary law. He joined the ILC from 1952 to 1954 after Brierly resigned because of ill health. During his period of membership, the ILC produced the three main results of its work: (1) the Draft on Arbitral Procedure in 1953, (2) the Final Draft on the Régime of the High Seas in 1953, namely the eight draft articles on the continental shelf, the three articles on fisheries, and the one article on the contiguous zone, and (3) the two Draft Conventions on Statelessness in 1954. Lauterpacht clearly belonged to the legal school of international lawyers in the Commission, which was opposed to the diplomatic school represented by Kozhevnikov. In the discussion on the two draft conventions on statelessness, for example, Lauterpacht said that 'the Commission regarded it as of the greatest importance, and indeed as axiomatic, that the convention, like all conventions concluded under United Nations auspices, should contain a provision for the settlement by arbitration of any disputes arising out of it.'⁴¹ Lauterpacht also expressed his crusading spirit not only in discussions at the Commission but also in the 1953 Report of the ILC to the General Assembly prepared by himself as General Rapporteur. Kozhevnikov criticised Lauterpacht for obtruding 'his own point of view – which had not been discussed by the Commission' in the 1953 Commission's Report.⁴² Furthermore, Lauterpacht produced his two reports on the Law of Treaties, though not discussed at the ILC at that time. This section will examine the 1953 Final Draft on Arbitral Procedure, the Arbitral Clause

⁴⁰ Thirlway/1972/24.

⁴¹ YBILC/1953/vol.1/228/para.97.

⁴² *Ibid.*/383/para.76.

of the 1953 Final Draft Articles on Continental Shelf, the 1954 Draft Conventions on Statelessness, and his two reports on the law of treaties.

5.2.1. THE DRAFT ON ARBITRAL PROCEDURE

Arbitral Procedure is one of the topics proposed in the Lauterpacht's *Survey*⁴³ and chosen by the ILC in the first session. The ILC elected Georges Scelle as Special Rapporteur on this topic, who submitted to the ILC the First Report in 1950, the Second Report in 1951 and the Supplementary Note in 1952. It is therefore, Scelle who was essentially responsible for the Draft as a whole. However, Lauterpacht also contributed to the 1952 Drafts on Arbitral Procedure as a member of the Standing Drafting Committee, whose other members were Yepes and Hudson.⁴⁴ It should be noted, furthermore, that Lauterpacht was responsible for the general comment of the 1953 Draft as General Rapporteur.

The main characteristic of the 1952 Draft is the concept of judicial arbitration. In particular, Lauterpacht was responsible for Paragraph 24 of the 1952 Commission Report to the General Assembly, which describes the ILC adopting the concept of 'judicial arbitration' rather than 'diplomatic arbitration.' This paragraph reads as follows:

'Two currents of opinion were represented in the Commission. The first followed the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the

⁴³ Lauterpacht/R6/1949/CP-I/514-515.

⁴⁴ However, Hudson was opposed to the adoption of the 1952 Draft as a whole. YBILC/1952/vol.2/58/n. 3.

parties threatens to render nugatory the original undertaking.⁴⁵

However, compared to diplomatic arbitration, what characteristics does judicial arbitration have? There are two aspect of judicial arbitration: the intervention of the International Court of Justice to the arbitration process in the pre and post adjudicative phase, and the judicialisation of arbitration procedure.

The first feature of judicial arbitration is that arbitration is connected to the International Court of Justice in any deadlock between parties. However, one of the problems of judicial arbitration is that the role of the ICJ is greatly increased, possibly in a completely revolutionary manner, in both the pre-adjudicative and the post-adjudicative phases. With regard to the pre-adjudicative phase, Articles 2 and 3 of the 1952 Draft of Arbitral Procedure allow the Court itself or a member of the Court to solve the deadlock of arbitration. Draft Article 2 allows parties to submit the unilateral application to the Court about the problem of the existence of the dispute and the extent of obligation. Furthermore, Paragraph 2 admits the binding force of the provisional measure indicated by the Court with regard to the questions, though the Court had not solved the question whether or not the provisional measures have binding force until recently.⁴⁶ At the 156th meeting, Lauterpacht suggested the incorporation of the text that '[e]ach party is under a duty to take the measures indicated to it' into Paragraph 2. Although Lauterpacht's suggestion was rejected, the Commission and Lauterpacht agreed to Scelle's suggestion to use the term 'prescribe,' the French term *prescrire* indicating the obligatory nature of the provisional measure.⁴⁷ Consequently, Article 2, Paragraph 2, of the 1952 Draft stipulated that '[i]n its judgment on the question, the Court may *prescribe* the

⁴⁵YBILC/1952/vol.2/59-60.

⁴⁶In the *LaGrand* case, the Court for the first time answered the question. 'Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. ... [T]he Court is now called upon to rule expressly on this question.' (para.98). The *LaGrand* case, Judgment of 27 June 2001, paras.98-116. http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm
Also see Dissenting Opinion of Judge Oda, paras.28-35.
http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_dissenting_oda_20010627.htm

provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal⁴⁸ with no comment on the binding force of the provisional measures indicated by the Court, although the comment of Article 17, which stipulates the power of the arbitral tribunal to *prescribe* the provisional measures, clearly admits that '[t]he word "prescribe" implies an obligation on the parties to take the measures prescribed.'⁴⁹ Draft Article 3, Paragraph 4, admits the power of the President of the ICJ, the Vice-President in the case of the President having the nationality of the parties to dispute, or the senior Judge in the case of both the President and the Vice-President being the nationals of the parties, to appoint members of the arbitral tribunal, when parties fail to choose the members or to entrust a third state to make the necessary appointments.

The Court is also expected to play a definitive role with regard to the post-adjudicative phase. Article 28 of the 1952 Draft describes the interpretation of the arbitral award. Its second paragraph stipulates the right of parties to submit the unilateral application to the Court for the interpretation of the award, if the tribunal which renders the award becomes ineffective. Draft Article 29 also permits one of the parties to submit the application of the revision of the award to the Court, when it is impossible for the tribunal to deal with the claim to revise the award. Furthermore, the Court has the compulsory jurisdiction concerning the annulment of award under Draft Article 31. These provisions are operative if the tribunal which has rendered the award would be unable to function for several reasons. However, even if this is the case, it is undoubtedly the progressive development of international law to provide the parties with the compulsory jurisdiction of the Court concerning the problems of international arbitration.

The second aspect of judicial arbitration is the ILC adoption of the judicial procedure similar to the Statute of the ICJ. Draft Article 12, for example, refers to Article 38, Paragraph 1, of the Statute on the legal rules applicable to arbitration. Its Paragraph 2, furthermore, stipulates the

⁴⁷ YBILC/1952/vol.1/193.

⁴⁸ Emphasis added.

⁴⁹ YBILC/1952/vol.2/64.

obligation imposed on tribunals not to declare *non-liquet*. Even the ILC admits that 'this principle would mark a great advance in the development of judicial arbitration.'⁵⁰ This kind of judicial procedure is also found in other Draft Articles. Draft Article 16 describes the admissibility of counterclaims without any conditions. Draft Article 17 allows the tribunal to *prescribe* the binding provisional measures. Even the non-appearance of one party before the tribunal was written under Article 20, a phenomenon which seems to undermine the political foundation of arbitration.

It should be remembered, however, that the concept of judicial arbitration caused divergence among Commission members. Some, namely Kozhevnikov and Zourek, were strongly opposed to judicial arbitration. Zourek, for example, criticised the Draft on Arbitral Procedure for being based on the new concept of judicial arbitration, though he thought the so-called diplomatic arbitration had been established. He described the three characteristics of diplomatic arbitration as follows: (1) the voluntary nature of arbitration, (2) the choice of arbitrators by the parties and (3) the determination by the parties of the rules of law to be applied. However, Lauterpacht's response was that the Draft on Arbitral Procedure was based on the three elements which Zourek had pointed out, and that in this sense, the three elements were characteristics of the concept of judicial arbitration. He then continued that '[t]he only innovation contained in the draft was that, in cases of deadlock between the parties, it provided machinery for rendering the existing obligation to arbitrate as efficacious as possible.'⁵¹ It is true that the 1952 Draft of Arbitral Procedure allows the parties to decide the applicable law, to appoint the arbitrators and to adopt the procedure freely. In this sense, Zourek's criticism was pointless. However, the crux of the problem of the 1952 Draft was the 'machinery for rendering the existing obligation to arbitrate as efficacious as possible,' which Lauterpacht pointed out. It soon became clear that such machinery was not realistic in the sense that the majority of states did not welcome the compulsory jurisdiction of the Court and the arbitral procedure which was more judicially developed than the ICJ Statute.

Indeed, the ILC faced strong opposition from the governments which replied to the 1952

⁵⁰ *Ibid.*

⁵¹ YBILC/1952/vol.1/239.

Draft on Arbitral Procedure. Among eleven governments which returned comments on the 1952 Draft, only the British government expressly welcomed the judicialisation of arbitration.⁵² Other governments were more or less reluctant to accept the concept of judicial arbitration. The Belgian government, for example, severely criticised the ILC for the judicialisation of arbitration as follows: 'In the Belgian Government's opinion the Commission appears to have gone outside its task of drawing up rules on arbitral procedure, since the proposed draft deals indiscriminately with concepts of arbitration and international justice.' Consequently, the Belgian government warned that '[t]he second conception [the concept of judicial arbitration] seems hardly acceptable if it is hoped to secure the support of the majority of States for the draft on arbitral procedure.'⁵³ The same concern was also expressed by the Netherlands government, which thought that 'arbitration should retain definite characteristics of its own by which to distinguish itself from judicial settlement.' It furthermore continued that '[t]his Government doubt whether a great number of States will not feel inclined to reject the draft because in their view it might restrict too much the lenient rules of arbitral procedure.'⁵⁴ The United States also gave notification that 'there may be a wide reluctance on the part of States at this time to enter into a convention along the lines of the one drafted by the International Law Commission, intended to cover all types of case,' although it did not forget to pay lip service to the Commission, indicating that the 1952 Draft has 'positive value as a statement of desired goals in the field of arbitration.'⁵⁵

Nonetheless, the Commission disregarded the concerns of those governments which replied to the 1952 Draft at the fifth session in 1953. The majority of Commission members preferred the maintenance of the 1952 Draft with some technical changes to the fundamental amendment of the Draft. Lauterpacht also played a leading role in maintaining the 1952 Draft as a whole. In the discussion with regard to Draft Article 2, for example, he stated that 'the very purpose of the article – and, indeed, of the whole draft – was to give effect to the will of the parties and to ensure that,

⁵² YBILC/1953/vol.2/237-238.

⁵³ *Ibid.*/232.

⁵⁴ *Ibid.*/235.

once the parties had agreed to arbitrate, neither would be able to frustrate the process.' 'That was,' he continued, 'the central aspect of the draft now before the Commission.'⁵⁶ Consequently, after amending some 1952 Draft Articles technically, without changing the fundamental feature of judicial arbitration, the Commission submitted the 1953 Draft as Final Draft to the General Assembly with the recommendation of 'the conclusion of a convention' under Article 23, paragraph 1, (c) of the ILC Statute.

The Commission was soon forced to realise, however, that the 1953 Draft was not acceptable to the member states. The majority of the Sixth Committee disapproved of the 1953 Draft.⁵⁷ The discussion on the Sixth Committee shows the majority of member states finding it difficult to accept the compulsory jurisdiction of the Court over difficulties of arbitration. Although some states accused the 1953 Draft of destroying the flexibility of arbitration and the principle of the autonomy of states, such an accusation would be pointless unless they were not linked to the problem of the compulsory jurisdiction of the Court, because the undertaking of arbitration is the result of the free will of states, and the 1953 Draft would be by nature residual, so that parties could agree to opt out of the Draft in *compromis* or arbitration clause, whenever they wish. In this sense, the 1953 Draft guaranteed the flexibility of arbitration in the sense that the parties could choose the composition of a tribunal, arbitrators, applicable law and arbitral procedure itself. As Lauterpacht pointed out, the Draft clearly admits the autonomy of parties on the question of flexibility of arbitration.⁵⁸ The main reason, therefore, why the member states rejected the 1953 Draft is not because of the inflexibility of the Draft, but because dissenting states did not want arbitration compulsorily imposed on them by the Court in a situation in which they saw no hope in arbitration. In other words, the majority of the Sixth Committee preferred to retain the right to waive arbitration unless they positively wished to use it. Consequently the General Assembly passed Resolution 989 (X) on 14 December 1955,

⁵⁵ *Ibid.*/238.

⁵⁶ YBILC/1953/vol.1/11/para.97.

⁵⁷ See the 461st-464th and the 466th-472nd sessions in the tenth session in the General Assembly. Sixth-Committee/1955/83-103/and/109-144.

⁵⁸ Lauterpacht/1955/CP-II/286-287.

which '[i]nvited the Commission to consider the [comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly.' It is not necessary, here, to examine the subsequent discussion on the ILC on the Draft on Arbitral Procedure after 1955, because it was after Lauterpacht resigned the ILC to become the Judge of the International Court of Justice that the ILC started to reconsider the Draft on Arbitral Procedure in 1957. It is sufficient to note that the Commission gave up hope of the Draft becoming a convention insofar as the Commission maintained the fundamental structure of the 1953 Draft, including the concept of judicial arbitration.⁵⁹ The ILC's only hope at this stage was that the General Assembly would adopt the 1958 Model Rules the resolution, which might be followed by states subsequently putting it into practice.⁶⁰ However, the General Assembly did not adopt the 1958 Model Rules by resolution, simply taking note of the Report and bringing the 1958 Model Rules to the attention of the member states.⁶¹ Despite the Commission's hope, furthermore, it should be noted that 'the Model Rules have not yet been adopted as such as the basis for an international arbitration.'⁶²

What was the real problem for the majority in the Sixth Committee with regard to the 1953 Draft? It is often said that one of the problems brought to light by the 1953 Draft was that the majority of the ILC, including Lauterpacht, were too idealistic to be practical. This point is indicated by Amado, who was an ILC member but also joined the Sixth Committee as the Brazilian representative. He said that the members 'had, in a spirit of academic research, built up an entire judicial system of the most rigid kind to replace an institution which by its flexibility and optional character was adapted to the needs of a still imperfect legal order.' 'In that way,' he continued, 'they had prepared a draft which was far removed from reality and from the practice of States, and which in the, fortunately very unlikely, event that it was adopted, would involve the

⁵⁹ YBILC/1958/vol.2/81/para.14.

⁶⁰ *Ibid.*/82/para.17.

⁶¹ G.A./Res./1262/(XIII).

⁶² Watts/1999/vol.3/1775.

abandonment of an extremely valuable method of settling disputes.⁶³

However, the crux of the episode of the 1953 Final Draft lies in the fact of a conflict of different perspectives between the majority of the ILC and the majority of the Sixth Committee with regard to the role of adjudication in international relations. The majority of the ILC considered the role of adjudication from a legalistic viewpoint. From such a viewpoint of law, it is appropriate to think that legal obligation should be as effective as possible; law cannot allow one party to breach its legal obligation unless the breach itself is legally justified.⁶⁴ Consequently, the majority of the ILC were of the belief that the malfunction of adjudication is of necessity undesirable once the parties have the undertaking of arbitration. On the other hand, the majority of the Sixth Committee considered adjudication in the context of politics, namely the maximisation of national interest to as great a degree as possible. From this political point of view, the maximum effectiveness of legal obligation is undesirable if the legal obligation is contrary to national interests considered important to governments. In order to avoid any situation which would jeopardise national interest, member states had hoped to have a free hand to decide whether or not they would use arbitration. From this standpoint, the malfunction of arbitration would be desirable to a government concerned that arbitration might damage its interests.

In brief, the majority of the ILC, including Lauterpacht, considered the role of arbitration legalistically, although the Sixth Committee essentially viewed it politically. It follows that what the majority of the Sixth Committee could not accept with regard to the 1953 Draft was ILC's legalistic policy of maximising the role of arbitration with the compulsory jurisdiction of the ICJ, which consequently deprives states of the political choice intentionally to make the undertaking of arbitration ineffective. In this sense, the member states' rejection of the 1953 Final Draft means that they did not accept the image of the International Rule of Law proposed by the ILC.

The policy of the Commission is clearly legalistic in terms of the application of the principle

⁶³ Sixth-Committee/1955/95/para.33.

⁶⁴ See, for example, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 20-25. Crawford/2002/163-186.

of effectiveness to the undertaking of arbitration. The idea behind the policy of the ILC is the belief that law should control politics. However, the reality is that international law is one of many tools of international politics. Although this point does not deny that international law enjoys relative autonomy in the sphere of politics, it is also undeniable that the sociological precondition of international law is the political willingness of states. Neither is it possible for international arbitration to function without states agreeing politically that a matter should be settled by the application of international law. It is this undesirable but undeniable aspect of international arbitration that the majority of the ILC disregarded. In this sense, the episode of the 1953 Draft on Arbitral Procedure symbolises the failure of the legal school of international lawyers with regard to the codification of international law.

5.2.2. THE 1953 DRAFT ARTICLE 8 ON THE CONTINENTAL SHELF

Since the Truman Proclamations of 1945,⁶⁵ the law of the sea has been in a state of flux. It was a matter of urgency to recover the balance between the extension of state jurisdiction over the high seas and the freedom of the high seas. It was only natural that Lauterpacht should propose this topic in *Survey*,⁶⁶ and that the Commission gave priority to it at its first session. The Commission appointed François as the Special Rapporteur for the régime of the high seas in 1949, and for the régime of territorial waters in 1951. The Commission submitted to the General Assembly the provisional draft articles on the régime of the high seas on the basis of François's second report in 1951. After receiving comments from the member states, the Commission prepared the Final Draft Articles on the régime of the high seas at the fifth session in 1953. Among the topics, the compulsory arbitration clause of the 1953 Draft Article 8 on the continental shelf is important for any consideration of the legalistic attitude of the Commission at that time. Lauterpacht inserted Draft Article 8 on the continental shelf, which was not included in François's report. This section

⁶⁵ Whitman/vol.4/756-757.

⁶⁶ Lauterpacht also published an article on continental shelf. Lauterpacht/1950h/CP-III/143-203.

discusses the arbitration clause of the 1953 Final Draft Articles on the continental shelf, which clearly shows the controversy between the legal school and the diplomatic school with regard to the task of the Commission.

Discussion on the arbitral clause of the 1953 Draft Articles on the continental shelf was initiated at the 202nd meeting by Scelle, who proposed an additional article relating to the establishment of a new permanent organ to investigate the exploitation of the continental shelf, and the compulsory arbitration of the Permanent Court of Arbitration.⁶⁷ Some members, including Lauterpacht, supported Scelle's proposal for the compulsory judicial or arbitration clause with regard to the dispute on the continental shelf.⁶⁸ However, François was reluctant to introduce an arbitration clause to the 1953 Draft Articles:

'Its [the Commission's] task was the codification of international law, not its practical application. What the Commission had to do was to decide what should be the rule in any particular instance. To introduce a clause at every stage in the Commission's work on specific texts, concerning the obligatory submission of disputes to arbitration would be outside its competence and would diminish the possibility of acceptance by governments of the rules of law it was concerned to codify.'⁶⁹

The same position was taken by Spiropoulos.⁷⁰ Kozhevnikov also criticised the proposed arbitration clause as follows:

'The criterion of the effectiveness of the Commission's work was the attitude of governments towards it. The Commission was not working *in vacuo*, and was not engaged on pure research. It was preparing standards for governments and endeavouring to secure the development of international law. The members of the

⁶⁷ YBILC/1953/vol.1/113/para.27.

⁶⁸ Yepes/para.28; Alfaro/para.31; Hsu/para.35; Pal/para.36; Córdova/para.39; Lauterpacht/para.42. *Ibid.*/113-115.

⁶⁹ *Ibid.*/119/para.10.

⁷⁰ *Ibid.*/para.13.

Commission were not law-givers, but they must help to make international relations more normal. That was why it was necessary to avoid any action likely to frustrate that aim. The Commission's texts must ultimately be applicable in practical life. If they were unacceptable, they would serve no purpose. He [Kozhevnikov] was convinced that compulsory arbitration would make it difficult for many governments to accept the draft on the continental shelf, with the result that all the work done on it would be wasted.⁷¹

Summing up, they were concerned about the willingness of states to accept compulsory arbitration, Spiropoulos saying that 'the inclusion of such a provision would increase the reluctance of governments to ratify.'⁷² Members opposed to the compromissory clause saw the task of the Commission as formulating legal principles which states would accept.

On the other hand, the majority view was expressed thus by Córdova.

'He [Córdova] ... felt that great progress would be made if the Commission now decided that all disputes concerning the continental shelf should be submitted to arbitration. The more so since the Commission was legislating rather than codifying, and could not, therefore, precisely foresee how the rules could be applied. In the absence of a provision on compulsory arbitration, it was doubtful whether disputes would ever be settled. If the Commission were properly to discharge its tasks of developing international law, it must not only state what the rules were in any particular case, but also indicate the means by which they were to be applied.'⁷³

Lauterpacht also said,

'The Commission would never at any time be able to formulate rules which would not be debatable. But if that premise were made the starting point for codification, provision for arbitral procedure would have to be

⁷¹ *Ibid.*/122/para.46.

⁷² *Ibid.*/120/para.25.

⁷³ *Ibid.*/121/para.28.

made in every subject.⁷⁴

In other words, the majority of the Commission preferred the legal desirability of the draft to the acceptability of states. Finally, the Commission adopted Scelle's proposal referring to arbitration rather than that of the Permanent Court of Arbitration by 7 votes to 4 with 1 abstention.⁷⁵

Lauterpacht as General Rapporteur thought that the Commission should recommend that the General Assembly 'take no action, the report having already been published' under Article 23, Paragraph (a), of the ILC Statute. In other words, he considered that 'the present final draft is not such as to call, for the time being, for the conclusion of a Convention' because of the lack of state practice, and that the 1953 Final Draft would 'exert the influence to which they are entitled by virtue of their intrinsic merit and authority.'⁷⁶ However, the Commission finally adopted Yepes's proposal,⁷⁷ recommending in the 1953 Final Draft to the General Assembly 'the adoption by resolution of this part of the present report and the draft articles on the continental shelf.'⁷⁸

The General Assembly decided to defer action until all the problems pertaining to maritime law had been studied by the Commission and reported on to the General Assembly.⁷⁹ The Commission then restarted the discussion on the law of sea as a whole from 1955. Once again, it is not necessary to describe the detail of the discussion within the Commission with regard to the judicial clause relating to the continental shelf, namely Article 73 of the 1956 Final Draft Articles, because Lauterpacht had already left the Commission. Suffice it to note that Article 73 of the 1956 Final Draft Articles became the 1958 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

⁷⁴ *Ibid.*/122/para.39.

⁷⁵ *Ibid.*/124/paras.71-79.

⁷⁶ *Ibid.*/358-359/n.7.

⁷⁷ *Ibid.*/361/paras.84-85.

⁷⁸ YBILC/1953/vol.2/217/para.91.

⁷⁹ G.A./Res./798/(VIII).

5.2.3. THE TWO DRAFT CONVENTIONS ON FUTURE STATELESSNESS

The problem of nationality, including statelessness, is also a topic proposed by Lauterpacht in *Survey*. He was particularly concerned about the problem of statelessness.⁸⁰ He was understandably enthusiastic in his approach to this problem due to the experience of the Second World War.⁸¹ Partly due to the lack of agreement on the settlement of the problem of statelessness, partly due to the development of the consciousness of human rights from the end of the war, Lauterpacht believed that the problem of statelessness should be solved not by the codification of customary law but by the progressive development of international law.⁸²

This topic was subsequently selected by the ILC at the first session, although this topic had not been given priority until the Economic and Social Council requested the Commission to 'prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness' in 1950.⁸³ The Commission elected Hudson as Special Rapporteur in 1951. However, he resigned the post because of health problems after submitting his first report. The Commission then appointed Córdova as the second Special Rapporteur, and Kerno, Assistant Secretary-General for Legal Affairs at that time, as assistant to Córdova in 1952. At the fifth session in 1953, Córdova submitted the two draft conventions on the problem of statelessness, namely the Draft Convention on the Elimination of Future Statelessness and the Draft Convention on the Reduction of Future Statelessness in accordance with the instruction of the Commission, though Córdova himself thought that in order to solve the problem of future statelessness, the Commission should adopt the Draft Convention on the Elimination of Future Statelessness.⁸⁴ The Commission discussed and submitted these two Draft Conventions as the Final Draft in 1954. In that work of the ILC, Lauterpacht contributed to the two Draft Conventions as General Rapporteur in 1953, as a

⁸⁰ Lauterpacht/R6/1949/CP-I/500.

⁸¹ Also see Lauterpacht/1949a/CP-III/383-404.

⁸² Lauterpacht/R6/1949/CP-I/500.

⁸³ ECOSOC/Res./319/B-III/(XI).

⁸⁴ Córdova/YBILC/1953/vol.2/169/para.19.

member of the special sub-committee for the final clauses which was composed of François and Córdova,⁸⁵ and as member of the Drafting Committee for the Draft Conventions, of which other members were Scelle and François in 1954.⁸⁶

The Draft Conventions show the legalistic approach of the Commission during the early 1950s. They provide the implementation mechanism, such as the establishment of 'an agency to act on behalf of stateless persons', and a tribunal 'which shall be competent to decide upon complaints presented by the agency' within the framework of the United Nations under the common Article 10, Paragraphs 1 and 2. Furthermore, the common Article 10, Paragraph 3, proposed by Lauterpacht,⁸⁷ grants the parties 'the right to request the General Assembly to set up such agency and tribunal,' if the parties fail to establish them within two years of the entry into force of either Convention. Paragraph 4 stipulates the compulsory jurisdiction of the Court relating to disputes concerning the interpretation of the Draft Conventions.

It should be noted, however, that there was again a serious divergence between the majority and the minority of the Commission on this legalistic aspect of the Draft Conventions. Article 10 in particular was acceptable neither to Kozhevnikov nor Zourek, who saw the question of nationality as essentially a matter falling within the domestic jurisdiction of states. They rejected the proposed texts for Article 10 with regard to compulsory arbitration and the status of individuals under international law.⁸⁸ Their opposition to the Draft Conventions is clearly based on the diplomatic approach of international law. However, the majority of the Commission disagreed with them, and adopted Article 10.

Fifteen nations filed their comments on the 1953 Draft Conventions on Statelessness. Five nations approved of, or at least had no objection to Article 10.⁸⁹ However, four states were opposed

⁸⁵ YBILC/1954/vol.1/15/para.12.

⁸⁶ *Ibid.*/45/para.61.

⁸⁷ YBILC/1953/vol.1/260/para.19.

⁸⁸ Kozhevnikov/YBILC/1953/vol.1/259/para.7; Zourek/YBILC/1953/vol.1/260-261/paras.22-23.

⁸⁹ Australia/YBILC/1954/vol.2/164; Costa/Rica/*ibid.*/165; Denmark/*ibid.*/166; Honduras/*ibid.*/168; Netherlands/*ibid.*/170.

to Article 10.⁹⁰ India was also opposed to the two Draft Conventions as a whole.⁹¹ The main reason for five nations, including India, being opposed to Article 10 of the 1953 Draft Conventions was their belief that the question of nationality was essentially a matter of domestic jurisdiction. The United States, for example, said simply that '[s]ince this Government considers that the question of determining who are American nationals is one of purely domestic concern, it would not be willing to delegate to an international tribunal the power to over-rule a decision made by it that a particular individual did not have American nationality.'⁹²

However, the majority of the Commission rejected the objection raised to Article 10 by these countries. At the 244th meeting, Córdova, for example, said that these objections were groundless since 'the Commission had taken good care not to encroach upon matters essentially within the domestic jurisdiction of States.'⁹³ Lauterpacht agreed with Córdova, and then proposed the 'appellate jurisdiction' of the ICJ which reviews the award of the tribunal proposed by Article 10.⁹⁴ However, at that time a majority on the Commission were reluctant to accept his proposal, and decided to delete Article 10, Paragraph 4, in order to confer exclusive jurisdiction of interpretation of the Conventions to the tribunal proposed by paragraph 2.⁹⁵ After the Drafting Committee, of which Lauterpacht was a member, submitted the new articles of the Draft Conventions, he again proposed to restore Paragraph 4 on the compulsory jurisdiction of the Court, which was adopted by the Commission.⁹⁶ The Commission adopted the implementation mechanism as Article 11 of the 1954 two Draft Conventions on Future Statelessness.

Although some members of the Sixth Committee argued that the question of nationality is essentially within the domestic jurisdiction of the states, the General Assembly decided to convene the international conference for the two Conventions when twenty nations communicated to the

⁹⁰ Belgium/*ibid.*/164; Egypt/*ibid.* /167; U.K./*ibid.*/172; U.S.A./*ibid.*/173.

⁹¹ *Ibid.*/168.

⁹² *Ibid.*/173.

⁹³ YBILC/1954/vol.1/12/para.13.

⁹⁴ *Ibid.*/para.14.

⁹⁵ *Ibid.*/12-14.

⁹⁶ *Ibid.*/168/paras.56-58.

Secretary-General of the United Nations their willingness to co-operate in the conference. Consequently, the conference was held in Geneva in 1959. However, at that time, the conference failed to reach agreement. When the second conference took place in New York in 1961, it produced the 1961 Convention on the Reduction of Statelessness.⁹⁷ The 1961 Convention came into force in 1975 in accordance with Article 18 which requires 'two years after the date of the deposit of the sixth instrument of ratification.' In 2003, twenty-six nations are parties, and five nations are signatories.

However, the 1961 Convention 'departed substantially from the Commission's draft as the result of substantial amendment at the conference.'⁹⁸ Insofar as the implementation mechanism is concerned, the 1961 Convention does not mention the tribunal prescribed by Article 11, Paragraph 2, of the 1954 Draft Conventions. It is true that the 1961 Convention stipulates 'a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority' under Article 11, and that the compulsory jurisdiction of the Court was admitted under Article 14. However, Article 11 of the 1961 Convention simply describes the promotion of the establishment of the body, which is far from any obligation to establish it. Furthermore, both Articles 11 and 14 are subject to reservations permitted by Article 17. It is so even while only three nations, France, Niger and Tunisia, declared their reservations to Articles 11 and 14.⁹⁹ It is reasonable, therefore, for Sinclair to mention that 'the Commission's work on statelessness cannot be counted among its more successful endeavours.'¹⁰⁰

5.2.4. THE TWO REPORTS ON THE LAW OF TREATIES

In 1952, Lauterpacht was elected Special Rapporteur on the Law of Treaties after the resignation of Brierly. Lauterpacht submitted his first report on the Law of Treaties to the Commission in 1952, and

⁹⁷ See Weis/1962.

⁹⁸ Watts/1999/vol.1/140-141.

⁹⁹ <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/treaty4.asp>

his second in 1953, although the ILC had no time to discuss the reports neither at the fifth nor sixth sessions. Nevertheless, it is appropriate here to discuss his two reports from the viewpoint of the Rule of Law in international relations. There are two important topics in his two reports concerning the Rule of Law. The first topic is the question of reservation. The second topic is the problem of the invalidity of treaties. Both topics are related to the question of legal indeterminacy.

5.2.4.1. THE QUESTION OF RESERVATIONS TO MULTILATERAL TREATIES

In the 1950s, rules on reservations to multilateral conventions were uncertain. It was thought at that time that a general rule applicable to multilateral conventions was the unanimity rule, which does not allow a reserving state to become a party to the treaty unless all contracting parties agree to the reservation. However, on the other hand, there was another system on reservations to multilateral conventions, the so-called Pan-American system, which allows a reserving state to become a party to the treaty only in relation to other states which accept the reservation. The unanimity rule was unsuitable, because one contracting party could prevent the reserving state from becoming a party to the conventions. Insofar as multilateral treaties are concerned, a result allowing a contracting party a *de facto* veto despite the fact that the convention purports to be universal is undesirable. Nor is the Pan-American system desirable for multilateral treaties, because the integrity of a multilateral treaty is severely damaged by the fragmentation of the legal relationship between the contracting parties. This problem of reservation occurred with regard to the Genocide Convention. The reservation made by certain states such as the Soviet Union and Poland to the Genocide Convention produced a controversy on the legal effects of the reservations to the Convention by the member states. As a result, the General Assembly requested the International Court of Justice to give an Advisory Opinion about the question of reservations, and invited the ILC 'to study the question of reservations to multilateral conventions from the point of view of codification and from

¹⁰⁰ Sinclair/1987/51.

that of the progressive development of international law' by Resolution 478 (V) adopted on 16 November 1950.

In the Advisory Opinion in *Reservations to the Genocide Convention*, the Court rejected the unanimity rule, and adopted the compatibility test in favour of the Pan-American system:

'The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.'¹⁰¹

Furthermore, the Court admitted that 'each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own stand.'¹⁰² Consequently, the Court concluded as follows:

'(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention; (b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.'¹⁰³

The ILC, on the other hand, provisionally adopted the unanimity rule on the question of the reservations to multilateral conventions in 1951. The reason the ILC adopted a position different from the Court's at that time was that the Commission regarded its own work different from the task of the Court on the question of reservation. The ILC adopted the position whereby the Commission was invited to study the question of reservations to multilateral conventions in general

¹⁰¹ ICJReps/1951/24.

¹⁰² *Ibid.*/26.

¹⁰³ *Ibid.*/29-30.

from the viewpoint of codification and progressive development of international law, while the Court dealt with the question of the reservations to the Genocide Convention only from the viewpoint of existing law. Therefore, despite the Advisory Opinion of the Court with regard to the reservations to the Genocide Convention, the Commission 'feels that it is at liberty to suggest the practice which it considers the most convenient for States to adopt for future.'¹⁰⁴

The Commission in 1951 rejected the Pan-American system, since the system tends to 'spilt up a multilateral convention into a series of bilateral conventions, and thus reduce the effectiveness of the former.'¹⁰⁵ Neither was the compatibility test adopted by the Court acceptable to the Commission in 1951. Firstly, the compatibility of the object and purpose of a multilateral convention seemed to the majority of the ILC to involve 'a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose.' Furthermore, even if the distinction is logically possible, the ILC also thought that such a distinction is impossible without the subjective appreciation of parties to the convention. Therefore, the Commission concluded, with regard to the compatibility test, '[s]o long as the application of the criterion of compatibility remains a matter of subjective discretion, some of the parties being willing to accept a reservation and others not, the status of a reserving State in relation to the convention must remain uncertain.'¹⁰⁶

Thus the Commission devoted attention to the question of reservations to a multilateral convention from the viewpoint of the Secretary-General of the United Nations as the depositary. In other words, the ILC reaffirmed the practice of the United Nations on multilateral conventions, namely the unanimity rule linked to the function of the Secretary-General as the depositary. The ILC provisionally formulated the rules about reservations to a multilateral convention as follows.¹⁰⁷ Firstly, the depositary of a multilateral convention should communicate each reservation to all states which are entitled to accept or reject the reservations to a multilateral convention. Then, the states

¹⁰⁴ YBILC/1951/vol.2/126/para.17.

¹⁰⁵ *Ibid.*/128/para.22.

¹⁰⁶ *Ibid.*/128/para.24.

are required to decide their position, whether affirmative or negative, to the reservations within a certain period. However, if the states fail to express their objections to the reservations within the fixed period, the states should be understood as having acquiesced in these reservations. In either case that a convention enters into force with signature only, or that the convention enters into force with ratification, reserving states will become parties to the convention as far as there is no objection by any other states to the reservation.

The majority of the Commission in 1951 was so confident in the rules above mentioned that when Lauterpacht succeeded Briery as Special Rapporteur on the law of treaties, the Commission required him to 'take into account the work that had been done by the Commission'¹⁰⁸ with respect to reservations to multilateral treaties. Lauterpacht accordingly submitted the unanimity rule under Draft Article 9 that '[a] signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty.' He admitted that, in the view of the Commission, this text 'must be regarded as probably still representing the existing law.'¹⁰⁹ However, at the same time, he regarded the unanimity rule as unsatisfactory on the question of reservation to multilateral conventions, since the rule was no longer supported by the majority of states after the Court had impaired the authority of the rule.¹¹⁰ Neither was the compatibility test acceptable to him, because 'unless jurisdiction is vested in some international organ to determine, with an effect binding all parties, whether a reservation is compatible with the object of a treaty, the test laid down by the Court is probably unworkable in practice.'¹¹¹ He also, therefore, proposed four alternatives, which are also seen in his speech to the Grotius Society,¹¹² with regard to the admissibility of reservations to a convention decided by: (a) a two-thirds majority of the parties to the convention, (b) two-thirds majority of the interested parties qualified to offer objection, (c) the committee established by the parties to the

¹⁰⁷ *Ibid.*/130-131/para.34.

¹⁰⁸ YBILC/1952/vol.2/69/para.51.

¹⁰⁹ Lauterpacht/R10/YBILC/1953/vol.2/123.

¹¹⁰ *Ibid.*/124-125.

¹¹¹ Oppenheim-Lauterpacht/1955/915/n.2.

convention, and (d) the advisory opinion of the Chamber of Summary Procedure of the Court.¹¹³

The spirit of his alternative texts is also seen in his edition of *Oppenheim's*:

'A more rational solution would seem to be to confer the power to decide on the admissibility of a reservation either upon some international judicial or administrative authority or upon the contracting parties themselves. These could act either through an organ created by them or by arriving at a decision themselves in the sense that a reservation should be regarded as admissible unless rejected by a substantial majority of the contracting parties.'¹¹⁴

Lauterpacht clearly admitted that the alternatives were completely *lex ferenda*.

It is not necessary here to consider whether or not his alternative proposals could have been acceptable to the member states.¹¹⁵ It is enough to point out that Humphrey Waldock, the fourth Special Rapporteur on the law of treaties, rejected Lauterpacht's alternative proposals.

'Admirable as were Sir Hersch Lauterpacht's idea, they were inapplicable: the Commission had to face the realities of international life, one of which was that it was often not possible to include in treaties a jurisdictional clause for the handling of disputes, including disputes as to reservations.'¹¹⁶

Consequently, the 1969 Vienna Convention adopts the compatibility test under Article 19, Paragraph (c), without saying who is ultimately competent to decide the admissibility of reservation. It is so even though each party to a convention decides the admissibility of reservations to the convention, which simply means that the admissibility of reservation is bilaterally and relatively decided. The silence of the 1969 Vienna Convention on this point, therefore, inevitably causes the

¹¹² Lauterpacht/1954a/108-118.

¹¹³ Lauterpacht/R10/YBILC/1953/vol.2/123-136.

¹¹⁴ Oppenheim-Lauterpacht/1955/916.

¹¹⁵ On the problems of Lauterpacht's alternative proposals, see D./R./Anderson/1964/465-468.

¹¹⁶ YBILC/1962/vol.1/143/para.61. Also see also Waldock/YBILC/1962/vol.2/78/para.8.

indeterminacy of reservations. In particular, the question of the indeterminacy of reservations appears as the controversy between the 'permissible' school, whose doctrine is that 'the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international or even a national tribunal even if the State claiming the nullity of the reservation had not itself made any objection to it,' and the 'opposability' school which claims that 'a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other contracting State had accepted it.'¹¹⁷ Although the ILC has once more returned to this topic in 1993,¹¹⁸ it is still uncertain how this problem would be solved without the organ which determines the validity of reservations. In this sense, Lauterpacht's answer to the question of the indeterminacy of reservations seems to be theoretically correct, even if not practically acceptable, because the indeterminacy of reservation is avoidable when the third organ can decide the admissibility of reservation.

5.2.4.2. THE INVALIDITY OF TREATIES

Lauterpacht examined the cause of the invalidity of treaties in his two reports on the law of treaties. His draft articles on the invalidity of treaties possess two characteristics. First, he drafted the two types of rules with regard to the invalidity of treaties: the articles stipulating the nullity of a treaty such as Articles 10 (the capacity of the parties under international limitations), 12 (duress), 15 (the consistency with international law) and 16 (the consistency with prior treaty obligation), and those articles describing the voidableness of treaties such as Articles 11 (the constitutional limitations upon the treaty-making power), 13 (fraud), and 14 (error). This distinction between nullity and voidableness is adopted by the 1969 Vienna Convention. While the possibility of states invoking the invalidity of a treaty is stipulated in Articles 46 (provisions of internal law regarding competence to conclude treaties), 48 (error), 49 (fraud), the 1969 Vienna Convention admits the

¹¹⁷ YBILC/1995/vol.2/pt.2/100/para.418.

¹¹⁸ YBILC/1993/vol.2/pt.2/97/para.440.

nullity of treaties under Articles 51 (coercion of a representative of a state), 52 (coercion of a state by the threat or use of force), 53 (treaties conflicting with a peremptory norm of general international law).

The second feature of Lauterpacht's drafts on the invalidity of treaties is that the invalidity of a treaty should be decided by either the International Court of Justice or an international tribunal. He said as follows:

'[I]t must, *de lege ferenda*, be regarded as fundamental that any allegation of the invalidity of a treaty on account either of compulsion or of any other reason of invalidity as laid down in articles 12-16 [the articles on the invalidity of a treaty] of this chapter may properly be made with legal effect only: (a) if accompanied by the willingness of the State making such allegation to obtain a finding of an international tribunal on the matter, and (b) if followed by an actual finding of the tribunal to the effect.'¹¹⁹

Consequently, he admitted that either the Court or an international tribunal, if parties agreed so, would have the compulsory jurisdiction to declare the invalidity of a treaty. This point is clearer compared to Article 66 of the 1969 Vienna Convention, stipulating the judicial clauses only with regard to *jus cogens* under Paragraph (a) of Article 66, while other relevant articles on the invalidity of a treaty are subject to Paragraph (b) of the same Article, whose process the Annex provides as the Conciliation Commission whose report has no binding force. In this sense, his two reports on the law of treaties, especially the 1953 report, clearly shows that Lauterpacht's theory of international law is based on the centrality of international adjudication in the international community. From such a viewpoint of the Rule of Law, the drafts of Lauterpacht concerning duress and 'overriding principles of international law' are more important than others. It is because both Article 13 (duress) and Article 15 (the consistency with international law) are deeply related to the function of the Court to decide the normative authority of international law.

¹¹⁹ Lauterpacht/R10/YBILC/1953/vol.2/150-151/para.11.

5.2.4.2.1. DURESS

Lauterpacht studied the problem of duress even in his early academic career. The problem of duress seemed to him to symbolise the imperfect nature of international law as 'law,' when war was admissible. In *Analogies*, he wrote,

'It is believed that the lack of analogy of treaties and contracts so far as it is occasioned by the admissibility of duress cannot survive in an organised community of nations. The development of international law towards a true system of law is to a considerable degree co-extensive with the restoration of the missing link of analogy of contracts and treaties, *i.e.* of the freedom of will as a requirement for the validity of treaties, and with the relegation of force to the category of sanctions. The Covenant of the League of Nations, which, in its Article 10, safeguards the political independence and territorial integrity of the Members of the League from acts of external aggression, may be regarded as containing, *in germio*, the elements of this development.'¹²⁰

However, the situation certainly began to change as a result of the outlawry of war. In his lecture at The Hague, Lauterpacht clearly admitted the change of international law with regard to the problem of duress.

'Customary international law has in this respect undergone a fundamental change as the result of the limitation of the right of war in the Covenant of the League and of its total elimination in the General Treaty for the Renunciation of War as an instrument of national policy, *i.e.* as an instrument for enforcing and changing rights. A State which has resorted to war in violation of its obligations under these instruments is not applying force in a process authorized by law. In such cases duress renders the treaty invalid. The victor must, if he can, seek other means of regularizing the fruits of unlawful resort to force. The defeated State, confronted with the

¹²⁰ Lauterpacht/*Analogies*/166-167.

threat of occupation or annihilation by the victor, cannot validly give its consent to the treaty terminating the war.¹²¹

Thus, he emphasised the change in traditional theory concerning duress. The same logic is seen in his 1953 Report on the law of treaties. In his 1953 Report, Lauterpacht declared,

[A] treaty imposed by or as the result of force or threats of force resorted to in violation of the principles of these instruments of a fundamental character is invalid by virtue of the operation of the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings. The reasons which in the past rendered that principle inoperative in the international sphere have now disappeared.¹²²

It was, therefore, necessary and imperative that ‘a codification of the law of treaties under the auspices of the United Nations should elevate to the dignity of a clear rule of international law a general principle of law recognized by all civilised States, namely, that freedom of consent – i.e. absence of constraint exercised otherwise than by law – is an essential condition of the validity of treaties conceived as contractual agreements.’¹²³

His adherence to the ideal of the Rule of Law is seen not only in his argument on the analogy of contract, but also in his opinion that it should be the Court which decides the invalidity of treaties concluded under duress, because ‘its conclusion and continuation are contrary to international public policy.’¹²⁴ In Lauterpacht’s view, the nature of the prohibition of duress as international public policy does not allow the consent of the defeated states to cure the original illegality of the treaty concluded under duress. Furthermore, he claimed that *actio popularis* should be allowed due to the character of international public policy: ‘[T]he present Article gives to every Member of the

¹²¹ Lauterpacht/1937-IV/CP-I/354.

¹²² Lauterpacht/YBILC/1953/vol.2/148/para.3.

¹²³ *Ibid.*/149/para.6.

United Nations – whether it has become a party to the Code of the Law of Treaties or not – the right to ask the Court to declare, in contentious proceedings, the invalidity of a treaty imposed by force.’¹²⁵ This result would have been revolutionary, had his drafts been adopted by the Commission. It should be noted, however, that his conception of international public order is not clear in this context. It is therefore necessary to refer to the article directly dealing with international public policy in his report.

5.2.4.2.2. THE CONCEPTUAL ORIGIN OF *JUS COGENS* IN THE LAW OF TREATIES

As some lawyers in the inter-war era already argued the norm of the higher authority which invalidates treaties,¹²⁶ Lauterpacht also discussed the possibility of the invalidity of immoral treaties. In his general lecture at The Hague, however, Lauterpacht was cautious of the invalidity of immoral treaties.

‘Taken literally, it amounts to a re-introduction into the system of international law of natural law pure and simple; it signifies that law has no validity unless it can justify itself and be approved by the tribunal of morality. From the practical point of view, so long as there is no authoritative body endowed with obligatory jurisdiction to determine the morality or otherwise of a treaty obligation, the supposed invalidity of immoral treaties is a standing invitation to the law-breaker to disengage himself unilaterally – in a heroic manner – from an inconvenient duty.’¹²⁷

However, it was Lauterpacht who introduced the conceptual origin of *jus cogens* into the

¹²⁴ *Ibid.*/151-152/para.11.

¹²⁵ *Ibid.*

¹²⁶ Verdross/1937. According to Ragazzi, Anzilotti distinguished between peremptory norms and dispositive norms in international law without using the term ‘*jus cogens*’ in his Italian article in 1914. Ragazzi/1997/44-45/n.3.

¹²⁷ Lauterpacht/1937-IV/CP-I/358.

codification on the law of treaties.¹²⁸ Article 15 in his First Report on the Law of Treaties discusses the legality of the object of a treaty in the context of international public order. Article 15 says as follows:

'A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.'

Article 16, Paragraph 1, of his two reports also basically adopted this idea in the context of treaties:

'A bilateral or multilateral treaty, or any provision of a treaty, is void if its performance involves a breach of a treaty obligation, previously undertaken by one or more of the contracting parties.'¹²⁹

The main feature of both Articles is that any treaty inconsistent with international law becomes invalid due to its illegality. The idea that the inconsistency of a treaty with the prior treaty invalidates that treaty stems from his articles on the *Oscar Chinn Case*,¹³⁰ the Covenant of the League¹³¹ and the law of contract¹³² from 1935 to 1936. The essence of this idea is to establish the hierarchical order of international law by applying the law of state responsibility, while avoiding the so-called problem of relative normativity.¹³³

It is true that Lauterpacht did not use the term 'relative normativity', but he would have acknowledged the problem of the relative normativity of international law. Indeed, it is difficult to explain how he introduced the conceptual origin of *jus cogens* into international law without using

¹²⁸ Schwelb/1967/949.

¹²⁹ Lauterpacht/R11/YBILC/1954/vol.2/133. Emphasis original. Italicised means the words added to the text in First Report.

¹³⁰ Lauterpacht/1935/CP-IV/337-340.

¹³¹ Lauterpacht/1936b/CP-IV/326-336.

¹³² Lauterpacht/1936c/CP-IV/340-375.

¹³³ On the problem of relative normativity, see Weil/1983; Tasioulas/1996; Fastenrath/1993; J.A./Beckett/2001; Shelton/2003/145-172.

the term 'relative normativity.' On this point, it should be noted that Lauterpacht used the term 'hierarchy' as the dynamic sense of the gradual concretization of law from the viewpoint of Kelsenian normativism.¹³⁴ In his draft for the 9th edition of *Oppenheim's*, Lauterpacht found the hierarchical relationship of the sources of international law in Article 38 (1) of the Statute of the Court.¹³⁵ It is because Kelsenian normativism conceived the applicability of legal rule as the sphere of validity of legal rule. Consequently, the hierarchy of the source of international law meant to Lauterpacht just the application of *lex specialis derogat generali*. A treaty can override custom, because the former provides more concrete right and obligation of the parties than the latter. For the same reason, customary law is more applicable than general principles of law. However, as Akehurst pointed out, '*lex specialis derogat generali* is no more than a rule of interpretation.'¹³⁶ If the maxim *lex speciali derogat generali* is applicable to the relation between two sources, the two legal sources should be regarded as of the same authority. Akehurst said that 'there is a presumption that the authority laying down a general rule intended to leave room for the application of more specific rules which already existed or which might be created in the future, even though the specific rules might be derived from an inferior source.'¹³⁷ If there is a difference of normativity between two sources, the norm of lower authority cannot override the norm of higher authority. In this sense, when he dissolved the problem of the hierarchy of the validity of law into the interpretation of law, Lauterpacht presupposed that there was no difference between the sources with regard to the normative authority.

It should be noted, moreover, that Lauterpacht did not admit the relative normativity of law between legislative convention and contractual treaty from his early academic career, because with Kelsen he believed that there was no difference between private law and public law. With regard to the view that a treaty is an act of legislation in the sphere of international law, Lauterpacht

¹³⁴ See above 1.2.1.2.

¹³⁵ The same usage of the term 'hierachy' is seen in Akehurst's argument on the sources of international law, although Akehurst discussed the conflict between *jus dispositivum* and *jus cogens* at the same time. Akehurst/1974-1975b/and/1987/39-42.

¹³⁶ Akehurst/1974-1975b/273.

emphasised the relative difference of normativity between a law-making treaty and contractual one:

‘This view is compatible with the current division of international treaties in law-making and other treaties, so long as it remains clear that that distinction, useful as it may be for the purpose of convenience and classification, does not entail any consequences so far as the juridical value of both kinds of treaties as source of international law is concerned. Every treaty contains rules governing the international conduct of the signatory States, and every treaty, law-making or not law-making, is a source of international law for the contracting parties – and for no one else. The above-mentioned distinction is useful if meant to emphasise the fact that some treaties are of more permanent and general application than others, and that they resemble therefore an act of legislation. Apart from this, however, it is obvious that its value is a relative one.’¹³⁸

It is true that Lauterpacht referred to the Covenant of the League as ‘higher law,’ which sometimes gives the impression that he admitted the relative normativity of international law. However, the reason he called the Covenant ‘higher law’ was not because the Covenant had higher normative authority than other conventions, but because it was more general and comprehensive than others. He referred to the invalidity or unenforceability of treaties inconsistent with the Covenant as follows:

‘They follow not because there is any hierarchical superiority about the Covenant as a legislative instrument – for there is none. Neither do they ensue for the mere reason that the Members of the League, not content to rely on general international law in the matter of inconsistency of treaties, have expressly endowed the Covenant with comprehensive overriding powers – for such caution is merely declaratory of existing principle. The grave consequences in the shape of possible incompatibility are the direct result of the comprehensiveness of the Covenant, which not only limits the right of resort to war but also imposes most far-reaching obligations

¹³⁷ *Ibid.*

¹³⁸ Lauterpacht/Analogies/157.

for the enforcement of the Covenant.¹³⁹

This passage indicates his intention of establishing the hierarchical order of international law, while he tried to maintain the view that there is no difference of normativity between a law-making treaty and a contractual treaty. In other words, Lauterpacht attempted to harmonise two conflicting propositions.

However, it was difficult to establish the hierarchical order without introducing relative normativity. In his draft article about *jus cogens*, Waldock pointed out that

‘Unless the concept of what is “illegal under international law” is narrowed by reference to the concept of *jus cogens*, it may be too wide. ... The phrase “illegal under international law” would also seem open to the interpretation that any treaty infringing the prior rights of another State is *ipso facto* void. This does, indeed, appear to have been the view of Sir H. Lauterpacht; but the evidence hardly seems to bear it out, especially with regard to treaties which conflict with the rights of other State under prior treaties.’¹⁴⁰

Indeed, Lauterpacht found it difficult to distinguish between the case where the inconsistency of a treaty with prior obligations invalidates the later treaty and the case that it does not do so. Therefore, it is not surprising that he introduced in his two reports on the law of treaties the difference of the normative authority of law between the norm which invalidates the subsequent treaty and the norm which does not.

Draft Article 15 of Lauterpacht’s 1953 Report indicated that the object of a treaty might be contrary to international customary law. However, even in this case, the treaty which is inconsistent with customary law is not invalid, because states are allowed to modify their legal relations by concluding a treaty. It is rather the violation of ‘such overriding principles of international law which may be regarded as constituting principles of international public policy’ that makes a treaty

¹³⁹ Lauterpacht/1936/CP-IV/331.

¹⁴⁰ Waldock/YBILC/1963/vol.2/53/para.2.

invalid. Lauterpacht wrote,

'It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public order (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Articles 38 (i) (c) of its Statute.'¹⁴¹

Thus, he introduced the conceptual origin of *jus cogens* to the codification of the law of treaties.

Unlike the 1969 Vienna Convention which introduced the consensual concept of peremptory norms into its Article 53 rather than the concept of international public order,¹⁴² Lauterpacht thought that the overriding principle of international law was independent of the will of states.¹⁴³ Rather, the question whether or not a customary norm overrides principles of international law is decided by the consideration of morality in Lauterpacht's view. This point is more explicit, compared to Fitzmaurice's Draft Articles on *jus cogens* and international morality. In his third report, Fitzmaurice divided Lauterpacht's concept of 'overriding principles of international law' into two articles. Article 17 in the third report explains the concept of *jus cogens*. Article 17 reads,

'It being always open, prima facie, to any two or more States to agree, for application *inter se* upon rule or régime varying or departing from the rules of customary international law in the nature of *jus dispositivum*, a treaty embodying such an agreement cannot be invalid on that ground. Here it is only if the treaty involves a

¹⁴¹ Lauterpacht/R10/YBILC/1953/vol.2/155/para.4.

¹⁴² Akehurst/1974-1975b/283; Alexidze/1981/254-255; Komori/1987/15-27; Danilenko/1991/55.

¹⁴³ Sztucki/1974/97-98.

departure from or conflict with absolute and imperative of *jus cogens* that a cause of invalidity can arise. Since the treaty is in any event *res inter alios acta*, and without force as against non-parties, the invalidity as such of the treaty only affects directly the relations between the parties to it, and means that neither or none of the parties can claim compliance with it on the part of the other or others.¹⁴⁴

On the other hand, Article 20 in the same report deals with the ethics of the object of international treaties:

‘The unethical character of a treaty which is not actually illegal by virtue of the provisions of articles 16 to 19 ... cannot *per se* be a ground of invalidity as between the parties which have concluded it (and has in any case no force as against non-parties). Nevertheless an international tribunal may refuse to take cognisance of or apply it (even as between the parties, and even if its invalidity has not been claimed) in those cases in which the treaty is clearly contrary to humanity, good morals, or to international good order or the recognized ethics of international behaviour.’¹⁴⁵

In other words, Fitzmaurice identified *jus cogens* as legal rules which reflect ‘considerations of morals and of international good order,’¹⁴⁶ while he accepted the view that international tribunals should refuse to apply ‘a treaty that has an immoral or unethical (but not illegal) object.’¹⁴⁷ Lauterpacht’s concept of ‘overriding principles of international law’ had both aspects of Fitzmaurice’s idea. Although he ‘does not refer in a separate Article to consistency with international morality as a condition of validity of treaties,’ Lauterpacht satisfied himself by saying ‘[i]n so far as considerations of morality – such as conduct in accordance with canons of good faith – form a constituent part of general principles of law and of the requirements of international public

¹⁴⁴ Fitzmaurice/YBILC/1958/vol.2/27.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*/41

¹⁴⁷ *Ibid.*/45.

policy they are provided for in the present article.¹⁴⁸ This remark shows that considerations of morality decide the normative difference between international public order which invalidate a treaty inconsistent with it, and normal customary norms which parties can depart from.

Lauterpacht also discussed the problem of relative normativity in the context of multilateral conventions. Draft Article 16, Paragraph 4, of his two reports modified his claim that the subsequent treaty inconsistent with the prior convention should be invalid:

*'The rule formulated above [under paragraphs 1 and 2] does not apply to subsequent multilateral treaties, [such as the Charter of the United Nations], partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest. Neither does it apply to treaties revising multilateral conventions in accordance with their provisions or, in the absence of some provisions, by a substantial majority of the parties to the revised convention.'*¹⁴⁹

In the Second Report, Lauterpacht frankly confessed that Paragraph 4 of Article 16 is a kind of introduction of legislation to the international community:

*'In so far as that principle sanctions and treats as valid departure from the terms of a binding treaty as the result of the conclusion of a multilateral treaty of a sufficient degree of significance and generality, it amounts to an interference with the legal rights of States without their consent. To that extent it amounts to a produced measure of international legislation in the literal sense. That consequence is probably unavoidable in a progressive and developing international society. However, it is of importance to realize the implications of that aspect of the codification of the law of treaties.'*¹⁵⁰

¹⁴⁸ Lauterpacht/R10/YBII.C/1953/vol.2/155-156/para.2.

¹⁴⁹ Words added in the Second Report to Article 16 in the First Report are italicised. The words in square brackets are those deleted in the Second Report.

In other words, the subsequent multilateral convention can override the prior convention due to the higher normativity of the subsequent multilateral convention, expressed as 'legislative character,' even if the former is contrary to the latter. Later, Lauterpacht clearly admitted that legislative treaties may have different normativity from the normative character of contractual treaties in his separate opinion in the *Petioners* case.¹⁵¹

The same consideration is also applicable to customary law. Lauterpacht claimed that international public policy can also be exchanged for international treaty régime which has the normativity of international public policy: '[I]f ...international courts are to be judges of the validity of treaties in the light of overriding principles of international custom and international public policy as hitherto recognized, a situation may be created in which international society may be deprived of the necessary means of development through process'. '*De lege ferenda*', he continued, 'there may be room for the consideration of a principle affirming that a multilateral treaty concluded in the general international interest is valid even if departing from or contrary to what has been considered in the past to be an overriding rule of customary international law.'¹⁵²

However, Lauterpacht knew that the introduction of relative normativity clearly causes the indeterminacy of law without the authority to decide it. Therefore, according to him, the compulsory jurisdiction of the International Court was indispensable to the hierarchical order of the normativity of international law. In the *Hague Academy*, Lauterpacht said as follows:

'The general principle of law invalidating immoral treaties is a necessary and salutary corrective when applied by an impartial agency. It may become an abuse and a negation of law when determined unilaterally by Governments supported by writers anxious to supply a cloak of juridical decency for cynical breaches of the law.'¹⁵³

¹⁵⁰ Lauterpacht/R11/YBILC/1954/vol.2/138-139.

¹⁵¹ Lauterpacht/*Petioners*/ICJReps/1956/48-49. Also see Fitzmaurice/1986/684-685/and/810-812.

¹⁵² Lauterpacht/R11/YBILC/1954/vol.2/155.

It is not surprising, therefore, that in Draft Article 15 of the 1953 Report, Lauterpacht proposed the compulsory jurisdiction of the International Court: 'It is the Court, and not the interested party, which is finally entitled to declare the treaty, or part thereof, to be void on account of illegality.' Furthermore, he continued, 'the operation of the principle involved [the nullity of treaties] must be dependent upon the willingness of the party invoking it to abide by the decision of an international tribunal upholding the allegation of invalidity or making, *proprio motu*, a finding to that effect.'¹⁵⁴ Although he did not forget the unwillingness of states to confer compulsory jurisdiction to the ICJ,¹⁵⁵ it is clear that, in the view of Lauterpacht, the Court would have very broad discretion under his Draft Article 15, because international public policy cannot be determined without moral considerations or values. Thus, his Draft Article 15 was one of the examples of Lauterpacht attempting to reconstruct the international community from the lawyer's perspective of international law. He wished to give international judges the right to decide the normativity of international law which invalidates treaties on grounds of moral and policy considerations.¹⁵⁶ In this sense, Draft Article 15 symbolises his legalistic ideal of the international community.

¹⁵³ Lauterpacht/1937-IV/CP-I/358-359.

¹⁵⁴ Lauterpacht/R10/YBILC/1953/vol.2/155.

¹⁵⁵ *Ibid.*

¹⁵⁶ On the role of international judges with regard to the indeterminacy of international law, Tasioulas/1996. But J./A./Beckett/2001.

6. THE RESPONSIBILITY OF INTERNATIONAL JUDGES

When Lord McNair retired from the International Court of Justice, Lauterpacht was elected as his successor in October, 1954. He became a judge of the International Court of Justice on 6 February 1955. In the same year, he was given knighthood. Although he had limited practical experience of international litigation, no-one doubted his ability as a judge due to his encyclopaedic knowledge of international law and his theoretical insights into international judicial functions.¹ Lauterpacht discussed many topics relating to international judicial functions from the point of view of the Rule of Law in the international community. As Scobbie points out, Lauterpacht 'found himself in the happy position of being able to practise his theory as a judge of the International Court of Justice.'²

Lauterpacht took his seat as Judge when the Court gave one order on Provisional Measure,³ six judgements⁴ on jurisdiction or merits and three advisory opinions,⁵ although he had to recuse himself from the *Nottebohm* case since he had advised Liechtenstein Government on that particular incident.⁶ In these cases, he appended one declaration,⁷ five separate opinions⁸ and two dissenting opinions.⁹ Apart from his individual opinions, Lauterpacht wrote 'the Provisional Report on the Revision of the Statute of the Court' for the General Conference for the Revision of the Charter, which was supposed to be held at the Tenth Annual Session of the General Assembly, while he recessed from the second phase of the *Nottebohm* case. Although this paper was an internal paper

¹ Rosenne/1961/826.

² Scobbie/1997/264.

³ *Interhandel/Interim-Measures/ICJReps/1959/105*.

⁴ *Norwegian/Loans/ICJReps/1957/9*; *Right/of/Passage/ICJReps/1957/125*; *Guardianship/ICJReps/1958/55*; *Interhandel/ICJReps/1959/6*; *Israel/v./Bulgaria /ICJReps/1959/127*; *Frontier/Land/ICJReps/1959/209*.

⁵ *Voting/Procedure/ICJReps/1955/67*; *Petitioners/ICJReps/1956/23*; *ILO/Administrative/Tribunal/ICJReps/1956/77*.

⁶ Lauterpacht/R-8/1950/CP-IV/5-20.

⁷ Lauterpacht/*Frontier/Land/ICJ-Reprots/1959/230-232*.

⁸ Lauterpacht/*Voting/Procedure/ICJReps/1955/90-123*; Lauterpacht/*Petitioners/ICJReps/1956/35-59*; Lauterpacht/*Norwegian/Loans/ICJReps/1957/34-66*; Lauterpacht/*Interhandel/Interim-Measures/ICJReps/1957/117-120*; Lauterpacht/*Guardianship/ICJReps/1958/79-101*.

⁹ Lauterpacht/*Interhandel/ICJReps/1959/95-122*; Lauterpacht-Koo-Spender/*Israel/v./Bulgaria /ICJReps/1959/156-194*.

of the Court, and was not published until 2002,¹⁰ Wilfred Jenks, Elihu Lauterpacht and Scobbie discussed it.¹¹ According to Elihu Lauterpacht, this report was circulated on 1 September 1955. Judge Lauterpacht purported to submit a final report on or before 15 January 1956 after hearing the comments of the judges of the Court. However, the final report seems not to have been prepared. This report expresses the general scheme of Hersch Lauterpacht on the International Court of Justice. Its basis is his belief in the Rule of Law in international relations. For example, it discusses questions of the 'automatic' reservation and the compulsory jurisdiction of the Court, and proposed a wide amendment of the Statute, including the abolition of judges *ad hoc* and the grant of *locus standi* to individuals and international organisations. Although his proposal seems too bold even now for states to accept, the report is worth reading as a statement of Lauterpacht's ideals.

These individual opinions and the Provisional Report show how Lauterpacht legitimised and protected the authority of the Court in order to accomplish his ideal of the Rule of Law in the international community. This chapter discusses the question of how international judges should be responsible for the authority of the Court from the viewpoint of the legitimacy of judicial decision rather than legal validity. It is appropriate to explain the concept of legitimacy of judicial decisions before discussing the problem of the responsibility of judges. It would be easier to understand the notion of the legitimacy of judicial decisions by comparing it with the concept of legal validity. The legitimacy of judicial decisions is different from the legal validity of decisions. The former is the authority of decision as a declaration of law, while the latter is the legal status of a judicial decision within the legal order. The problem of reasoning in judicial decision-making is a good example to understand the difference between them. The absence of reasons is conceived as the cause of the nullity of the decision. However, its absence does not automatically nullify the decision. With regard to the problem of *excès de pouvoir*, Kaiyan Kaikobad says,

[A] judicial or arbitral decision is to be regarded as valid and binding upon the states parties to the dispute,

¹⁰ Lauterpacht/R-12/1955.

¹¹ Wilfred/Jenks/1960/97-98; Elihu/Lauterpacht/1991/4-5; Scobbie/1997/265-266.

even if either of them considers the decision null and void...In such circumstances, the legally correct course of action is for the litigating states to conclude an agreement to refer the matter for impartial consideration by a tribunal or the International Court. Thus it is for the latter to decide whether or not the decision is without legal effect. It follows that until it is declared void, if at all, the previous decision must be considered as standing.¹²

This point explains the formal nature of legal validity. The legal validity of a judicial decision is reached by the fact of the Court deciding the case under Article 59 of the Statute. The decision binds parties even if one of the parties is unsatisfied with the reasoning behind the decision.

On the other hand, the reasoning behind judicial decision-making takes on a different aspect when looked at from the point of view of legitimacy. The importance of legal reasoning is due to the problem of the objectivity of a judicial decision in the sense that the decision should not be arbitrary. If a decision were regarded as arbitrary or politically biased, the legitimacy of the decision would be damaged, even though the decision is legally valid. This problem arose in the *South-West Africa* case. There were too many criticisms of the 1966 judgement for its political bias. Ram Anand described the harsh political criticism of this judgement as follows: 'It [the 1966 judgement] was variously decried as incredible, regrettable, "scandalous," "opaque as to law, justice, equity and morality," "grotesque," "disgrace" to the UN, the most unfortunate and unjust pronouncement ever made by the International Court, and an atrocious miscarriage of justice.'¹³ However, the real problem concerning the legitimacy of the 1966 judgement was neither its political bias nor its legal conservatism, but the fact that it breached the principle of *res judicata* in its reasoning. Hugh Thirlway points out that

'The fact that it deprived the Parties, and the waiting world, of a judgement on the merits which had confidently expected (and had been confidently expected to be a condemnation of South Africa's policies) is

¹² Kaikobad/1999/321.

¹³ Anand/1969/144.

not *in itself* a legitimate ground of criticism... The way in which it was done, and in particular the violation, real or apparent, of the principle of *res judicata*, however place the matter in a different perspective. The sin committed was however not one of over-conservatism: to scrap the procedural structure which protect the principle of consent as basis of jurisdiction would be a seriously retrograde step, however justified it might seem in the short term for the purposes of a particular case.¹⁴

Thus, even though the judgement binds Ethiopia and Liberia, on the one hand, and South Africa, on the other hand, the judgement, which is contrary to the principle of *res judicata*, was regarded as arbitrary by many member states of the United Nations. Consequently, the 1966 judgement considerably damaged the authority of the Court.

The crisis of the 1966 judgement shows the two elements being necessary to the legitimacy of the Court: the political impartiality of judges and the conformity of decisions with legal principles. If the judges were regarded as politically biased, the decision would be also necessarily disregarded as arbitrary. The impartiality of judges, therefore, is one of the important elements of the legitimacy of a decision. On the other hand, with regard to the conformity of a decision with law, it is axiomatic that judicial decisions should be based on law. However, this assumption easily falls apart, because it is commonplace even for lawyers to disagree as to which rule of international law is applicable to the subject matter. This problem so often appears as judicial discretion in hard cases. The political impartiality of judges is discussed first, followed by an examination of the conformity of decisions with law.

6.1. THE IMPARTIALITY OF JUDGES

Even before becoming a judge of the Court, Lauterpacht fully recognised the problem of the impartiality of judges from the point of view of legitimacy of decision. He thought the reason why

¹⁴ Thirlway/1995a/143. Emphasis original.

states do not fully rely on a judicial settlement lay judges not enjoying the complete trust of states: '[T]he real difficulty lies not in the inability of international law to protect important interests of States, but in the apprehension that it would be dangerous to expose such interests to the risks of a decision by judges whose impartiality is regarded as problematical.'¹⁵ The distrust of international judges is more obvious in the context of hard cases: 'If States refuse to treat disputes as justiciable on account of alleged lack of legal rules, it is because they distrust the impartiality of international judges in the unavoidable exercise of their creative function of filling the gaps in an undeveloped legal system.'¹⁶ Therefore, the impartiality of international judges is 'the Cape Horn of international judicial settlements'¹⁷ for Lauterpacht.

Lauterpacht discussed two problems in the context of the impartiality of judges: the personal integrity of judges and their political impartiality. The former concerns the probity of judges, for example, the possibility of corruption.¹⁸ The latter is more important and difficult; it is the problem of the impartiality of international judges between parties, in other words, 'a problem of loyalty to the judicial oath of impartiality.'¹⁹ This problem is especially apparent in the context of national judges and judges *ad hoc*. Lauterpacht was critical of both these types of judges, because the two types of judges seemed to him to reflect the notion that judges are representative of their own states and interests which was the greatest danger to their impartiality:

'[T]hat process ought not to be impeded by the continuance of formal institutions perpetuating the idea of representation of national interests. National judges are such an institution. The very presence of a national judge changes the character of the deliberations of the Court. They cease to be a contest between the various aspects of the impersonal claims of justice; they tend to degenerate into a contention between the conflicting claims of the parties. The fine scales of justice are loaded with the crude and incongruous element of partisan

¹⁵ Lauterpacht/Function/202.

¹⁶ *Ibid.*

¹⁷ *Ibid.*/203.

¹⁸ *Ibid.*/211-215.

¹⁹ *Ibid.*/215.

interest.²⁰

Indeed, the history of the Court shows that it is difficult for national judges and judges *ad hoc* to go contrary to the opinions of their own governments or of the governments that appoint them. Although there are some cases where national judges were opposed to the opinions of their own governments,²¹ there is only one case where a judge *ad hoc* took an opposite position to the government that appointed them.²²

Elihu Lauterpacht, however, justifies the institution of judge *ad hoc* in the *Application of Genocide Convention* case by saying that '[a judge *ad hoc*] has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write.'²³ Some lawyers support the opinion of Elihu Lauterpacht. Geoffrey Palmer, who is a judge *ad hoc* in the *Request for an Examination of the Situation* case, agrees with Elihu Lauterpacht.²⁴ Shabtai Rosenne also says that 'the inclusion of the individual opinion of the judge *ad hoc* alongside the text of the judgement may be no less of an assurance to a government than his

²⁰ Lauterpacht included both regular national judges and judges *ad hoc* in the term 'national judges.' *Ibid.*/233.

²¹ See, for example, McNair/ICJReps/1952/116-123; Basdevant/ICJReps/1953/74-84

²² Judge *ad hoc* Bastid supported the judgement which rejected the claim of Tunisia that appointed her in the *Application for Revision and Interpretation* case. Bastid/ICJReps/1985/247-252. In addition to the case of Judge *ad hoc* Bastid, somebody might argue that Judge *ad hoc* Valticos also was opposed to Bahrain which appointed him, because in the Judgement of 1 July 1994 in the *Qatar v. Bahrain* case, he agreed with the majority of the Court that 1990 Minute is a legal instrument, though Bahrain claimed that it is just a political instrument. However the 1994 Judgement is a kind of 'interim' decision in which the Court avoided to decide the question of jurisdiction by giving the parties 'an opportunity to submit to the Court the whole of the dispute.' See Schwebel/ICJReps/1994/130-131; Elihu/Lauterpacht/1996b. Indeed, Judge *ad hoc* Valticos was opposed to the majority of the Court in the Judgement of 15 February 1995 by supporting for the contention of Bahrain. Valticos/ICJReps/1995/74-78. Therefore, it cannot be said that he was opposed to the Bahrain government which appointed him.

²³ Elihu/Lauterpacht/ICJReps/1993/409/para.6. Also see Peck-Lee/1997/371-378.

²⁴ Palmer/ICJReps/1995/420/para.118.

presence on the Bench.²⁵ Merrills has the same view that ‘the vote of the ad hoc judge, like that of the “national” member of a court of arbitration, is never likely to change the result of a case, but his presence provides an important link between the parties and the Court.’²⁶ Collier and Lowe agree with them that it [the institution of judge *ad hoc*] increases the confidence of States in the Court, particularly when the other party has a judge of its nationality on the Court, in that the presence of an *ad hoc* judge may reassure the party which has appointed him that the nuances of its pleadings have been understood by at least one member of the Court.²⁷ They presuppose that the institution of judge *ad hoc* is harmless to the judicial decision of the Court, and rather useful to appease the governments reluctant to use the Court.

It is true that there has been no case where a judge *ad hoc* has had definitive influence over the judgement of the Court. Even in the *Lotus* case, which was decided by the casting vote of the President, the vote of *ad hoc* Judge Feizi-Daïm Bey was counterbalanced by the dissenting vote of French judge, Vice-President Weiss. The *South West Africa (Second Phase)* case is another example where the votes of judges *ad hoc* cancelled each other out, though the absence of Judge Zafrullah Kahn was decisive to the 1966 judgement.²⁸ Insofar as judges *ad hoc* have less influence over the decision of the Court, the institution of judge *ad hoc* (and regular national judges) is harmless from the pragmatic viewpoint.

However, the partiality of judge *ad hoc* is still problematical from the point of view of the legitimacy of a judicial decision. The opinion of a judge *ad hoc* is clearly less objective in the sense that he is clearly in favour of the government that appoints him. It is true that lawyers who defend the institution of judge *ad hoc* deny the view that a judge *ad hoc* is the representative of the state that appoints him in the bench. Elihu Lauterpacht, for example, mentions that

‘This has led many to assume that an *ad hoc* judge must be regarded as a representative of the State that

²⁵ Rosenne/1997/vol.3/1128.

²⁶ Merrills/1998/139.

²⁷ Collier-Lowe/1999/131.

appoints him and, therefore, as necessarily pre-committed to the position that that State may adopt. That assumption is, in my opinion, contrary to principle and cannot be accepted.²⁹

Nevertheless, it seems difficult to spot the difference between the opinion of Elihu Lauterpacht and the view that a judge *ad hoc* is the representative of the state which appoints him, because a judge *ad hoc* would play a role of *avocat supplémentaire*³⁰ insofar as he tries 'to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration.'³¹ Although it seems true, as *Abi-Saab* pointed out, that if a judge *ad hoc* acts as 'a disguised advocate,' 'he will be completely isolated and will exercise no influence whatsoever,'³² it is still arguable whether the role of judge *ad hoc* is similar to the role of advocate in the sense that judge *ad hoc* is in favour of the government which appointed him/her, considering the fact that there is only one example that judge *ad hoc* voted against the government which appointed her. Indeed, Elihu Lauterpacht himself admitted that

'[U]nderlying the whole of this discussion is an unarticulated premise (though we have actually expressed it) that a person appointed by a country as an *ad hoc* judge or a person sitting as a titular judge with a particular nationality, is inevitably going to favour that country or is under strong emotional pressure to do so. If that premise is correct (and I fear it is), then there is really nothing you [Professor Brown Weiss] can do to change the situation by mere statutory provision, except in the other direction – by diminishing his or her independence. You cannot enhance his or her independence, because the limitation on that independence is not statutory, but emotional, whereas you can limit independence by statutory provision or by some appropriate practice'³³

²⁸ McWhinney/1991/17-20.

²⁹ Elihu/Lauterpacht/ICJReps/1993/409/paras.5-6.

³⁰ Dubisson/1964/65.

³¹ ICJReps/1993/409/para.6.

³² Peck-Lee/1997/394.

Such a role of judge *ad hoc* was the concern of Hersch Lauterpacht. For him, the interests of parties 'must be represented and defended by advocates and counsels – not by judges pledged by their oath to the duty of impartiality' under Article 20 of the Statute.³⁴

Furthermore, the fact that the votes of national judges and judges *ad hoc* have the same value as the votes of other judges necessitates the impartiality of national judges and judges *ad hoc* between parties, because even their votes contribute to judicial decisions regarded as the declaration of law. In other words, even national judges and judges *ad hoc* are responsible for the legitimacy of judicial decisions. Lauterpacht confessed his concern that 'although in this case the vote of the Turkish judge had no decisive effect with regard to the actual decision of the Court, it did have the effect of giving to the world, with the authority of a formal majority of the Permanent Court, approval of a doctrine of great importance which some believe to be mistaken.'³⁵

Lauterpacht, of course, knew the actual difficulty of abolishing the institution of judge *ad hoc* and its political or pragmatic usefulness. However, he criticised the institution from the point of view of the legitimacy of the judicial decision. In this context, it should be noted that the problem of the impartiality of international judges is turned into the question of legal reasoning. In *Development-II*, Lauterpacht offered a general discussion of the relation between the impartiality of judges and legal reasoning:

'[I]t [the problem of judicial impartiality] can be considerably alleviated by the fullest possible completeness of judicial reasoning which renders it practicable for everybody to know and to assess the value of the grounds of the decision given by an international tribunal. Even if there existed no other inducement prompting the full elaboration and exhaustiveness of judicial pronouncements, this aspect of the matter must in itself constitute a factor of compelling cogency in discouraging any semblance of deliberate brevity. It is not without significance that in the history of international arbitration allegations of improper exercise of the arbitral

³³ *Ibid.*/388.

³⁴ Lauterpacht/1954f/534.

³⁵ Lauterpacht/1930b/184/n.1/and/Function/235/n.1.

function have been mostly made in cases in which the award was not accompanied by reasons.³⁶

This point is also seen by his approval of the right of national judges to append individual opinions, because the individual opinions of judges are indispensable for checking their impartiality:

‘[T]he dissenting opinions may have the advantage of checking manifestly partisan dissent by at least compelling the national judge to produce the reasons for dissent and by exposing the dissenter to the criticism consequent upon the weakness or frivolity of any such dissent. . . . [T]here devolves upon international lawyers a distinct duty to examine the dissenting opinions, with due respect and without any implication of motives, but with a determination to call attention, if and when occasion arises, to any improper use of this right.’³⁷

It is not enough, therefore, to discuss the problem of impartiality. It is necessary to pay attention to the problem of legal reasoning in order to discuss the legitimacy of judicial decision.

6.2. THE PROBLEM OF LEGAL REASONING

Lauterpacht adhered to the problem of legal reasoning from his early academic career. Indeed, as discussed in chapter 2, private law analogy is nothing but ‘the role of “reason” in the treatment of the positive material’³⁸ from the viewpoint of the development of international law. As Rosenne correctly points out, thus, in Lauterpacht’s view, ‘the Court, and that ultimately means its individual members, has a role to play, amounting to a duty, in the development of the law, which he regarded as one of the most important conditions of the continued successful functioning and jurisdiction of international tribunals.’ This duty of judge is ‘the exhaustiveness of judicial reasoning.’³⁹ Lauterpacht did not change his adherence to the problem of legal reasoning after he was elected as

³⁶ Lauterpacht/Development-II/40.

³⁷ Lauterpacht/Function/234.

³⁸ Nussbaum/1947/275.

a Judge of the ICJ. Indeed, In the *Voting Procedure* case, Lauterpacht said as follows:

‘Clearly, in order to reply to that question, the Court is bound in the course of its reasoning to consider and to answer a variety of legal questions. This is of the very essence of its judicial function which makes it possible for it to render Judgments and Opinions which carry conviction and clarify the law.’⁴⁰

Thus, the problem of legal reasoning was for Lauterpacht the question of responsibility of international judges. This section discusses the questions of legal reasoning as the responsibility of judges.

6.2.1. JUDICIAL DISCRETION

Lauterpacht tried to show how the international courts and tribunals interpret international law. His interest in the interpretation of international law is seen not only in his trilogy of international judicial functions, namely *Analogies*, *Function* and *Development-II*, but also in his articles on the interpretation of international treaties, because the interpretation of treaties is one of the essential tasks of the Court. The interpretation of law is the judicial process of discovering the real meaning of law, whether international treaties, customary law or general principles of law.

However, the problem is that the interpretation of law is not automatic. Judicial discretion is more or less necessary in the interpretation of law. This is so especially in hard cases where a ready-made answer does not seem to exist at first sight. However, insofar as judicial discretion is allowed, judges can always find one correct answer in the interpretation of international law. It is the proposition of Lauterpacht’s theory of the completeness of international law. In this sense, the theory of the completeness of international law is the corollary of the theory of judicial discretion. Thus, there are three features in Lauterpacht’s theory of the completeness of international law: (1)

³⁹ Rosenne/1961/833.

⁴⁰ Lauterpacht/ICJReps/1955/92-93.

the viewpoint of judge, (2) the frequent occurrence of hard cases, (3) the affirmation of judicial discretion governed by legal principles. These points are now discussed below.

First, the completeness of international law cannot be discussed without the viewpoint of international judges. This point is clearly seen in the remark that ‘once the parties have submitted a dispute for judicial determination, the principle of the completeness of the legal order fully applies, with the result that all disputes thus submitted are capable of a legal solution.’⁴¹ If we ignore the centrality of international judges in Lauterpacht’s theory, it would be easy to misunderstand the meaning of the completeness of international law. Teruo Komori, for example, is of the opinion that Lauterpacht should have discussed the completeness of international law as the substantial problem of the source of law, distinct from the procedural problem of the competence of international judges.⁴² What Komori fails to understand is that the substantial problem of the source of law in the view of Lauterpacht could not be separated from the procedural competence of international judges. Lauterpacht did not distinguish between them from the point of view of the gradual concretization of law. It was only possible for him to think that it was unavoidable for international judges to exercise law-making function from the perspective of Kelsenian normativism. It is the reason why Lauterpacht linked the completeness of international law to the prohibition of the declaration of *non liquet*, which is essentially a problem for international judges.

Secondly, Lauterpacht believed that hard cases were more usual than occasional on the international plane. He said, for example, that ‘in the majority of cases international tribunals have been confronted with novel situations for which international law has had no ready-made solutions at hand.’⁴³ Lauterpacht called such a phenomenon of hard cases ‘the novelty of action.’ The novelty of action occurs mainly because of the relative scarcity of judicial precedent, the absence of clear and ascertained rules, and the imbalance between the cause of action and the many cases of

⁴¹ Lauterpacht/Development-II/5.

⁴² Komori /2001/117-118.

⁴³ Lauterpacht/Function/105.

international problems.⁴⁴ This situation does not change in the case of treaty interpretation: 'The treaty must be taken to have been made within the frame [*sic*] of international law, in relation to which the facts of the case may present an entirely novel situation.'⁴⁵ Consequently, international judges necessarily use judicial discretion. Indeed, they have many occasions to use it. It is so even if treaty interpretation is the subject-matter of the dispute. Although he recognised the usefulness of the doctrine of plain meaning,⁴⁶ the doctrine of plain meaning seemed to Lauterpacht to be enough to allow international judges to discover exactly what state parties agree. It is because the parties dispute the real meaning of the text in most cases, which means that the text is not clear at all, although the Court tends to say that the text is sufficiently clear.⁴⁷ On the contrary, Lauterpacht emphasised the judicial discretion of judges to evaluate the evidence of the will of states. It is the reason Lauterpacht accentuated the preparatory work in the interpretation of treaties:

'In the case of treaties the preparatory work is as a rule recorded, formal, authoritative, explicit, and continuous. If thoroughly studied, it permits the tracing of the development of a clause, in an illuminating chain of continuity, from the first instruction to the delegate or from the first note initiating the correspondence to the final provision as adopted in the treaty.'⁴⁸

The will of states, furthermore, should be found in the background of general international law. It is because international treaties are embodied not only as the expression of the will of states but also as the will of the international community:

⁴⁴ *Ibid.*/105-107.

⁴⁵ *Ibid.*/109.

⁴⁶ Lauterpacht/1950f/CP-IV/400-401.

⁴⁷ *Ibid.*/397. However, William Beckett pointed out the political intention of a state to dispute the meaning of a treaty. 'It certainly happens that the meaning of a treaty provision is perfectly clear but that one or another party to the treaty has for one reason or another found provision inconvenient. The political position of the State concerned may be such that it can only give way on the basis of an international legal decision.' W./Beckett/1950/440. On the discussion between Lauterpacht and Beckett with regard to the interpretation of treaties, see Fitzmaurice/1986/42-48.

‘[I]t would be a mistake to assume that the function of interpretation of treaties, consisting as it does in ascertaining what was the intention of the parties, is a process divorced from the application and development of customary international law. The eliciting of the intention of the parties is not normally a task which can be performed exclusively by means of logical or grammatical interpretation. As a rule, the established canons of construction – which themselves partake of the nature of customary law – must be supplemented by the principle that when the intention of the parties is not clear it must be assumed that they intended a result which is in conformity with general international law.’⁴⁹

Therefore, Lauterpacht allowed judges to take the preparatory work into consideration as the use of judicial discretion in the interpretation of international law. In order to find the will of state parties, judges have to choose which general rules and principles of international law should be applicable to the case. Thus, they cannot help but use their discretionary power. Lauterpacht said that ‘the selection of any particular rule, one of a number of competing and occasionally mutually inconsistent rules, is necessarily a matter of discretion.’⁵⁰ Judicial discretion always accompanies the interpretation of law:

‘When the law is clear and non-controversial, judicial discretion is correspondingly circumscribed within narrow limits. Even then it is far from being wholly eliminated.’⁵¹

This passage shows that Lauterpacht considered the judicial discretion to be essential to the interpretation of international law. Furthermore, judges are often asked to co-ordinate opposing values:

‘[E]ven in the absence of difficulties of that character, the Judge is often confronted with a choice between

⁴⁸ Lauterpacht/1935/576.

⁴⁹ Lauterpacht/Development-II/27-28.

⁵⁰ Lauterpacht/1949c/CP-IV/411.

conflicting and equally legitimate principles of interpretation. It is his duty to give effect to the intention of the parties. But he is bound to interpret that intention in accordance with the paramount principle of good faith which demands that, again within the limits determined by circumstances, the maximum of effect must be given to the instrument in which the parties have purported to create legal obligations. At the same time he must take into account the fact that, especially in the international sphere, their intention may have been to create only a limited or even a nominal obligation.⁵²

The Court frequently encounters situations where legal values are in conflict. As a result, Lauterpacht concluded that 'the International Court of Justice is not, as a rule, faced with situations which, upon examination, reveal a clear and obvious preponderance of the legal merits of the claim of one party as against that of the other.'⁵³

The third problem is whether or not judicial discretion is arbitrary. In other words, it is the question whether judicial discretion is free from law. The answer of Lauterpacht to the question is that judicial discretion is always regulated by law.

'While all these considerations bring into relief the element of judicial discretion, they must not be allowed to obscure the fact – which is ultimately of overriding importance – that such discretion is circumscribed by the duty to apply the existing law and that it moves within the orbit of the tendencies, enshrined in precedent.'⁵⁴

In this sense, Lauterpacht's conception of judicial discretion, if Dworkin's expression is used, is judicial discretion in the weak sense that 'for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgement.'⁵⁵ Judicial discretion in the weak sense has four implications. First, it presupposes that law is not only composed of rules but also

⁵¹ Lauterpacht/Development-II/394.

⁵² *Ibid.*/396.

⁵³ *Ibid.*

⁵⁴ *Ibid.*/399.

⁵⁵ Dworkin/1977/31.

principles. Indeed, Lauterpacht's trilogy of judicial functions discusses how international judges apply legal principles to the case. Second, the exercise of judicial discretion is the application of legal norms, especially general principles, because law always governs judges. Third, there is always one right answer to a legal question. Fourthly, the judges are logically and legally prohibited to declare *non liquet*. We now discuss the first and second questions in the context of judicial legislation.

6.2.2. THE APPLICATION OF LEGAL PRINCIPLES AS JUDICIAL LEGISLATION

Although Lauterpacht regarded the exercise of judicial discretion as an application of legal principles, this exercise of judicial discretion for filling gaps in law is 'judicial legislation.' On this point, it should be noted that there are two views. The first view is, as some positivists claim, that judges create law as 'legislators' where they cannot find any applicable rules. There are two presuppositions for this view. First, it is assumed that international law is composed only of legal rules made by states. Secondly, this view distinguishes law-creation from law-application. According to this view, there are many gaps in the international legal order, and international judges must either declare *non liquet* or make law as legislators do in hard cases. Ryoichi Taoka, for example, said that 'if international judges are not allowed to have the competence to make judgements based on other than the existing law, and are imposed the strict limitation upon by arbitration treaties or compromises, or by the Statute in the case of the Permanent Court, they cannot help but declare their incompetence and abandon the settlement of the dispute.'⁵⁶ However, this view tends to criticise judicial legislation, because the creation of law is not the task of international judges, but essentially the task of sovereign states as legislators. It is so even if judges *prima facie* apply legal principles to the disputes, because this view holds that the choice of principles is political rather than judicial. Law-creation, therefore, is exceptional to the judicial

⁵⁶ Taoka/1938/713.

courts apart from the case where the parties expressly authorise judges to do so.

The second view is that judges do not act like legislators, although they in fact make law in their own way. According to the second view, judicial legislation is very normal as a judicial process. This view presupposes that international law is composed not only of the rules made by the states but also legal principles such as general principles of law or legal maxims, and that the task of the judges is not to legislate as legislators do, but to discover and apply law. Even when judges find it difficult to detect any applicable rule, they are always regulated by law, namely legal principles, and they have to exercise their discretion regarding the application of principles. The application of general principles, however, necessarily results in law-creation especially in hard cases. Therefore, law-creation by judges should be regarded as a proper judicial process. Lauterpacht held this second view. He admitted that judges have the competence to create individual norms. It is because he adopted Kelsenian normativism, especially the concept of the gradual concretization of law. For Kelsenian normativism, the application of general norms is the creation of individual norms at the same time:

‘A norm regulating the creation of another norm is “applied” in the creation of the other norm. Creation of law is always application of law. These two concepts are by no means, as the traditional theory presumes, absolute opposites. ... The creation of a legal norm is – normally – an application of the higher norm, regulating its creation, and the application of a higher norm is – normally – the creation of a lower norm determined by the higher norm. A judicial decision, e.g., is an act by which a general norm, a statute, is applied but at the same time an individual norm is created obligating one or both parties to the conflict.’⁵⁷

Lauterpacht also said that ‘any apparent innovation [of law] is the result of nothing more daring than the application of a general principle of law or of a general legal maxim.’⁵⁸ He continued that ‘[j]udicial legislation, so long as it does not assume the form of a deliberate disregard of the existing

⁵⁷ Kelsen/1945/133.

⁵⁸ Lauterpacht/Development-II/155.

law, is a phenomenon both healthy and unavoidable.⁵⁹

The crux of the difference between the first view and the second view is whether or not the application of principles should be regarded as a proper judicial process. Both views recognise that the Court cannot act as a legislature. However, the first view sees even the application of principles as belonging to legislative activity. Prosper Weil, for example, recognises the application of general principles as judicial legislation. However, he denied it as proper judicial activity. For him, even judicial legislation as the result of the application of principles needs to be authorised by parties:

‘[W]henver states decide, by way of a special agreement, a compromissory clause, or otherwise, to ask for the judicial settlement of a dispute, they impose on the judge or arbitrator an obligation to settle the dispute. Therefore, *ipso jure* they confer on the tribunal the normative and quasi-legislative power necessary to produce that result.’⁶⁰

Judge Vereshchetin agrees with him as follows:

‘The Judgement of the Court in a contentious case is aimed at the settlement of a concrete dispute dividing concrete parties. By its nature, it requires a ruling between “the right and the wrong.” In this situation, proper administration of justice prompts the Court to seek every possible way to overcome inconclusiveness which may exist in the legal regulation of the matter under consideration.’⁶¹

However, the views of Weil and Vereshchetin are contrary to the experience of international adjudication. The *Eastern Extension, Australasia and China Telegraph Company* case between the United Kingdom and the United States in 1923 shows this point. The case was about whether the United States should compensate for the cutting of submarine telegraph cable during the American-

⁵⁹ *Ibid.*/156.

⁶⁰ Weil/1997/115.

⁶¹ Vereshchetin/1999/540.

Spanish war. The problem is that even the British government accepted that there was no treaty nor customary law imposing on the United States the legal obligation to pay compensation for the cutting of these cable at that time. The tribunal, however, concluded as follows:

‘International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find – exactly as in the mathematical sciences – the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.’⁶²

Consequently, the Tribunal rejected the claim of the British government that ‘in the absence of any rule governing the matter of cable cutting, it is the duty of this Tribunal to frame a new rule.’ The Tribunal declared as follows:

‘[T]he duty of the Tribunal, in our opinion, under article 7 of the Special Agreement, is not to lay down new rules. Such rules could not have retroactive effect, nor could they be considered as being anything more than a personal expression of opinion by members of a particular Tribunal, deriving its authority from only two Governments.’⁶³

The same attitude is seen in the case law of the Court as well. The Court recognises the application of principles as the proper judicial activity. In the *Fisheries* case, the Court declared that ‘[i]t does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its

⁶² RIAA/vol.6/114-115.

⁶³ *Ibid.*/118.

validity under international law.⁶⁴ In the *North Sea Continental Shelf* case, 'in which the International Court was faced with a situation of potential *non liquet*,'⁶⁵ the Court said as follows:

'[T]he legal situation . . . is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States face with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties.'⁶⁶

In the *Fisheries Jurisdiction* cases, although it recognised that the law governing maritime delimitation was changing at that time, it was still possible for the Court to judge the legality of the unilateral extension of the fishery zone by Iceland without judicial legislation in the first sense. Indeed, the Court said that '[i]n the circumstances, the Court, as a court of law, cannot render judgement *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.'⁶⁷

International judges, therefore, clearly have regarded the application of principles as a proper judicial process. However, there are still some problems on the application of principles as judicial legislation. The first problem is the application of formal principles such as the adversary principle and the residual negative principle. It is generally said that the formal principles guarantee the completeness of law. Joseph Raz, for example, says that in the case that law is silent, 'closure rules [that whatever is not legally prohibited is legally permitted and vice versa], which are analytic truths rather than positive rules, come into operation and prevent the occurrence of gaps.'⁶⁸ However, the application of formal principles does not justify judicial discretion, because it means nothing but the *de facto* declaration of *non liquet*. Secondly, even if the formal completeness of law is inappropriate,

⁶⁴ ICJReps/1951/132.

⁶⁵ Fitzmaurice/1974a/107.

⁶⁶ ICJReps/1969/46/para.83.

⁶⁷ ICJReps/1974/23-24.

⁶⁸ Raz/1979/77.

the question still remains about how the material completeness of law is possible. The third problem is about the legal nature of the choice of principles; if judges choose the applicable principle without any standard, how is the choice of principle regarded as the proper judicial process? These are discussed regarding the application of these principles below.

6.2.2.1. THE MATTER OF PRINCIPLES

The conformity of judicial decision with legal principles is an important element in the matter of the legitimacy of judicial decision. Even a positivist like Neil MacCormick admits this point as the requirement of coherence: 'When problems of relevancy or of interpretation or of classification arise within the system, the requirement of coherence is satisfied only to the extent that novel rulings given can be brought within the ambit of the existing body of general legal principles.'⁶⁹ However, what types of legal principles are necessary to justify judicial decision? There are two types of legal principles applicable to hard cases: formal principles and material principles.

Formal principles are technical and rather automatic principles for judges to decide the case. There are two types of formal principles: the adversary principle of judicial procedure and the residual negative principle. The adversary principle of judicial procedure is that 'unless the court finds that there is a rule of law supporting the Applicant's claim, judgement must be for the Respondent.'⁷⁰ This method is logically very simple, and it is impossible for international judges to declare *non liquet* in a formal sense. The residual negative principle that sovereign states have freedom of action unless international law restricts such a freedom produces the same result as the adversary principle of judicial procedure. The residual negative principle is also sometimes used as justification of the formal completeness of international law, because if judges cannot find any restrictive rules, they can always declare that the activity of the defendant is lawful under international law. Hans Kelsen indicated that the application of formal principles is enough to

⁶⁹ MacCormick/1978/107.

⁷⁰ Stone/1959/134.

justify a judicial decision:

'That there is no rule referring to a case can only mean that there is no rule imposing upon a state (or another subject of international law) the obligation to behave in this case in a certain way. He who assumes that in such a case the existing law cannot be applied ignores the fundamental principle that what is not legally forbidden to the subjects of the law is legally permitted to them.'⁷¹

Georg Schwarzenberger also held the same view that '[i]n the absence of any other applicable rule, it is always possible to decide a case in favour of the defendant, that is to say, on the presumption in favour of the freedom of States under international law.'⁷²

Although there is an opinion that it is irrelevant to distinguish between these two principles,⁷³ the difference between them is still theoretically useful with regard to legal justification. The difference between them is that while the adversary principle does not recognise the legality of the act or omission of the respondent, the residual negative principle presumes it. As Julius Stone explained,

'A court's decision for a Respondent in a contentious proceeding on the ground that there is no rule of international law supporting the Applicant's claim (international law being completely silent on the particular matter) does not necessarily imply that the Respondent's behaviour was legally *permitted* by international law. It could equally mean merely that it was legally neutral in relation to the law in question. ...On the other hand, when the "residual negative principle" is invoked, that principle itself has the effect of rendering the Respondent's behaviour legally permitted, for this principle is so far as it is adopted equivocates legal neutrality to legal permission.'⁷⁴

⁷¹ Kelsen/1966/439-440.

⁷² Schwarzenberger/1960/234.

⁷³ Sugihara/1985/205.

Fitzmaurice also recognised this difference, though he observed the difference between the two principles were 'too subtle to have much practical importance in many situations.'⁷⁵

The adversary principle of judicial procedure was applied in the *Savarkar* case. In 1910, the British government sent, by steamship, a British-Indian named Savarkar from England to India to be prosecuted for abetting a murder. The ship arrived at Marseilles on 7 July, and an authority of the French Police placed himself at the disposal of the Commander in respect of the watch to be kept. However, next morning, Savarkar escaped from the ship and swam ashore, but was arrested by a brigadier of the French maritime gendarmerie who was not aware of the identity of Savarkar. The French officer, who could not understand English, returned Savarkar to the British agents. On 9 July, the ship left Marseilles with him on board. However, the French government did not approve of the manner in which these agents returned at Marseilles, and demanded the restitution of Savarkar to France, though the British government refused to do so. As a result, the governments agreed to submit this dispute to the Permanent Court of Arbitration. After examining the fact, the Tribunal quite simply said that '[w]hereas, while admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British Police, there is no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.'⁷⁶ Therefore, the Tribunal decided the case in favour of the British government.

On the other hand, the residual negative principle was applied by the Permanent Court in the *Lotus* case. In 1926, the French mail steamer *Lotus* collided with a Turkish collier on the high seas. The Turkish ship sank, and eight Turkish nationals died. After this collision, the *Lotus* arrived at Constantinople, and Turkish authority prosecuted the French officer of the *Lotus* on a charge of manslaughter. The Turkish criminal court sentenced him to eighty days' imprisonment and a fine.

⁷⁴ Stone/1959/136. Emphasis original.

⁷⁵ Fitzmaurice/1974a/108.

⁷⁶ HAC/236.

However, the French government protested against the arrest of the French officer and the jurisdiction of the Turkish criminal court. As the result of negotiations between two governments, they decided to submit to the Permanent Court of International Justice the question of which government had jurisdiction to prosecute the officer for the collision on the high seas. After stating that restrictions on the independence of states cannot be presumed because international law emanates from the free will of states, the Permanent Court continued,

‘[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. ... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.’⁷⁷

Therefore, the question was whether there was a legal rule which restricted such a wide discretion of states. However, the French government failed to prove that such a prohibitive rule exists. Therefore, the Permanent Court concluded that Turkey had not acted contrary to international law.

‘No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, ...the courts of many countries, ...,

⁷⁷ PCIJ/A/No.10/18-19.

interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. ...[T]he Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. ...[T]here is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principles.⁷⁸

The application of formal principles may seem correct at first sight. However, there is a serious problem with reference to the application of formal principles. Gerald Fitzmaurice pointed out that '[t]he truth is that the whole formal position turns in a circle, because it involves that since the absence, or seeming absence, of applicable substantive rules or principles cannot be allowed to prevent a decision being given, that the very absence must if necessary itself become the basis of the decision.'⁷⁹ In other words, even if the international judges avoid the pronouncement of *non liquet* by using these formal principles, the application of these formal principles essentially amounts to the declaration of *non liquet*.

This point does not change at all even if the residual negative principle allows judges to recognise the legal right of a respondent state. The residual negative principle is based on the assumption that the situation that international law does not prohibit an activity necessarily means that the activity is legal. However, this presumption is simply wrong, because 'being not prohibited' is not the same as 'being legal.' The former covers the two situations whereby the activity conforms to law, and the activity is not regulated by law. In both cases, the Court can declare that the activity

⁷⁸ PCIJ/A/No.10/23.

⁷⁹ Fitzmaurice/1974a/110.

is not legally prohibited. On the other hand, 'being legal' means that the activity is justified by right or that the activity is justified by the conformity with legal obligations. However, 'being legal' excludes the case where there is neither a legal right nor a obligation, because the non-existence of law simply means that we cannot grasp a matter in legal terms. In this sense, the residual negative principle is a result of the confusion between 'being not prohibited' and 'being legal.'

It is argued that freedom of action is justified by the principle of state sovereignty in the case where there is no positive international law. However, this view is also logically wrong. State sovereignty simply means 'legal authority which is not in law dependent on any other earthly authority.'⁸⁰ It is true that state sovereignty is the basis of some important principles, including the legal equality of sovereign states and the principle of non-intervention. However, the principle of state sovereignty does not necessarily allow all kinds of activity justified on the basis of freedom of action. Take the case of the exercise of domestic jurisdiction, which is the most typical case of freedom of action as state sovereignty. It is true that, as the Permanent Court said in the *Lotus* case, the principle of state sovereignty justifies a wide discretion to exercise jurisdiction in its own territory. In this context, the function of the principle of state sovereignty is to permit states to exercise domestic jurisdiction on their own territory. However, the question whether the exercise of jurisdiction is opposable to other states in the international plane, namely the principle of state sovereignty as the power-conferring norm for states to produce the obligations of other states, is quite another matter. The exercise of state jurisdiction does not automatically mean that it has international legal validity at the same time. Indeed, in its jurisprudence, the Court clearly distinguishes between these two questions. In the *Fisheries* case, the Court said:

'The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the

⁸⁰ Oppenheim-Jennings/Watts/122.

delimitation with regard to other States depends upon international law.⁸¹

In the *Nottebohm* case, the Court also concluded as follows:

‘International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgement given by the competent court of a State which it is sought to invoke in another State.’⁸²

These statements show that the principle of state sovereignty does not function as the power-conferring rule which gives a state the power to obligate other states. In other words, the principle of state sovereignty is not enough legal justification to other states insofar as the opposability of domestic law is concerned.

Furthermore, it should be noted that the *Lotus* judgement has less authority to justify the residual negative principle. The judgement was given by the casting vote of the President in the situation that votes of judges were divided between 6 and 6. As already noted, the Court itself does not follow the *Lotus* judgement as far as the problem of the opposability of the exercise of domestic jurisdiction is concerned. It is only in the *Lotus* case that the Court said that the exercise of the domestic jurisdiction ‘necessarily and automatically’ has international effect, which obligates other states to recognise such an exercise of the domestic jurisdiction. Finally, the international community adopted the contrary rule to the judgement in the multilateral treaties such as the 1952 Brussels Convention, the 1958 Geneva Convention on the High Seas and the 1982 UNCLOS.

Nevertheless, some lawyers, including Judge Guillaume, argue that the Court admits the

⁸¹ ICJReps/1951/132.

⁸² ICJReps/1955/21.

residual negative principle in the *Nicaragua* case.⁸³ It is true that in the context of the armaments of the Nicaraguan government, the Court says that ‘in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.’⁸⁴ However, it is also clear that this statement neither recognises the legal right of Nicaragua to procure its armament, nor the legal obligation of the United States to recognise the armed position of Nicaragua. What the Court says is simply that ‘[i]t is irrelevant and inappropriate, in the Court’s opinion, to pass upon this allegation of the United States [that the militarisation of Nicaragua proves its aggressive intent].’⁸⁵ In other words, the Court declines to examine the claim of the United States with regard to the legal meaning of the armament of Nicaragua. In this sense, this statement is not the expression that the Court accepts the residual negative principle.

The formal principles, therefore, are not appropriate to justify a judicial discretion. In Lauterpacht’s words,

‘[A] rigid application of tests based on these formal principles [the adversary principle and the residual negative principle] may, by reducing the activity of the judge to a merely automatic function, defeat the very end of law. Undoubtedly it secures what may be called the formal justiciability of disputes, inasmuch as it produces a judicial pronouncement on the legal merits of any claim whatsoever submitted to a Court. But at the same time it may make us forget that the necessary aim of any legal system is also material completeness. In order to achieve that material completeness the judge must consider not only the letter of the law, but also its spirit and purpose.’⁸⁶

⁸³ Guillaume/ICJReps/1996-I/291-292/para.10. Also see Thirlway/1989/77; Akande/1997/212-215.

⁸⁴ ICJReps/1986/135/para.269.

⁸⁵ *Ibid.*

⁸⁶ Lauterpacht/Function/85-86.

In this sense, Lauterpacht was reluctant to admit the formal completeness of international law,⁸⁷ although some lawyers mistook his conception of the completeness of international law for the formal one. Taoka, for example, misunderstood the meaning of the completeness of international law. He criticised Lauterpacht on the grounds that that the completeness of international law was simply the formal one, so that international tribunals could not effectively settle international disputes.⁸⁸ However, if his conception of the completeness of international law is simply formal, Lauterpacht could not insist on the role of international judges to develop international law. Fitzmaurice pointed out as follows:

‘Lauterpacht believed that an international legal tribunal could always resolve a dispute positively, so far as its legal aspects were concerned, and not merely by the negative process of rejecting a claim or complaint on the ground of the supposed absence of legal rules. He believed this could be done by the application of general principles of law, if necessary of private law.’⁸⁹

Lauterpacht was reluctant to accede to Kelsen’s position with regard to the formal completeness of law, although he accepted Kelsenian normativism. It is because Lauterpacht disagreed with Kelsen with regard to the separation thesis between law and morality. For Kelsen, who is a formalist *par excellence*, a legal system is closed to morality. Even in hard cases, judges have to apply nothing but existing legal norms. Therefore, Kelsen denied the judicial transformation of morality into law:

‘The assumption that the law-applying organs are authorized to fill such gaps, by applying to the particular case norms other than those of existing conventional or customary international law, implies that the law-applying organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory. From the point of view of legal positivism, such a law-creating power must be

⁸⁷ Also see Lauterpacht/1955/CP-II/275.

⁸⁸ Taoka/1938/705-706.

⁸⁹ Fitzmaurice/1986/649.

based on a rule of positive international law. Whether there exists such a rule of general international law is doubtful, although many writers take it for granted that there are gaps in existing international law, and that the states or international agencies competent to apply international law are authorized to fill these gaps.⁹⁰

For Lauterpacht, on the other hand, a legal system is open to morality. It is the reason for Lauterpacht's emphasis on the importance of general principles of law, which is 'an expression of what has been described as socially realisable morality,'⁹¹ in the completeness of international law, though he admitted that 'the main function of "general principles of law" has been that of a safety valve to be kept in reserve rather than a source of law of frequent application.'⁹²

The notion of the material completeness of law may be explained by the English tradition of international law. John Fisher Williams, for example, explained the completeness of international law in the context of English legal history:

'The law of our ancestors, in the time, let us say, of Edward I, seems to a modern reader of legal history so imperfect that one of the questions which he is constantly asking himself is how it ever was possible for reasonable men to be content with such a system. But no one ever suggested that the judges of that day could not decide the cases submitted to them, there being perhaps then a lively sense even in domestic matters of the paramount importance of the King's Peace. And it would be a mistake to exaggerate the importance of the gaps, even in this sense, in international law.'⁹³

James Brierly also affirmed that 'no system of law consists only of formulated rules, for these can never be sufficiently detailed or sufficiently foreseeing to provide for every situation that may call for a legal decision; those who administer law must meet new situations not precisely covered by a formulated rule by resorting to the principle which medieval writers would have called natural law,

⁹⁰ Kelsen/1966/439.

⁹¹ Lauterpacht/Development-II/172.

⁹² *Ibid.*/166.

and which we generally call reason.’⁹⁴ Therefore, Brierly also denied the admissibility of the declaration of *non liquet*:

‘It [the pronouncement of *non liquet*] does not arise, because international law, like any other system of law, is, in a formal, though of course not in any other, sense a “perfect” system; it can provide a solution for any issue submitted to a court, and it can do this because it accepts the practice by which the judge is required to “find” a rule of law which is applicable to the case before him.’⁹⁵

Their agreement on the material completeness of law is not coincidental; they were inspired by the common law tradition, one feature of which is faith in judges. Roscoe Pound proclaimed the superiority of the common law tradition as follows:

‘Where such a doctrine obtains, not merely the interpretation and application of legal rules but in large measure the ascertainment of them must be left to the disciplined reason of the judges, and we must find in the criticism of the reported decision by bench and bar in other cases our assurance that they will be governed by reason and that the personal equation of the individual judge will be suppressed. The vitality of the common law and the steady increase in the value attributed to judicial decisions in the rest of the world attest the soundness of this expectation. We have, then, the means of progress in our law to begin with, where the rest of the world is struggling to attain it.’⁹⁶

In this sense, Lauterpacht’s concept of material completeness of law comes from the English school of international law.

It is still undeniable, however, that Lauterpacht’s conception of the completeness of law was influenced by Kelsenian normativism. This point is evident in his discussion on the decision *ex*

⁹³ Fisher/Williams/1929/51.

⁹⁴ Brierly/1963/66.

⁹⁵ *Ibid.*/68.

aequo et bono. The decision based on *ex aequo et bono* for Lauterpacht was a part of the judicial function, since the common will of state parties should be regarded as law, even though the international judges cannot decide a case *ex aequo et bono* without the common will of state parties:

‘So long as the Court does not arrogate for itself the right of deciding *ex aequo et bono*, but acts in this capacity at the express wish of the parties, that envisaged in the opening paragraph of Article 38 of the Statute in which the Court is authorized to apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting States.” Given such an agreement, the decision rendered will, it is submitted without diffidence, be a strictly legal one. It will be a decision given in accordance with rules agreed upon by the parties.’⁹⁷

This remark clearly shows that Lauterpacht adopted Kelsenian normativism, especially the gradual concretization of law. The gradual concretization of law explains the legal validity of individual norm derived from general norm from the point of view of competence. The validity of the individual norm which somebody creates is deduced from the higher norm that gives him the competence to create the norm. Therefore, according to Kelsenian normativism, the validity of the decision *ex aequo et bono* can be explained by the authorisation of parties to give the Court the competence to do so.

However, Lauterpacht failed to make more accurate the decision *ex aequo et bono*. He confused the validity of the decision *ex aequo et bono* with the problem of legitimacy. Although the Permanent Court said that ‘even assuming that it were not incompatible with the Court’s Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit Special

⁹⁶ Pound/1922/183.

⁹⁷ Lauterpacht/Function/317.

Agreement' in the *Free Zone* case,⁹⁸ the Court does not interpret the will of states as considerations which the Court should take into account for the decision *ex aequo et bono*. The authorisation of parties to ask judges to decide *ex aequo et bono* belongs to the matter of the procedure which the Court should act in accordance with as the condition of the validity of the decision. It is not a matter of the substantial questions to which the Court should reply as the condition of the objectivity of the decision. The following passage clearly demonstrates Lauterpacht's view:

'Upon, analysis, it is not accurate to say that, in cases of a decision *ex aequo et bono* rendered in pursuance of the wish of the parties, the Court creates new contractual rights and duties as distinguished from a regulation of already existing rights and duties. These rights and duties are already contained *in nuce* in the very agreement conferring upon the Court jurisdiction *ex aequo et bono*. The Court gives flesh and bones to this agreement.'⁹⁹

However, the authorisation of parties to confer upon the Court the power to decide *ex aequo et bono* is different from the indication of considerations as the basis of decision *ex aequo et bono*.

This problem is serious in the context of judicial discretion, because it shows that Lauterpacht failed to explain why the use of judicial discretion, at least insofar as the decision *ex aequo et bono* is concerned, is a part of the proper judicial function. What the Court is given by the parties is the competence to decide *ex aequo et bono*, not the practical considerations which the Court should rely on, although the parties can separately indicate the considerations which the Court should take into account. Consequently, since there would be no substantial criteria for the Court, discretion in the case of the decision *ex aequo et bono* necessarily becomes wider than judicial discretion in the interpretation of international law. It is true that Lauterpacht accepted this point, writing that

'[A]n authorization to decide *ex aequo et bono* imposes upon the Court a heavier and more responsible task

⁹⁸ PCIJ/A/No.24/10.

⁹⁹ Lauterpacht/Function/318.

than that involved in the interpretation or application of a single rule of conventional or customary international law. It obligates the Court to have regard to a variety of factors which it would not have to consider otherwise.¹⁰⁰

However, he continued as follows:

‘Even in interpreting and applying concrete legal rules the Court does not act as 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 law. The distinction between the making of the law by judges and by the legislature is upon analysis one of degree.’¹⁰¹

This remark shows that Lauterpacht misapprehended the difference between the decision based on law and the decision *ex aequo et bono*. For him, even the decision *ex aequo et bono* is the application of law: ‘An international tribunal asked to act as a legislator is in effect asked to apply, not rules of arbitrary discretion, but the higher law of international justice and solidarity.’¹⁰² However, it is utterly unclear what ‘the higher law of international justice and solidarity’ is. In this sense, Lauterpacht obscured the difference between the decision under Article 38 (1) of the Statute and the decision *ex aequo et bono* under Article 38 (2) by describing even the latter as the application of law.¹⁰³ It is so even though he disagreed with Judge Kellogg who denied the competence of the Court under Article 38 (2).¹⁰⁴

¹⁰⁰ Lauterpacht/Function/319.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*/325.

¹⁰³ Kelsen also could not distinguish between the application of general principles of law under Article 38 (1) of the Statute and a decision *ex aequo et bono* under Article 38 (2). Kelsen/1943/406.

¹⁰⁴ Judge Kellogg said that ‘it is not, in my opinion, possible to hold that the provision contained in Article 36 of the Statute of the Court to the effect that the Court’s jurisdiction “comprises all cases which the Parties refer to it” authorizes this Court to take jurisdiction of purely political questions and decide them upon considerations of political and economic expediency as an amiable

Thus, Lauterpacht did not distinguish the nature of the decision *ex aequo et bono* in the two senses. First, he did not explain the legal nature of the decision *ex aequo et bono* by confusing between the validity of decision (the problem of the competence of the Court) and the legitimacy of decision (the problem of the reasoning in the decision). Second, even if it is assumed that he succeeded in proving that the decision *ex aequo et bono* is a part of the judicial function in the sense that the Court should apply 'the higher law of the international justice and solidarity' as judicial discretion, it would be more difficult for him to distinguish between the decision based on law and the decision *ex aequo et bono*. If the decision *ex aequo et bono* is justified as a judicial process, it would be meaningless that Article 38 (2) of the Statute requires the state parties to give the Court their special consent for the decision *ex aequo et bono*. In this sense, the decision *ex aequo et bono* should not be regarded as a normal judicial process. The crux of Article 38 (2) is that the Court could decide a case with equity *contra legem* or equity *praeter legem*, subject to the common consent of parties. Indeed, the Chamber in *Frontier Dispute* case identifies the decision *ex aequo et bono* as the application of equity *contra legem* and equity *praeter legem*:

'Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*.'¹⁰⁵

In other words, Article 38 (2) allows the Court to refer to political considerations which are different from the legal considerations under Article 38 (1). However, why did Lauterpacht fail to conceive the difference between two types of argumentation?

This point is again explained by the gradual concretization of law. For Kelsenian normativism, legislation is not different from judicial process in the sense that the creation of an individual norm is the result of the application of general norm. The difference between legislation and judiciary is

compositeur or conciliator.' Kellogg/PCIJ-Series/A/No.24/41.

¹⁰⁵ ICJReps/1986/567.

just a matter of degree. This presupposes that even legislators apply legal principles for the creation of law:

‘Legislation is creation of law, but taking into account the constitution, we find that it is also application of law.

In any act of legislation, where the provisions of the constitution are observed, the constitution is applied.’¹⁰⁶

This statement shows a blurring of the distinction between legislature and judiciary with regard to the application of principles. In other words, Kelsenian normativism concentrates too much on ‘law.’ However, even if Lauterpacht thought that whatever judges do is ‘legal,’ the doubt about the objectivity of legal reasoning still remains especially in the context of the choice of principles, because principles can conflict with each other. Consequently, the problem occurs whether or not the choice of principles is objective. Lauterpacht admitted that ‘even in the absence of difficulties of that character, the judge is often confronted with a choice between conflicting and equally legitimate principles of interpretation.’¹⁰⁷ However, if judges choose a principle applicable to the subject matter, among conflicting principles without any standard, can such a choice of a principle be seen as free from arbitrariness? Indeed, it is the reason Stone criticised Lauterpacht for the choice of principle as law-creation:

‘[I]t is a juristic commonplace that the main judicial problem springs from the fact that opposed decisions can usually be attached to different principles; and, indeed, often to the same principle by reason of its ambiguity, circuitry or indeterminacy. Nothing in these competing starting-points themselves can direct the court which of them is the correct one, that is, the correct principle or version of a principle to choose for the instant case. That choice finally is the court’s choice, a law-creating choice, however much it be concealed by the form of logical deduction from the principle finally chosen.’¹⁰⁸

¹⁰⁶ Kelsen/1945/133.

¹⁰⁷ Lauterpacht/Development-II/395.

¹⁰⁸ Stone/1959/133.

On this point, Lauterpacht answered as follows:

‘That choice [of principles] can be made only after conscientious and exhaustive scrutiny; even then the decision, when made, is not invariably accompanied by any feeling of inevitability. The only sentiment that can be registered with confidence is that the decision is accompanied by a consciousness of duty performed.’¹⁰⁹

When do we feel that the duty is performed? According to Lauterpacht, it is performed insofar as judges ‘balance the conflicting or competing legal considerations – all of which are relevant to the case and all of which, though in different degrees, are worthy of consideration.’¹¹⁰ However, judges have to accomplish their responsibility ‘within the orbit of the tendencies, enshrined in precedent.’ Therefore, he said that ‘[s]ubject to that overriding primacy of the existing law, they [the tendencies in precedent] bring to mind the fact that the necessity of a choice between conflicting legal claims is of the very essence of the judicial function, whether within the State or in the international sphere.’¹¹¹

Drencho Georgiev tries to defend this position from the point of view of legitimacy, though he admits that the choice of principles is ‘politics within law’:

‘Legitimacy, understood as conformity with the general principles *of law*, is a concept which – I claim – addresses issues *within law*. If the general principles of international law are recognized as valid, albeit in some cases indeterminate, rules *of law* and not merely of justice or politics, their interrelations and their relations with other rules of international law are entirely in its own sphere and not somewhere outside it. ... Answering the question about the legitimacy of a rule or of behaviour will involve, however, making choices and

¹⁰⁹ Lauterpacht/Development-II/396.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*/399.

constructing solutions which have to conform with contradicting and indeterminate principle. Therefore, these choices and solution could be called “political.” Even so, this would be politics *within law*, politics which would *not* be sheer unrestrained arbitrary power. It would not be “subjective” politics destroying the “objectivity” of international law but a process of “politicisation” of law (*and* perhaps of “legalisation” of politics) which aims at solving the contradictions within international law and enhancing its pertinence for an international rule of law.¹¹²

The similarity between Lauterpacht and Georgiev is apparent. It is true that Georgiev emphasises that the choice of principles is ‘political’ in the sense that it involves a value judgement, though Lauterpacht, on the other hand, accentuated the judicial responsibility for taking all legal elements into consideration. However, both consider that the choice of principles is legitimate as judicial process insofar as the decision conforms with principles. For them, the choice of principles is not an arbitrary process at all.

It is clear, nevertheless, that judicial responsibility or ‘politics within law’ is not a sufficient answer to the question proposed by Stone, because Stone’s view is based on the assumption that there is no correct answer in hard cases: ‘Nothing in these competing starting-points themselves can direct the court which of them is the correct one, that is, the correct principle or version of a principle to choose for the instant case.’¹¹³ Therefore, it is necessary to pay attention to the problem of the One Right Answer thesis in order to answer the question whether or not the choice of principles is arbitrary.

6.2.2.2. THE ONE RIGHT ANSWER THESIS

The One Right Answer thesis means that there is always a correct answer to a legal question even in a hard case where there seems to be no applicable rule at first sight. The doctrine of the

¹¹² Georgiev/1993/13-14. Emphasis original.

¹¹³ Stone/1959/133.

completeness of international law presupposes the One Right Answer thesis. The completeness of international law would be impossible, if there is no correct answer to a legal question in a hard case. The completeness of international law would be also meaningless, if there are some legally correct answers at the same time. Lauterpacht talked about the One Right Answer thesis in the context of the interpretation of international treaties:

'[A]lthough there are many possible interpretations of a disputed provision there is in theory – in what is believed to be the accurate legal theory – only one correct interpretation of the law. The balance in favour of that correct interpretation may be indeed slight and the merits of alternative interpretation may be considerable, but to say that in every case there are a number of *equally* correct legal interpretations and that the choice between them is – legitimately, avowedly, and consciously – the result of a political decision and of political predilections of the judge is to put forward an assertion which denies the very essence of the judicial function in a society under the rule of law.'¹¹⁴

However, there is one question about the One Right Answer thesis. If there were some equally persuasive answers at the same time, how could we find the right answer to the question? There may be two criteria for measuring the correctness of the answer: (1) the extra-legal or political correctness of judicial decisions, and (2) the intra-legal or moral correctness of judicial decision. The extra-legal or political correctness of judicial decisions, including advisory opinions, is essentially a problem of the post-adjudicative phase. If the answer of judges to a legal question does not settle the dispute between states, in other words, the dispute still continues regardless of the judicial decision, the answer itself seems not to be legally correct. On the other hand, the intra-legal or moral correctness of judicial decision is somewhat obscure in the sense of the conformity of the legal answer with the sense of justice.

The political correctness of judicial decisions is essentially a problem in the post-adjudicative

¹¹⁴ Lauterpacht/1949c/CP-IV/443.

phase. The non-compliance of the decisions shows that the state parties are not satisfied with the legal answer given by the Court. Consequently, the legal answer would be ineffective in the situation that the enforcement mechanism of the judicial decisions is very limited. In other words, the effectiveness of judicial decision is dependent on the degree of the satisfaction of the state parties, which itself is not a legal question, but a political one. Insofar as the decision has binding force between the state parties, the non-compliance of a state party with the decision legally constitutes the breach of the obligation imposed on the state parties to comply with the decision. There is legally no room for the state parties to disregard the decision apart from the case that a party challenges the legal validity of the decision. In this sense, the effectiveness of a legal answer is essentially political insofar as the non-compliance with judgement is dependent on the satisfaction of the state parties.

However, non-compliance of the state with a judicial decision at the same time involves the legal aspect of the correctness of the answer. According to the view that affirms the political correctness of the judicial decision, the purpose of international law is to regulate the activity of the sovereign states. However, the effectiveness of international law is very dependent on the voluntary compliance of the states in the international community. Therefore, according to this view, the answer which does not satisfy states is also legally incorrect. With regard to the *Legality of Nuclear Weapons* case, Judge Vereshchetin expresses this view, when he says that 'the Court must be concerned about the authority and effectiveness of the "deduced" general rule with respect to the matter on which the States are so fundamentally divided.'¹¹⁵ Judge Vereshchetin clearly thinks that there is a legal lacuna with regard to the problem of nuclear weapons, and that the judicial decision to fulfil gaps would be legally wrong, because states with nuclear weapons are highly likely not to respect the Court's answer, even if the Court answers that the use of the nuclear weapons is not generally but absolutely illegal. Daniel Bodansky also stands this position:

¹¹⁵ Vereshchetin/ICJReps/1996/281.

'In contrast to the domestic sphere, international society lacks the common culture and traditions that help instil confidence in international judges and their ruling. As a result, the persuasiveness and legitimacy of international tribunals depend to a greater extent on the degree to which their decisions simply give effect to existing norms, which the parties themselves have accepted.'

He further continues that '[g]iven the lack of enforcement mechanisms, an international rule is likely to be durable only if it successfully accommodates the competing interests involved.'¹¹⁶

Lauterpacht clearly denied the effectiveness of legal decisions as the criterion for the correctness of the answer:

'It is tempting to judge the notion of completeness of the law by its capacity to remove political "tensions" between States. The latter test has all the attractions of the recurrent tendencies to what has been described as realism. However, it is not the function of courts to eliminate any particular cause of friction between the parties to a dispute – except in so far as tension can be removed, or reduced, by the realization that legal justice has been done and that a decision has been reached by a method more objective than the *ipse dixit* of an interested party. The question whether the existing law is satisfactory from the point of view of taking into account political or economic interests in accordance with justice and reason has nothing to do with its completeness.'¹¹⁷

It was correct for Lauterpacht not to consider 'its capacity to remove political "tensions" between States' when he discussed the completeness of international law, because the view that the correctness of the legal answer is measured by the effectiveness of judicial decisions is harmful to the legitimacy of international courts. First, if the legal correctness of the answer is subject to the political satisfaction of the states, the impartiality of judges will be damaged, because if they pay much attention to the degree of the satisfaction of state parties, they become mere conciliators in the

¹¹⁶ Bodansky/1999/169.

¹¹⁷ Lauterpacht/1958/CP-II/217.

best case, or flatterers in the worst case. Although it is true that the judges can play a role of conciliators with the authorisation of the state parties under Article 38 (2) of the Statute, however, such a role is exceptional in the interpretation of law as the crux of judicial function.

Secondly, the effectiveness of the legal answer given by judges is the problem of the willingness of states to abide by the decision. In a sense, the question whether or not the state will in fact comply with the decision is the political matter decided by governments, as the United States did in the *Nicaragua* case, even if judges claim that the governments should legally respect the judicial decision. In such a case, what the judges can do is to treat non-compliance as a breach of the obligation imposed on states. In this sense, it is illogical and irrelevant to say that judges should be more concerned about the actual effectiveness of the decision. Judges cannot help but act on the assumption that states will comply with their decision. As it is inappropriate for legalism to try to invade the sphere of politics, it is also inappropriate for judges to introduce politics into legal matters.

The case law of the International Courts affirms this point. The Permanent Court said in the *Wimbledon* case:

‘The Court does not award interim interest at a higher rate in the event of the judgement not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency.’¹¹⁸

The Permanent Court restated, in the *Chorzów Factory* case, that ‘[t]he Court must also draw attention in this connection to what it has already said in Judgement No. I to the effect that it neither can nor should contemplate the contingency of the judgement not being complied with at the expiration of the time fixed for compliance.’¹¹⁹ The Court also kept the same position in the

¹¹⁸ PCIJ/A/No.1/32.

¹¹⁹ PCIJ/A/No.17/63.

*Nicaragua (Jurisdiction and Admissibility) case.*¹²⁰

It could be argued that the advisory opinions are very different from the judgements with regard to binding force, and that the Court should be conscious of the effectiveness of the opinion even if the Court 'neither can nor should contemplate the contingency of the judgement not being complied with' in contentious cases. However, this view completely misses the point that advisory opinion is simply 'advisory.' It is purported not to restrict the activity of the international organisation which asks the Court about legal matters; the international organisation is legally allowed to decide whether or not it accepts the advisory opinion.¹²¹ If the Court needs to take compliance with advisory opinion into consideration, the Court should be more concerned with the legitimacy of advisory opinion, because compliance with the advisory opinion can be expected only in the situation that the member states regard it as the authoritative declaration of international law. As Judge Winiarski said in the *Peace Treaties* case:

'Opinions are not formally binding on States nor on the organ which requests them, they do not have the authority of *res judicata*; but the Court must, in view of its high mission, attribute to them great legal value and a moral authority. This being the case and if *tantum valvet quantum valvet ratio*, the Court, as a judicial organ, will surround itself with every guarantee to ensure thorough and impartial examination of the question.'¹²²

This is actually the case in the Court's experience. The intra-legal or moral correctness of a legal answer is indispensable to the balancing process of the relative normativity of principles. Even if principles conflict with each other, judges can choose an applicable principle, and finally find an answer, by appreciating the normativity of competing principles. Patrick Capps explains this weighing process of principles in the context of Kant's conception of the conflict of duties:

¹²⁰ ICJReps/1984/437-438/para.101.

¹²¹ Hambro/1954/17.

¹²² ICJReps/1950/91-92.

'Each moral obligation has a normative force which provides a justification for a particular rule. By weighing and balancing the relative normative force of the competing moral principles, it can be ascertained which rules should be applied and followed.'¹²³

In other words, the normativity of law is nothing but the moral justifiability of legal norms. The balancing process of normativity of principles accompanies the ascertainment which principle is more consistent with morality than others.

Lauterpacht clearly adopted the moral justifiability of legal norms. Equity for him is a legal concept and a source of law. He said that '[e]quity, in its wider sense as connoting ideas of fairness, good faith and moral justice, is a source of international law to the not inconsiderable extent to which it may be regarded as forming part of general principles of law recognized by civilized States.'¹²⁴ In other words, equity is a relevant legal consideration for deciding one correct answer. In the context of the One Right Answer thesis in the interpretation of treaties, Lauterpacht said,

'Undoubtedly, the judicial choice of the standard of interpretation may be influenced by a variety of factors seemingly extraneous to the text. But these factors – such as considerations of justice, canons of fairness and good faith, and, in proper cases, an equitable reconciliation of the interests at stake – are of legitimate legal relevance. They do not obliterate the borderline between the function of the judge and the powers of the legislators.'¹²⁵

Indeed, the Court weighs the normativity of competing principles in terms of equity. The following statement of the Court in the *Continental Shelf (Tunisia/Libya)* case clearly shows this point:

'Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to

¹²³ Capps/2001/1024.

¹²⁴ Lauterpacht/General-Part/CP-I/85.

¹²⁵ Lauterpacht/1949c/CP-IV/443.

administer justice is bound to apply it...Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.¹²⁶

Equity in this sense is called equity *infra legem* in the *Frontier Dispute* case. The Chamber says that 'it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force and is one of its attributes.'¹²⁷ These statements of the Court show that even if there are competing principles, the Court can find the one correct answer to a legal question with equity *infra legem*.

Lauterpacht and the Court apparently presumed that the conformity of legal answer with equity or good faith legitimates the decision. There is, nevertheless, a problem about recourse to equity *infra legem* within legal interpretation. Martti Koskenniemi, for example, criticises recourse to equity as follows:

'[R]ecourse to equity (in its different forms) was, it seemed, in contradiction with the ideal of the Rule of Law. What was equitable seemed to depend on evaluative choices which were defined as subjective and arbitrary by the law's self-constitutive assumptions. Equity challenged the formality, generality and neutrality of the legal process. Recourse to it re-emerged the problem of uncertainty and the fear of political abuse which it was the purpose of the Rule of Law to dispose of.'¹²⁸

This statement presupposes that law is objective in the sense that it is independent of the subjective sense of judges, and that recourse to equity is subjective as the personal sense of justice. This assumption is simply wrong, because legal practice, including recourse to equity, is a human

¹²⁶ ICJReps/1982/60/para.71.

¹²⁷ ICJReps/1986/567-568/para.25.

¹²⁸ Koskenniemi/1989/477-478.

activity, which unavoidably involves the subjective views of lawyers.¹²⁹ However, this point does not mean that recourse to equity is arbitrary. As far as equity, especially equity *infra legem*, is applied in accordance with the requirement of coherence, it should be regarded as legitimate and objective. There may be a divergence among jurists, especially judges, with regard to what the correct answer is, because ‘lawyers who hold different types of moral theory will assess these differently.’¹³⁰ However, even if this is so, it does not mean that the One Right Answer thesis is incorrect. Although their opinions sometimes diverge, judges still have responsibility to ‘choose between eligible interpretations by asking which shows the community’s structure of institutions and decisions – its public standard as a whole – in a better light from the standpoint of political morality.’¹³¹ This point is directly related to the prohibition of the declaration of *non liquet*.

6.2.3. THE PROHIBITION OF THE DECLARATION OF *NONLIQUET*

If the exercise of judicial discretion is normal as part of the judicial process, and there is always one right answer, there would logically be no room for judges to be ‘at liberty to refuse to give a decision on the grounds of the supposed absence of a rule of law applicable to the individual case.’¹³² It is the reason why Lauterpacht considered the prohibition of the declaration of *non liquet* to be a corollary of the completeness of international law. Furthermore, he empirically tried to show that judges have a legal obligation not to declare *non liquet*. The history of international adjudication shows that there has been no case of a declaration of *non liquet*. The ILO Administrative Tribunal declared that ‘[o]ne of the fundamental tenets of all legal systems is that no court may refrain from giving judgement on the grounds that the law is silent or obscure’ in *Desgranges v. International Labour Organization* case.¹³³ Therefore, Lauterpacht thought that the

¹²⁹ Müllerson/2000/47.

¹³⁰ Dworkin/1985/143.

¹³¹ Dworkin/1986/256.

¹³² Lauterpacht/Function/61-62.

¹³³ ILR/vol.20/1953/530.

prohibition of the declaration of *non liquet* is 'one of the most indisputably established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice.'¹³⁴

However, does the practice of international tribunals really show the legal obligation of judges not to declare *non liquet*? Stone criticised this point as follows:

'It seems not to follow from the fact that past tribunals have chosen in many cases to devise new rules for the case rather than declare a *non liquet*, that therefore there is a rule prohibiting future tribunals from ever declaring a *non liquet*. The course of declaring a *non liquet* may still be open under a legal system, even though it has as yet not been resorted to. The distinction may seem a fine one between the question whether in the absence or obscurity of the law the court is *bound* to declare a *non liquet*, and the question whether in such circumstances the court is *permitted* to declare a *non liquet*. Yet the distinction is critical. For obviously even the mere permissibility of a *non liquet* would refute the view that there is a *prohibition* of *non liquet* in international law. And, conversely, the cases cited may merely show that tribunals *have not chosen* to declare a *non liquet*, rather than any view of the tribunals that they *could not* do so.'

Therefore, Stone concluded, the cases show that 'the arbitrator is *not bound* to declare a *non liquet*, not that he was *prohibited* by international law from doing so.'¹³⁵

The concern of Stone was realised in the *Legality of Nuclear Weapons* case. The Court declared as follows:

'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

¹³⁴ Lauterpacht/1958/CP-II/217.

¹³⁵ Stone/1959/139-140.

Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹³⁶

Some judges clearly think that the latter part of statement is the declaration of *non liquet*. Judge Higgins, for example, says that 'at paragraph 97 of its Opinion, and in paragraph 2 E of its *dispositif*, the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts.'¹³⁷ Some international lawyers also agree with her. Dapo Akande, for example, says that 'this is the first decision where the Court has pronounced a *non liquet*.'¹³⁸ Thus, the problem here is whether or not this case proves that the Court is permitted to declare *non liquet*.

It should be noted that the lawyers who support the declaration of *non liquet* in the *Legality of Nuclear Weapons* case emphasise the nature and purpose of the advisory procedure. Judge Vereshchetin, for example, expresses that the declaration of *non liquet* is admissible in the advisory procedure. There are two reasons: (1) the discretionary power of the Court which is given under Article 65 (1) of the Statute, and (2) the advisory function of the Court. These reasons are tangled up with each other, but they are also different reasons from each other.

With regard to the discretionary power of the Court, Judge Vereshchetin says as follows:

'The Court would never fully enumerate or spell out the "compelling reasons" which might lead to the refusal to deliver an opinion...One cannot exclude that among such "compelling reasons" there may be those relating to the state of the law (in particular, to the so-called "social insufficiencies" in the law alluded to earlier).'¹³⁹

Hugh Thirlway agrees with him that the declaration of *non liquet* is justified by the Court's

¹³⁶ ICJReps/1996-I/266/para.105/2-E. See also its reasoning, 261-263/paras.90-97.

¹³⁷ Higgins/ICJReps/1996-I/583/para.2. Also see Schwebel/ICJReps/1996-I/322-323.

¹³⁸ Akande/1997/212; Dekker-Werner/1999; Dinstein/2001/145. But see Verzijl/1966/206.

discretion that ‘the matter [the sub-paragraph E] is seen as one of exercise of the Court’s discretion to refuse to give an opinion.’¹⁴⁰

It is true that, in the advisory procedure, the Court is given the discretionary power to decide whether or not it should answer the questions under Article 65 (1) of the Statute. From the point of view of Judge Vereshchetin, the difference between the advisory opinion procedure and the contentious case procedure enables the Court to justify the declaration of *non liquet*. However, we need to be cautious about accepting their opinions. First, the question of *non liquet* is not the procedural questions of jurisdiction of the Court and of the admissibility of the request. The question of *non liquet* is the problem of merit whether or not judges are allowed to pronounce so in the case where there is a lacuna in international law. Judge Vereshchetin and his supporters seem to forget this point. As Marcelo Kohen points out, once the Court recognises that the question submitted is a legal one, it cannot thereafter back down on the ground that the law was insufficient or imperfect.¹⁴¹ Second, it is the case law of the Court that in the exercise of the discretionary power, the Court needs ‘compelling reasons.’ Even in the *Legality of Nuclear Weapons* case, the Court declared:

‘When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion.

In accordance with the consistent jurisprudence of the Court, only “compelling reasons” could lead it to such a refusal.’¹⁴²

If so, the Sub-paragraph 2 E cannot be justified as the exercise of judicial discretion, because even if the declaration of *non liquet* is the exercise of judicial discretion, the declaration of *non liquet* has to be justified by a compelling reason, not by the fact that the Court has the judicial discretion in the advisory procedure. What is the ‘compelling reason’ justifying the declaration of *non liquet*? This

¹³⁹ Vereshchetin/1999/541.

¹⁴⁰ Thirlway/2000/108.

¹⁴¹ Kohen/1997/349.

question returns once more to the problem of *non liquet*. The question is whether or not the indeterminacy of international law is regarded as one of 'compelling reasons' justifying the exercise of judicial discretion.

This question may be answered by the advisory function of the Court. According to a view, the advisory function of the Court is to state the law as such; if the law is insufficient, the Court has to declare the insufficient situation of the law. Judge Vereshchetin again expresses this view in his declaration:

'In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive.'¹⁴³

Prosper Weil agrees with Judge Vereshchetin:

'The duty to answer a request for an advisory opinion...does not imply the duty to resolve the question referred to it. An appropriate answer may be that at the present stage of the evolution of the law there is no answer to the question, or no complete answer.'

Then, Weil continues as follows;

'The I.C.J. certainly is not prohibited from "developing" the law in advisory proceedings. This is hardly uncommon. Indeed, some of the most conspicuous examples of progressive development of international law may be found in advisory opinions. But the Court may also choose to limit itself in advisory opinions to stating the law as it is, with its prescriptive, prohibitive, or permissive rules, but also with its gaps and

¹⁴² ICJReps/1996-I/235/para.14.

¹⁴³ Vereshchetin/ICJReps/1996-I/280.

incompleteness. In contentious proceedings, *non liquet* may well be a scandal. In advisory proceedings, it is not.¹⁴⁴

Rosenne also says:

'[I]n the present case [the *Legality of Nuclear Weapons* case] the Court – doing what national courts frequently do – has stated quite clearly that the law is not in a satisfactory state. This is guidance. Article 38 of the Statute is commonly understood as preventing the Court from refusing to decide a contentious case on the ground of *non liquet*. The approach expressed by Judge Vereshchetin is appropriate when the Court is giving guidance to another organ or institution.'¹⁴⁵

However, is it really true that the advisory function of the Court is so different that the declaration of *non liquet* is permissible in the advisory procedure, though inadmissible in the contentious case procedure?

It is theoretically possible to distinguish between the declaration of law as the purpose of the advisory procedure and the settlement of disputes by applying law as the purpose of the contentious case procedure. However, there is less difference between the two proceedings with regard to the essential nature of judicial function. There are many contentious cases in which the Court could not contribute to the post-judicial settlement of international disputes. In these cases, the Court confined itself simply to the solution of legal questions of the disputes by making the applicable law clear rather than settling the disputes as a whole. In the *Hostage* case, the Court clearly took this position when it said that 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned.'¹⁴⁶ Consequently, the Court devoted itself not to the settlement of

¹⁴⁴ Weil/1997/117.

¹⁴⁵ Rosenne/1998/304.

¹⁴⁶ ICJReps/1980/20/para.37.

'overall problems' between the United States and Iran, but to the settlement of legal questions between them. On the other hand, there are the advisory opinion cases in which the Court tried to settle the dispute between a state and an international organisation. In the *Headquarters Agreement* case, the Court recognised the existence of legal disputes between the United Nations and the United States,¹⁴⁷ and solved the problem on the applicability of section 21 of the Headquarters Agreement.

It is also true that advisory opinion does not have *res judicata*. However, as discussed above, the advisory opinion has the almost same persuasive authority as the judgement enjoys. If, as Judge Vereshchetin says, 'the Court must be concerned about the authority and effectiveness of the "deduced" general rule with respect to the matter on which the States are so fundamentally divided'¹⁴⁸ in the advisory opinion, the Court should also be cautious about the judgement in the contentious case insofar as the enforceability of judgement is very limited even under Article 94 of the Charter of the United Nations. There have been no cases in which the Security Council enforced the Judgement of the Court. The Court cannot but expect the voluntary compliance of State parties with its judgement.

Despite the relative difference between the two procedures, the very emphasis on the difference is misleading the supporters into suggesting that the Court is allowed to legislate the applicable law in the contentious case procedure. Prosper Weil says:

'Whenever States decide, by way of a special agreement, a compromissory clause, or otherwise, to ask for the judicial obligation to settle the dispute. Therefore, *ipso jure* they confer on the tribunal the normative and quasi-legislative power necessary to produce that result.'¹⁴⁹

However, it is such a claim that the international tribunals have again and again denied in the

¹⁴⁷ ICJReps/1988/27-30/paras.34-44.

¹⁴⁸ Vereshchetin/ICJReps/1996-I/281.

¹⁴⁹ Weil/1997/115.

history of the judicial settlement of international disputes, as mentioned above. In the *Eastern Extension, Australasia and China Telegraph Company* case, the Tribunal clearly denied the so-called judicial legislation.¹⁵⁰ So did the Court. In the 1966 judgement in the *South-West Africa* case, the Court says as follows:

‘As implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.’¹⁵¹

Therefore, there is no reason why the difference between the two proceedings justifies the declaration of *non liquet* in the advisory opinion.

It is certainly true that Lauterpacht recognised that the difference between two procedures may cause different problems with regard to the problem of *non liquet*: ‘In advisory proceedings the problem assumes a different complexion.’ However, he continued that ‘the prohibition of *non liquet* applies here to the full extent in the sense that, as a rule, every question forming the subject-matter of a request for an Opinion may be couched in the form of a claim, for instance, in proceedings for a declaratory judgement.’¹⁵² If so, Sub-paragraph E would be clearly unjustifiable from the point of view of Lauterpacht. However, Judge Vereshchetin tries to justify Sub-paragraph E in the *Legality of Nuclear Weapons* case as the declaration of *non liquet* by citing the following statement of Lauterpacht:

‘[A]pparent indecision, which leaves room for discretion on the part of the organ which requested the Opinion, may – both as a matter of development of the law and as a guide to action – be preferable to a deceptive clarity which fails to give an indication of the inherent complexities of the issue. In so far as the decisions of the Court are an expression of existing international law – whether customary or conventional – they cannot but reflect

¹⁵⁰ RIAA/vol.6/118.

¹⁵¹ ICJReps/1966/48/para.89.

¹⁵² Lauterpacht/1958/CP-II/216/n.2.

the occasional obscurity or inconclusiveness of a defective legal system.¹⁵³

Therefore, Judge Vereshchetin concludes that 'Judge Lauterpacht went much further in distinguishing and apparently took a more liberal position with regard to the admissibility of *non liquet*, or something very close to it, in advisory cases.'¹⁵⁴

However, the above statement of Lauterpacht is not related to the problem of *non liquet* at all. Lauterpacht mentioned this statement in the context of the flexibility of the advisory opinion in the *Conditions of Admission* case. The crux of the above statements lies not in the denial of 'deceptive clarity' but in the affirmation of the 'discretion on the part of the organ which requested the Opinion.' This point would be understood, if we pay attention to the sentence just before the above passages quoted by Judge Vereshchetin:

'[T]he Opinions of both the majority and the minority of the Court in that case reveal a determination to lift the issue from its political background to the level of a pronouncement based on legal principles capable of general application.'¹⁵⁵

In other words, Lauterpacht appreciated that the Court could, in all appropriate circumstances, legally regulated the discretion of the organs of the United Nations to interpret the Charter, though the discretion may be very broad but still within legal principles. In this sense, the above statement of Lauterpacht simply means that the Court should allow the organs of the United Nations to exercise their discretionary powers regulated by international law. This point is nothing to do with the problem of *non liquet*. It is clear, therefore, that Judge Vereshchetin misreads the statement of Lauterpacht.

Far from justifying Sub-paragraph E as a declaration of *non liquet*, moreover, the close

¹⁵³ Lauterpacht/Development-II/152.

¹⁵⁴ Vereshchetin/1999/538.

¹⁵⁵ Lauterpacht/Development-II/152.

examination of the individual opinions in the *Legality of Nuclear Weapons* case shows that the latter sentence of Sub-paragraph E expresses the problems in the functioning of the Court as the collective body of judges. In the majority composed of seven judges, only three judges justify the second sentence of Sub-paragraph E as the declaration of *non liquet*. President Bedjaoui says,

‘[T]he Court could obviously not go beyond what the law says. It could not say what the law does not say. Accordingly, at the end of its Opinion, the Court confined itself to stating the situation, finding itself unable to do any more than this.’¹⁵⁶

As noted above, Judge Vereshchetin also tries to justify the declaration of *non liquet* as the exercise of discretionary power. Since he admits that there is no rule to solve the conflict between international humanitarian law and the right of self-defence, Judge Fleischhauer also says that ‘[t]he present state of international law does not permit a more precise drawing of the border-line between unlawfulness and lawfulness of recourse to nuclear weapons.’¹⁵⁷

However, other four judges voted for Sub-paragraph E for different reasons. Judge Shi, who is thought to have voted positively for the second sentence of Sub-paragraph E, adopts a different kind of justification from the declaration of *non liquet*. He thinks that the question of the nuclear deterrence is non-justiciable.¹⁵⁸ The remaining three judges admit that they voted for the first part of Sub-paragraph E rather than the second sentence. Judge Herczegh says that ‘to have voted against this paragraph [Sub-paragraph E] would have meant adopting a negative stance on certain essential conclusions – also set forth in this Opinion and alluded to in Paragraph 2 E – which I fully endorse.’¹⁵⁹ Judge Ferrari Bravo, who thinks that nuclear weapons are illegal, implies that he voted for the second part of the Sub-paragraph E with reluctance, by admitting ‘the difficulty of obtaining

¹⁵⁶ Bedjaoui/ICJReps/1996-I/270.

¹⁵⁷ Fleischhauer/ICJReps/1996-I/310.

¹⁵⁸ Shi/ICJReps/1996-I/277.

¹⁵⁹ Herczegh/ICJReps/1996-I/276.

consistent majorities with respect to certain components of the Advisory Opinion.¹⁶⁰ Judge Ranjeva clearly states his reluctance to admit the second clause of Paragraph 2 E:

‘I voted for the whole of the operative part, in particular the first clause of paragraph 2 E, since this Opinion confirms the principle of the illegality of the threat or use of nuclear weapons, although I consider that the second clause of paragraph 2 E raises problems of interpretation which may impair the clarity of the rule of law.’¹⁶¹

The fact that their opinions are very different, even among the majority, shows that, as Thirlway correctly points out, ‘reasoning had not in fact obtained the support of a majority at all.’¹⁶²

Furthermore, it should not be forgotten that all judges append their individual opinions. This fact clearly shows that there are certainly legal answers, in any form, with regard to the use of nuclear weapons even ‘in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.’ If all judges have their own legal answers, the second part of Sub-paragraph E is not the situation of *non liquet* in a genuine sense. The problem is not that there is no legal answer to the question. As Pierre-Marie Dupuy points out, ‘there was no gap in the applicable law, but, on the contrary, that there were too many applicable rules, some of which were inconsistent as between themselves.’¹⁶³ All judges found their own legal answer. Each of them no doubt believes that his/her interpretation of law is correct. This means that One Right Answer thesis is still valid on the normative phase. It is still theoretically possible that the Court could have avoided the declaration of *non liquet*.

The problem of the Court in the *Legality of Nuclear Weapons* case, rather, is that judges fail to produce the legal opinion of the Court as the collective body of judges. This failure certainly comes from the divergence of the political ideal and the sense of reality among them with regard to the

¹⁶⁰ Ferrari-Bravo/ICJReps/1996-I/283.

¹⁶¹ Ranjeva/ICJReps/1996-I/294.

¹⁶² Thirlway/1999b/397.

deterrent policy of nuclear weapons. In this sense, Sub-paragraph E is the result of the malfunction of the Court. The malfunction of the Court expressed in Sub-paragraph E shows that hard cases happen from the divergence of political morality in the international community. Dworkin points out that '[i]f there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory.'¹⁶⁴ Indeed, in the *Legality of Nuclear Weapons* case, Judge Herczegh honestly confesses the divergence between judges with regard to the conception of international law:

'The preparation of an advisory opinion on the highly complex question put by the General Assembly concerning the legality of the threat or use of nuclear weapons "in any circumstance" has highlighted the different conceptions of international law within the Court. The diversity of these conceptions prevented the Court from finding a more complete solution and therefore a more satisfactory result. The wording of the reasons and the conclusions of the Advisory Opinion reflects these divergences.'¹⁶⁵

Thus, the problem of Sub-paragraph E is now whether or not the divergence of political morality among judges allows them to pronounce *non liquet*. Koskenniemi tries to justify this 'silence of law' as follows:

'The Court felt both the law and its own authority to be insufficient for determining the status of the massive killing of the innocent. In so doing, it effectively suspend the liberal Utopia of a single and complete system of general (legal) rules and principles and a public procedure for giving effect to them. But this is a tragedy only if we assume that the validity of moral norms depends on everyone being able to reach the same conclusion about them. If that (Kantian) assumption is discarded, however, and focus is on the singularity of situations

¹⁶³ Dupuy/1999/459.

¹⁶⁴ Dworkin/1985/144.

¹⁶⁵ Herczegh/ICJReps/1996-I/275.

and the incommensurability of the values at stake in them, no angst need be felt.¹⁶⁶

However, Koskenniemi's claim of 'the incommensurability of the values' spoils the *raison d'être* of international judges, because it is usual that there are different political opinions among people due to their situationality. The conceptual incommensurability is not rare at all; it is simply normal that judges find it difficult to reach the same conclusion because of the divergence of legal and political opinions among themselves. Nevertheless, once the Court is seized of a case, international judges have the duty to unify their opinions as the Court, because they are assumed to work collectively. They have to find the legally correct answer to a question as much as possible, because it is the *raison d'être* of the Court to answer legal questions. The declaration of *non liquet* clearly falls short of such a duty of judges to produce a legal opinion of the Court. If the prohibition of the pronouncement of *non liquet* is 'not so much whether or not international law is a "complete system," but whether we can trust the lawyers who manage it always to do the right thing,'¹⁶⁷ the declaration of *non liquet* would be nothing but the betrayal of the trust in the judges once the Court is seized of the case. In this sense, the malfunction of the Court cannot be excused even if there is divergence of political sensibility between judges with regard to the right answer.

It is certainly undeniable that such a responsibility to find a correct answer was too heavy for the judges in the *Legality of Nuclear Weapons* case. However, this heavy responsibility on judges is not the problem of the incompleteness of international law which may allow them to declare *non liquet*, but the problem of the non-justiciability of political questions. Vaughan Lowe explains the distinction between *non liquet* and non-justiciability as follows:

'*Non liquet* is an acknowledgement that the matter should be regulated by the law, but that there is no identifiable rule that can be applied to the fact before the tribunal. Non-justiciability is an acknowledgement that the matter may be regulated by law but that it is inappropriate for the tribunal to apply the relevant rule.

¹⁶⁶ Koskenniemi/1999/508-509.

¹⁶⁷ Koskenniemi/1999/507.

Non liquet is a declaration of incompetence; non-justiciability is a posture of abstention.¹⁶⁸

Sub-paragraph E is clearly not 'a declaration of incompetence' but 'a posture of abstention,' because it came from the inability of judges to form the unified opinion as the Court. Pierre-Marie Dupuy also says as follows:

'The problem lies primarily with the organ, not with the norms. The true reason why the Court refused to go any further than it did in the direction of the illegality of the use of nuclear weapons is not essentially to be found in its rules, but in the position of the Court itself. Confronted with the inconsistency of an international legal order which includes potentially contradictory norms, and requested to rule out the types of potentially contradictory norms, and requested to rule out the type of weapons which effectively demonstrate its ability to preserve peace from the threat of massive destruction, the Court was returned to its real condition: a judiciary neither vested with international political legitimacy nor with any law-making competence.'¹⁶⁹

The Court, thus, should have admitted the serious political tension between states on the question of the legality of nuclear weapons, which forces it to malfunction in the sense that judges could not reach a conclusion, because misleading lawyers into believing that Sub-paragraph E is the declaration of *non liquet* was avoidable. Thus, the second clause of Paragraph 2 E should not be regarded as the precedent to the pronouncement of *non liquet*. It is rather the 'malfunction' of the Court due to highly political tension on the problem of nuclear weapons. In this sense, Lauterpacht's theory of the prohibition of the declaration of *non liquet* is still valid and persuasive. International judges still have responsibility of answering legal questions without declaring *non-liquet* even in hard cases.

¹⁶⁸ Lowe/2000/210.

¹⁶⁹ Dupuy/1999/459-460.

6.3. THE COMPATIBILITY OF AUTOMATIC RESERVATIONS WITH ARTICLE 36 (6) OF THE STATUTE

During the period of his judgeship from 1955 to 1960, Lauterpacht faced the crisis of the responsibility of international judge with regard to the so-called 'automatic reservation.' The problem of automatic reservation or subjective reservation of domestic jurisdiction itself is a problem of the authority of the Court. Indeed, Lauterpacht said that 'the "automatic reservation" has tended to impair the legal – and moral – authority and reality of the Optional Clause.'¹⁷⁰

It should be noted, however, that Lauterpacht had discussed this problem in 1930. When the British government accepted the compulsory jurisdiction of the Permanent Court, Arthur Henderson, British Foreign Secretary at that time, explained the reservation of the disputes 'with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom' in the British Declaration of the Acceptance of the Optional Clause of the Statute of the Permanent Court.

'On certain matters, international law recognises that the authority of the State is supreme. When once it is determined that the subject matter of the dispute falls within the category of cases where this is so, there is no scope for the exercise of the jurisdiction of an international tribunal.'¹⁷¹

Lauterpacht enquired into the meaning of the term '[w]hen once it is determined.' In the discussion in Parliament, Commander Bellairs asked Henderson whether they were the judges of the matter on the domestic jurisdiction.¹⁷² This question was not answered by Henderson. It should be noted, however, that according to *The Times*, the United Kingdom and its Dominions agreed that 'cases

¹⁷⁰ Lauterpacht/ICJReps/1957/64.

¹⁷¹ AJIL/Supplement/vol.25/1931/86.

¹⁷² Commons/vol.234/col.659.

judged by the signatories to be of domestic interest will be excluded from the compulsory jurisdiction of the Hague Court.¹⁷³ Taking these elements into consideration, Lauterpacht concluded that ‘unless it was meant to have the effect of preventing the Court from deciding on the question of its jurisdiction in these matters, it is difficult to see what is the object of this reservation.’¹⁷⁴ Therefore he assumed that the reservation of the domestic jurisdiction is purported to give the United Kingdom ‘the right to determine unilaterally whether the matter of dispute is by international law within its exclusive jurisdiction.’¹⁷⁵

Concerning this interpretation of the British reservation, Lauterpacht argued about the claims that the reservation gives the British government the unilateral right to decide whether the dispute is the matter of domestic jurisdiction as follows:

‘In the writer’s opinion, the Court would overrule them on the ground that the last paragraph of Article 36 [of the Statute of the Permanent Court on the *compétence de la compétence*] is an essential part, not only of that Article, but of every scheme of truly obligatory jurisdiction; that to deprive the Court of the power to determine its scope of competence, and to leave that right to the interested parties, is to deny the essence of the obligation to arbitrate; that a party signing the Optional Clause runs, apart from other risks, the risk that another State may bring before the Court any disputes on the ground that it falls within one of the four categories enumerated therein; and that the idea of a highest international tribunal implies, as an essential condition of its proper functioning, the confidence on the part of the State that it will not become guilty either of a usurpation of powers or of a disregard of international law.’¹⁷⁶

In conclusion, Lauterpacht wrote,

‘Possibly it might be argued that sweeping and indefinite reservations might be regarded as contrary to the

¹⁷³ Times/19/September/1929/14. Emphasis added.

¹⁷⁴ Lauterpacht/1930c/149.

¹⁷⁵ *Ibid.*/151.

very purpose of the Optional Clause and as such invalidating its signature. As such, for instance, might be regarded a reservation offending against the fundamental principle of the Statute of the Court with regard to its right to determine its own jurisdiction.¹⁷⁷

This view in 1930 shows that Lauterpacht did not distinguish between the so-called objective reservation of domestic jurisdiction and the subjective reservation of domestic jurisdiction, which Rosenne discusses.¹⁷⁸ It was because it seemed to Lauterpacht that the question whether a matter was within the domestic jurisdiction of a state was decided not by objective standards but by the subjective will of the state, although he was opposed to the reservation of domestic jurisdiction. In other words, Lauterpacht categorised the reservation of domestic jurisdiction as the problem of the subjective justiciability of international disputes. Indeed, he said,

‘It was of the essence of the usual reservations of vital interests, honour, or independence that the determination of their applicability should be left to the free decision of the parties and, in view of their highly subjective character, it is doubtful whether any court acting judicially would be in the position to pronounce on this matter. The reservation as to matters of domestic jurisdiction belongs to the same category of indefinite reservation.’¹⁷⁹

It is important to understand why Lauterpacht consistently claimed the invalidity of the declaration attached with the reservation of domestic jurisdiction; the unilateral determination by one state party clearly seems to him to be the problem whether law prevails over politics or not, which is the proposition of the legal school. If even the objective reservation seems to him to challenge to the ideal of the Rule of Law, it is no wonder that the so-called subjective reservation seemed to him to be a more serious challenge to the ideal of the Rule of Law.

¹⁷⁶ *Ibid.*/154.

¹⁷⁷ *Ibid.*/169.

¹⁷⁸ Rosenne/1997/vol.2/774-782.

This view was confirmed in the Provisional Report of the Revision of the Statute of the Court.

It states that

'[A]ny acceptance of the Optional Clause of Article 36 (2) which leaves to a State the right to determine the extent of its obligation, voluntarily undertaken, in relation to the jurisdiction of the Court is contrary to the Statute – in addition to being obnoxious to a general principle of law which denies the character of a legal obligation to an undertaking in which the promising party determines for itself the extent of the obligation which it has undertaken.'¹⁸⁰

Lauterpacht did not address this issue in his discussion on the Revision of the Statute. However, he proposed the amendment of Article 36 (6) of the Statute by adding the sentence that '[a] disposition, in the declaration referred to in paragraph 2 above or in any other instrument, shall be of no effect to the extent to which it purports to reserve the question of the jurisdiction of the Court for the unilateral determination of a party to the dispute.'¹⁸¹

While avoiding answering a question on automatic reservation in his Provisional Report, Lauterpacht expressed his opinion in the *Norwegian Loans* case and the *Interhandel* case. In his dissenting opinion in the *Interhandel* case, he summarised his reasoning as follows:

'(a) the reservation in question, while constituting an essential part of the Declaration of Acceptance, is contrary to paragraph 6 of Article 36 of the Statute of the Court; it cannot, accordingly, be acted upon by the Court; which means that it is invalid; (b) that, irrespective of its inconsistency with the Statute, that reservation by effectively conferring upon the Government of the United States the right to determine with finality whether in any particular case it is under an obligation to accept the jurisdiction of the Court, deprives the Declaration of Acceptance of the character of a legal instrument, cognizable before a judicial tribunal,

¹⁷⁹ *I. Lauterpacht/1930c/152.*

¹⁸⁰ *Lauterpacht/R12/1955/89/para.57.*

¹⁸¹ *Ibid./90/para.58.*

expressing legal rights and obligations; (c) that reservation, being an essential part of the Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party, through the system of the Optional Clause of Article 36 (2) of the Statute, cannot invoke it as an applicant; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance. Accordingly, there being before the Court no valid Declaration of Acceptance, the Court cannot act upon it in any way – even to the extent of examining objections to admissibility and jurisdiction other than that expressed in the automatic reservation.¹⁸²

The crux of his argument is that the reserving state has the right to determine its own domestic jurisdiction. Lauterpacht clearly presumed that if a state party unilaterally determines whether the subject-matter of the dispute is within its domestic jurisdiction, the decision produces the legal effect to obligate other states or the Court to accept the decision of the state invoking the subjective reservation. Otherwise, the term ‘right’ would be meaningless, if the exercise of the right does not have a legal effect on others. This point explains his conclusion that insofar as the Court is concerned, on the one hand, the legal effect of the unilateral determination is to deprive the Court of the *compétence de la compétence* under Article 36 (6) of the Statute, and that, on the other hand, the instrument which gives such a right to one party is not a genuine legal bond to other states.¹⁸³ However, is his proposition legally correct? It is here necessary to examine his proposition whether the unilateral determination by a reserving state has legal effect to oblige other states or the Court to accept the determination.

The question whether the unilateral determination of the reserving state about the matter of domestic jurisdiction obliges the Court to accept the determination is usually discussed in the context of the compatibility of the subjective reservation with Article 36 (6) of the Statute. There are two views on the compatibility of the self-judgement reservation with Article 36 (6). One view is

¹⁸² Lauterpacht/ICJReps/1959/101-102.

¹⁸³ Fitzmaurice/1986/822-823.

the incompatibility argument; another one is called 'good faith argument.'¹⁸⁴

Although some of them did not consider the declaration of the acceptance of the Court's compulsory jurisdiction to be invalid, four judges supported the incompatibility argument of Judge Lauterpacht. In the *Norwegian Loans* case, Judge Guerrero adopted this view.¹⁸⁵ In the *Interhandel* case, Judges Spender, Klaestad and Armand-Ugon also agreed with Judge Lauterpacht about the incompatibility of the reservation with the Statute.¹⁸⁶ It should be noted, furthermore, that some lawyers also advocate the incompatibility argument.¹⁸⁷

However, two judges adopted the good faith argument. In the *Norwegian Loans* case, Judges Basdevant and Read expressed this view in their individual opinions. Judge Basdevant considered the French self-judgement reservation to be subject to the review of the Court. It is true that he discussed the Norwegian position regarding the French reservation. However, the interpretation of the reservation is applicable if France would claim the reservation:

'She [Norway] relied on it, and could only rely on it, in the sense that this reservation has in relations between France and Norway, that is to say, not as a reservation the application of which depends on the discretionary judgement of the State which relies on it, but as a reservation the scope of which depends on what is recognized by international law as found by the Court. I cannot suppose that Norway intended to give the reservation a more absolute sense which would be in conflict with the law existing in this matter between the two countries.... In invoking the French reservation, its intention was that its bearing on the present case should be considered in the light of the elements of the case: the subject of the claim and the law applicable. It is on this footing that the appeal to the reservation must be judged and that the discussion between the Parties in fact developed.'¹⁸⁸

¹⁸⁴ Jennings/1998/411.

¹⁸⁵ Guerrero/ICJReps/1957/94.

¹⁸⁶ Spender/ICJReps/1959/54-59; Klaestad/ICJReps/1959/75-78; Armand-Ugon/ICJReps/1959/90-94.

¹⁸⁷ Waldock/1954/131-137/and/1955-56/271-273; Jennings/1998/404-416; Takano/1963/301-347.

Although he was cautious about the notion of “good faith” or *abus de droit* in the interpretation of automatic reservation, Judge Read said,

‘[T]he wording of the reservation, must establish that there is a genuine understanding, i.e., that the circumstances are such that it would be reasonably possible to reach the understanding that the dispute was essentially national. Whether the circumstances are such is not a matter for decision by a respondent Government, but by the Court.’¹⁸⁹

Some international lawyers also support this view.¹⁹⁰

Which interpretation of automatic reservation is right? It is true that Lauterpacht denied the interpretation that the reservation is compatible with Article 36 (6) of the Statute, because he interpreted the intention of the authors of automatic reservations as being to deprive the Court of the *compétence de la compétence*.¹⁹¹ Judge Spender also expressed that the good faith argument is to redraft the reservation and to give it ‘an entirely different meaning to that which its words bear and which they clearly enough were intended to bear.’¹⁹² However, two questions are predicated in the reasoning of Lauterpacht and Spender. The first question is whether one party is legally entitled to deprive the Court of the *compétence de la compétence* under Article 36 (6) of the Statute. The second question is how the Court should interpret the intention of the authors of automatic reservations.

With regard to the first question, the *compétence de la compétence* is the evidence that the Court is a judicial organ. In the *Award of the UNAT* case, the Court referred to the fact that the United Nations Administrative Tribunal has the *compétence de la compétence* under Article 2 (3) of the Statute of the Tribunal in order to answer to the question whether it is a judicial organ or an

¹⁸⁸ Basdevant/ICJReps/1957/76.

¹⁸⁹ Read/ICJReps/1957/94.

¹⁹⁰ Hambro/1948/150; Briggs/1958-I/362-363; Shihata/1965/294-297; Greig/1976/656; Elkind/1984/157-164; Sugihara/1996/164-166.

¹⁹¹ Lauterpacht/ICJReps/1957/52-55.

advisory organ.¹⁹³ In the *Nottebohm* case (Preliminary Objection), furthermore, the Court declared the customary nature of the *compétence de la compétence*:

‘Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. ... This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, ... the principal judicial organ of the United Nations.’¹⁹⁴

The reasoning in the above cases shows that the *compétence de la compétence* is indispensable to the Court as judicial organ under international law.

Insofar as Article 36 (6) is concerned, furthermore, when the state becomes a party to the Statute of the Court, it gives its tacit consent to the *compétence de la compétence* of the Court. In other words, the *compétence de la compétence* is derived from ‘the consent given by them, in becoming parties to the Court’s Statute, to the Court’s exercise of its powers conferred by the Statute,’¹⁹⁵ if it would be allowed to use the analogy of the incidental jurisdiction of intervention under Articles 62 and 63 of the Statute. Huge Thirlway expresses this view as follows:

‘Although it may be said that in principle an expressed intention of a State prevails over any implied or

¹⁹² Spender/ICJReps/1959/59.

¹⁹³ ICJReps/1954/51-52.

¹⁹⁴ ICJReps/1953/119.

deemed intention, the implied grant of the *compétence de la compétence* effected by accession to the Statute could hardly be withdrawn or curtailed by a subsequent limitation of that competence contained in an Optional Clause declaration.¹⁹⁶

Therefore, it should be thought that it is legally impossible for one state party to deny the *compétence de la compétence* by the subjective reservation.

If it were legally impossible for one party to deprive the Court of the *compétence de la compétence*, there would be no reason to think that the determination of the reserving state has the legal effect to oblige the Court to accept its determination, even though the reserving state has such an intention. However, Lauterpacht over-emphasised the intention of the authors of the subjective reservation.¹⁹⁷ He presumed that the intention of the declarant state should be as effective as possible. It is true that the Court has to consider the intention of the declarant state in the interpretation of the declaration under Optional Clause, because the declaration to accept the compulsory jurisdiction is unilateral act. In the *Anglo-Iranian Oil Company* case, the Court said that '[i]t must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.'¹⁹⁸ In principle, nevertheless, even the declaration of the acceptance of the Court's jurisdiction should be interpreted not only in accordance with the intention of the declarant state but also in conformity with the Statute as a whole. In the *Right of Passage* case (Preliminary Objection), the Court referred to the compatibility of the Portuguese reservation, which excludes any disputes 'by notifying the Secretary-General of the United Nations with the effect from the moment of such notification,' with the Statute as follows: 'It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not

¹⁹⁵ ICJReps/1990/133/para.96.

¹⁹⁶ Thirlway/1999a/6.

¹⁹⁷ Greig/1976/656.

in violation of it.¹⁹⁹ There is no reason why this statement is inapplicable to the question of the compatibility of subjective reservation with Article 36 (6) of the Statute. The first proposition is that the reservation is compatible with Article 36 (6). In other words, the Court always has the *compétence de la compétence*, irrespective of the intention of the authors of the automatic reservations. Even if it wishes so, the reserving state has no right to oblige the Court to accept its determination, because as Shihata points out, '[i]n order to reach the conclusion that the reservation is valid or not, the Court necessarily exercises an aspect of this power which it cannot be deprived of.'²⁰⁰

With regard to the second question on the interpretation of the intention of the state submitting subjective reservation, the view of Lauterpacht is also doubtful. It is true that some writers interpreted the intention of the authors of the subjective reservation is to deprive the Court of the *compétence de la compétence*.²⁰¹ However, as James Crawford points out, '[n]o doubt the making of such a reservation demonstrates little faith in the Court, but enough, one would have thought, to leave to the Court the competence to determine whether an automatic reservation had in fact been invoked.'²⁰² This point is shown by the argument of the United States in the *Aerial Incident of 27 July 1955* (the United States v. Bulgaria) case.

In the *United States v. Bulgaria* case, the United States proposed the good faith argument that 'the reservation in question [the subjective reservation of domestic jurisdiction] does not permit the Government of the United States, or any other government seeking to rely on this reservation reciprocally, arbitrarily to characterize the subject matter of a suit as "essentially within the domestic jurisdiction".' Then, the United States continued as follows:

'Where a subject matter is quite evidently one of international concern, and has so been treated by the parties

¹⁹⁸ ICJReps/1952/104.

¹⁹⁹ ICJReps/1957/142.

²⁰⁰ Shihata/1965/295

²⁰¹ Preuss/1946; Wilcox/1946; Hyde/1946; Briggs/1959.

²⁰² Crawford/1979b/73.

to the suit, it is not open to either of them to determine that the matter lies essentially within domestic jurisdiction.²⁰³

Furthermore, the United States affirmed the above interpretation:

‘The United States does not consider that reservation (b) authorizes or empowers this Government, or any other government on a basis of reciprocity, to make an arbitrary determination that a particular matter is domestic, when it is evidently one of international concern and has been so treated by the parties.’

Then the United States continued to cite the statement of the author of the reservation, namely Senator Connally, in the Senate in August 1946:

‘Several Senators have argued that by this amendment the United States would put itself in the position of corruptly and improperly claiming that a question is domestic in nature when it is not, thereby taking advantage of an international dispute and saying that since the question is domestic, we will not abide by the decision of the Court. Mr. President, I have more faith in my Government than that. I do not believe the United States would adopt a subterfuge, a pretext, or a pretense in order to block the judgement of the Court on any such grounds.’

Consequently, the Observation of the United States says that ‘[i]t is the view of the United States that reservation (b) does not confer a power to nullify the jurisdiction of this Court through arbitrary determination that a particular subject matter of dispute is essentially domestic.’²⁰⁴ It is true that the United States later abandoned this interpretation, and insisted that ‘[a] determination under reservation (b) that a matter is essentially domestic constitutes an absolute bar to jurisdiction

²⁰³ ICJPls/*United States/v./Bulgaria*/305.

²⁰⁴ *Ibid.*/323-324.

irrespective of the propriety or arbitrariness of the determination.²⁰⁵ However, the fact remains that the United States showed another possible interpretation in which the determination of the United States about whether the subject matter of a dispute is within the domestic jurisdiction is subject to the judicial scrutiny of the Court. It should be noted, furthermore, that in the *Nicaragua* case, the United States did not claim the Connally amendment.²⁰⁶ According to Gardner, it is 'because we were ashamed to argue that mining another country's harbors and supporting insurgents seeking to overthrow its government were matters within U.S. domestic jurisdiction.'²⁰⁷ Therefore, there is room for the good faith argument even in the interpretation of the will of the reserving state.

Furthermore, the Court has chance to check procedurally whether the state party claims the subjective reservation in good or bad faith. It is true that even Judge Read, who supported the good faith argument in the *Norwegian Loans* case, thought that 'it is impossible...for an international tribunal to examine a dispute between two sovereign States on the basis of either good or bad faith or of abuse of law.'²⁰⁸ However, the Optional Clause system is a series of bilateral engagements in which the principle of good faith plays an important role.²⁰⁹ There is no reason why the principle of good faith is inapplicable to the interpretation of the subjective reservation as far as the Court has the *compétence de la compétence*.

In this context, it is true that the problem still remains how the Court will interpret the words like 'as understood by the Government of French Republic' or 'as determined by the United States of America.' However, if the object of these terms is interpreted simply to restate the expectation of the reserving states, the interpretation of these terms would allow the Court to review the unilateral determination of the state invoking the subjective reservation. Indeed, in the *Norwegian Loans* case, the Norwegian government claimed that 'within these limits [of the good faith and the abuse of right] the declarant State, under this reservation, has the right to evaluate freely the nature of the

²⁰⁵ *Ibid.*/677.

²⁰⁶ ICJReps/1984/422/para.67.

²⁰⁷ Gardner/1986/423.

²⁰⁸ ICJReps/1957/94.

²⁰⁹ See ICJReps/1984/418/para.60.

matter at issue.²¹⁰ Insofar as the subjective reservation is invoked in good faith, the state party invoking the subjective reservation can expect that the Court would accept its unilateral determination of domestic jurisdiction.

However, this does not mean that the unilateral determination is non-justiciable in the sense that it would not allow the Court to review the claim of the subjective reservation. Neither does it mean that the other party should accept the unilateral determination of the state invoking the subjective reservation, because it is possible for other states to dispute the applicability of the subjective reservation in the proceedings. If the automatic character of the determination of domestic jurisdiction by one party were admitted in the proceeding, it would not be necessary for the party invoking the subjective reservation to argue how its decision is appropriate and persuasive before the bench, because, as Elkind point out, the subjective reservation could justify 'non-appearance without default.'²¹¹ However, the practice shows that the principle of good faith works procedurally in the interpretation of the subjective reservation. The Norwegian government tried to show how the subject-matter of the dispute is the matter within its domestic jurisdiction in good faith. In the *Interhandel* case, even the United States also tried to prove how the subject-matter of the dispute falls within its domestic jurisdiction. In other words, the state invoking the subjective reservation has its own burden of proof. Furthermore, the applicant states can dispute the applicability of the subjective reservation, as Switzerland in the *Interhandel* case and the United States in the *United States v. Bulgaria* case did. If so, the Court has chance to check the applicability of the subjective reservation.

If the applicant state does not dispute but rather accepts the interpretation of the subjective reservation, as the United States finally admitted the interpretation of Bulgaria in the *United States v. Bulgaria* case, what the Court needs to do is to confirm the agreement of the interpretation of the subjective reservation between parties. It is the crux of the reasoning of the *Norwegian Loans* case:

²¹⁰ ICJPls/Norwegian/vol.1/138. Cited from Gross/1962/376/n.73.

²¹¹ See Elkind/1984/168.

'The validity of the reservation has not been questioned by the Parties. It is clear that France fully maintains its Declaration, including the reservation, and that Norway relies upon the reservation. In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the parties recognize it.'²¹²

There was no reason for the Court to reject the Norwegian interpretation of French reservation, insofar as both parties did not dispute the validity of French reservation, and the Norwegian government claimed the applicability of the subjective reservation in good faith. Clearly, the task of the Court in the *Norwegian Loans* case was not simply to register the unilateral determination of the state party invoking the subjective reservation. The Court confirmed that there was no dispute about the applicability of the subjective reservation between parties. This confirmation of non-existence of the dispute about the applicability of the subjective reservation is nothing but the Court's exercise of the *compétence de la compétence*. The Court would be ready to accept the claim of the subjective reservation, if it had found that the respondent claims the subjective reservation of domestic jurisdiction in good faith or reasonably with the reference to the circumstances of the case and to international law. However if it were unsatisfied with the claim, the Court could reject the claim of the subjective reservation. In this sense, it is inappropriate to call the subjective reservation of domestic jurisdiction 'automatic' reservation.²¹³

The reasoning of Lauterpacht is based on the assumption that the state invoking the subjective reservation has the right to oblige the Court or other states to accept its unilateral determination. However, as discussed above, such a 'right' does not exist in the relation between a party and the Court. Neither did it exist between the parties. It should be concluded, therefore, that Judge

²¹² ICJReps/1957/27.

²¹³ Sugihara/1996/166.

Lauterpacht's argument that the declaration of the acceptance of the compulsory jurisdiction of the Court is invalid is not persuasive. Even if it did not declare the invalidity of the subjective reservation of domestic jurisdiction, the Court would not abandon its responsibility. The international judges would still have performed their duty of interpreting international law.

CONCLUSIONS

The shadow of death suddenly visited Lauterpacht during the period of his judgeship. He suffered a serious heart attack in the autumn of 1959, fortunately recovering. However, he may have predicted his fate. He visited Israel after his recovery and is said to have spoken of his hope of building a house on a beautiful spot in Israel.¹ Although Lauterpacht returned to the Court in April 1960, his life came to the end at the age of 62 on 8 May 1960, following a second heart attack during an operation in London, in which doctors discovered that bowel cancer had spread to his liver. Many international lawyers lamented his fate. Indeed, the majority of the academic writings on Lauterpacht were published in the 1960s as a token of respect to his memory.²

The death of Lauterpacht symbolised the end of one era in international law. Lauterpacht himself belonged to the last generation for which international law effectively meant nothing other than the European law of nations. Ironically, perhaps, international law was dramatically modified by decolonisation in the year of Lauterpacht's death, which is often called 'the Year of Africa,' although many of European colonies in Asia had already achieved their independence in the aftermath of the Second World War.³ Harold Macmillan, Prime Minister after the British Empire had faced the Suez Crisis,⁴ addressed the South African parliament in February, 1960, saying that 'the wind of change' blew throughout the African continent.⁵ However, it was no wind, rather a typhoon. In September, seventeen newly independent states, including sixteen African nations, became members of the United Nations,⁶ a move which finally led the General Assembly to adopt

¹ Feinberg/1961/vii.

² See BYIL/vol.35/1959/ix; Fitzmaurice/1960; Wilfred/Jenks/1960; Feinberg/1961; Graveson-Jennings/1961; Jessup-Baxter/1961; Guggenheim/1961-II; McNair/1961; Rosenne/1961; Fitzmaurice/1961/1962/and/1963; Feinberg/1968.

³ See Thome/1985/144-210.

⁴ On the story of the Suez Crisis, see Judd/1996/359-371. For the legal controversy of the Suez Crisis within the British government, see Marston/1988.

⁵ Judd/1996/367-368; Thom/2000/50.

⁶ States gaining their independence from France in 1960 were: Cameroon, Togo, Madagascar, Benin, Niger, Burkina Faso, Côte d'Ivoire, Chad, Congo, Gabon, Central Africa, Mali, Senegal. Cyprus and Nigeria became independent from Britain, Somalia from Italy, Zaire from Belgium.

the Declaration on the Granting of Independence to Colonial Countries and Peoples⁷ in December of the same year. This Declaration is significant in the sense that it morally and legally condemned the colonisation which had been legally permitted, at least, before the end of the Second World War. Although it is not certain whether colonisation became illegal only by this Declaration, it cannot be denied that subsequent resolutions to the Declaration, such as the General Assembly Resolution 1541 (XV) or 2625 (XXV), provide evidence of the customary law which prohibits colonisation by affirming the right of the self-determination of peoples. As the Court made clear in the *Western Sahara Advisory Opinion*, the Declaration provided 'the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations.'⁸

It is now not Western nations, but Asian-African nations which hold the majority of seats at the United Nations as the consequence decolonisation. Asian-African nations, which dominate the General Assembly by the one-nation-one-vote principle, claimed that Eurocentric international law should be changed in their favour. In particular, they clamoured for the re-distribution of wealth in the international community through the United Nations. Thus the economic development of the Asian-African nations gradually appeared as one of main topics of international law. The General Assembly Resolution on Permanent Sovereignty over Natural Resources is a good example of how Asian and African nations claimed the re-distribution of wealth through the General Assembly resolution.⁹ They wished to establish New International Economic Order. This point partly explains why the so-called 'legislative' function of the General Assembly has been discussed among international lawyers from the 1960s to the 1970s.¹⁰ Although the revolutionary character of NIEO had been rejected by the Western countries,¹¹ it is undeniable that certain claims of developing countries, such as the Common Heritage of Mankind, became positive law. The increase of the role

⁷ G.A./Res./1514/(XV).

⁸ ICJReps/1975/32/para.57.

⁹ See Gess/1964.

¹⁰ See, for example, Fork/1970/174-184.

¹¹ See *Texaco/Libya/ILR/vol.53/485-495*.

of the Asian-African nations in the international law-making process means that Western nations lost the decisive role they had enjoyed in the international law-making process before the era of decolonisation.

The second result of the decolonisation process is seen in problems which arise as a result of the politically unstable situation between and within developing countries. One of the reasons European nations withdrew from their colonies in Asia and Africa was because their inability financially and militarily to solve the perplexities in their colonies in the wake of nationalism. The confusion which occurred when European nations withdrew continued in some independent nations for a long period and certain problems have still not been resolved. Territorial disputes took place when some ethnic groups formerly under European domination separately acquired independence. The dispute between India and Pakistan over Kashmir is a typical example of the confusion which accompanied decolonisation.¹² Such difficulties are also encountered in Africa, where frontier disputes have occurred over the former administrative line established by the colonial government. Although the principle of *uti possidetis* is declared as a general principle in the *Frontier Dispute* case,¹³ it is also undeniable that the artificial lines of the colonies' administrations are still unsatisfactory for some governments in Africa. Civil wars also broke out under ineffective governments during the decolonisation process. The Congo crisis in the early 1960s was typical.¹⁴ The politically unstable situations in former colonies were among the elements of political disturbance in the international community in and after the Cold War era.

Although these difficulties had already occurred before he died, it is not certain if Lauterpacht fully appreciated the political and legal implications of decolonisation. The reason he did not notice it seems to be mainly because he was by nature essentially an European who perceived his conception of civilisation as being universal. He believed that human beings have a universal nature, such as morality or rationality. His universalistic belief was no doubt influenced by his

¹² On the history of the dispute, see Hussain/2000/4-38.

¹³ ICJReps/1986/554/para.20.

¹⁴ See Legum/1961.

personal experience, growing up in Lwow, being a student in Vienna before finally settling in England during the inter-war era. It is true that Lauterpacht considered international law to be universal. However, the international law which he conceived as universal was nothing but the European law of nations. It is so, even though he contributed to the universalisation of international law by introducing liberalism into international legal theory without being aware of the European character of his theory.

This point is shown by his last article *International Law and Colonial Questions, 1870-1914*, written with Robert Jennings. Lauterpacht and Jennings generally appreciated the contribution of the British government to the development of international law during the period,¹⁵ including international arbitration or the law of wars. They discussed the regulation by international law of the relationship between European nations with regard to colonisation during the period of imperialism. They did not, however, discuss the problem of the legality of colonisation itself, although they touched upon the abolition of the slave trade and the acquisition and administration of colonies. Lauterpacht and Jennings, for example, extolled British policy not to recognise the annexation of the Congo to Belgium unless the British government was satisfied with the treatment of the Congo's native people. When the Congo Free State, where the inhuman abuse of indigenous people had been brought to the world's attention, was annexed to Belgium, France and Germany recognised the annexation. However, the British government did not. In the view of Lauterpacht and Jennings, the reason the British government refused to recognise the annexation of the Congo to Belgium was because it needed to be satisfied that the abuses had ended.

'This humane campaign of the British Government, acting for the most part in isolation, marks, therefore, an important step in the gradual transition of the native's rights, and indeed ultimately of human rights in general, from the sphere of the sovereign discretion of each separate government to the higher plane of general international law.'¹⁶

¹⁵ Lauterpacht-Jennings/1959/CP-II/96.

¹⁶ *Ibid.*/105.

However, their argumentation shows that what Lauterpacht and Jennings did not pay attention to was the legality and political legitimacy of colonisation which was the fundamental cause of the inhuman treatment of native people and of the slave trade. It does not mean, of course, that Lauterpacht and Jennings were ethically insensitive to colonial questions. They criticised the crucial policy of the Belgian government in the Congo Basin from the viewpoint of civilisation and humanity. However, there is room to question whether they thought that colonisation would be morally justified if the colonial domination were civilised and humanistic. As Mears said, '[t]he lesson ... that the "native" peoples, at least, have learned by now is that projects for humanitarian reforms for native peoples – no matter how sincerely meant – are impractical when combined with a system of Big Power power-politics and "mother-country" commercial-financial preference.'¹⁷ The fundamental question of colonisation is not whether or not colonial governments were humanitarian, but whether European nations universally could claim the predominance of European civilisation, including international law, over Asian-African nations. This is the question which Lauterpacht did not address in his last article. Neither had Jennings noticed it in 1958. Jennings ignored the fact that European powers imposed international law against Afro-Asian people in the 19th century without admitting the equality between the former and the latter as represented by capitulation or unequal treaties, when he discussed the universality of international law in his Whewell Lecture in 1958.

'It was in the nineteenth century that international law first spread to include States of widely differing customs and civilizations. It was the beginning of a system of law actually universal instead of notionally universal.'¹⁸

However, Jennings re-examined Eurocentrism in international law in an address given at a commemorative colloquium celebrating four centenaries of the birth of Grotius in 1983.

¹⁷ Mears/1948/304.

¹⁸ Jennings/1998/vol.1./294.

'Looking back on development since the Second World War, it is possible now to appreciate that the moment when the international legal system first began to be challenged by some of the newly independent States as being too Eurocentric was also the moment when the international legal system was for the first becoming in fact, and not merely theoretically, universal.'¹⁹

Unfortunately, Lauterpacht was not given a chance to re-consider the implication of colonial questions and the decolonisation process in international law.²⁰ In this sense, it is reasonable for Rosenne, who recognises that the international community had already lost its homogeneity in the 1960s, to doubt whether Lauterpacht noticed the change in the international community: '[W]hile... he [Lauterpacht] was well aware of the institutional difference between the League of Nations and the United Nations, it is not so clear that he was fully reconciled to the sociological and psychological difference for which the institutional changes are merely a screen.'²¹ Indeed, Lauterpacht tried to establish the Rule of Law in the international community without considering the sociological and psychological change in the international community.

Nevertheless, it should be noted that Lauterpacht contributed to the contemporary paradigm of international legal studies; legalism is the basis of legal thought as lawyers' ethics.²² As McCormick says, the juristic task is to take 'materials' or 'data' and put them back together, and to '*reconstruct* them in a way that makes them comprehensible because they are now shown as parts of a well ordered though complex whole.'²³ Legalism plays an important role as lawyers' ethics in this context, because '[n]ormative order as order is not a natural datum of human society but a hard

¹⁹ *Ibid.*/348.

²⁰ Some may argue that Lauterpacht criticised the establishment of Manchukuo and the Italian annexation of Abyssinian in the 1930s. However, the reason Lauterpacht criticised Japan and Italy was not because of the illegality of colonisation, but because he thought that the use of force by the Axis nations was contrary to the Covenant of the League.

²¹ Rosenne/1961/830.

²² S./Tanaka/1993/211-214/and/1994/383.

²³ McCormick/1990/556. Emphasis original.

won production of organizing intelligence.²⁴ It is true of international legal thought. The international legal materials are more scattered than domestic legal ones. To collect them, to put them together and to 'reconstruct' international legal order is the job of international lawyers. It is what Lauterpacht did by editing the *International Law Reports*. As McNair and Lauterpacht said,

'The work, of which this book is the first fruit, was prompted by the suspicion that there is more international law already in existence and daily accumulating "than this world dreams of" and by the conviction that it is more international law that this world wants. As the work has progressed that suspicion has ripened into a certainty.'²⁵

Thus, international legalism guarantees the autonomy of international legal thought. It is the reason why international legalism survives even though it has been severely criticised. What international law lacked in the destructive practices of states during two world wars was the conviction that international law is 'law.' Hedley Bull, who was of opinion that 'the view that international law is 'law' properly so-called is one that has important practical consequences, and the debate that has raged about this question is no idle or sterile one,' well understood international legalism as lawyers' ethics. Bull went on,

'International law as a practical activity does in fact have a great deal in common with municipal law. The language and procedure of the one are closely akin to those of the other. The modern legal profession is one that embraces international law as well as the municipal law of particular countries. The activity of those who are concerned with international law, public and private – statesmen and their legal advisers, national and international courts, and international assemblies – is carried on in terms of the assumption that the rules with which they are dealing are rules of law. ...The fact that these rules are believed to have the status of law, whatever theoretical difficulties it might involve, makes possible a corpus of international activity that plays an

²⁴ *Ibid.*/557.

²⁵ McNair-Lauterpacht/AD/vol.3/1929/ix.

important part in the working of international society.²⁶

In this sense, legalism is the basis of lawyers' projection of the image of law on to international order.

It should be noted, moreover, that legalism as lawyers' ethics makes international law work as 'a framework within which international relations can be conducted' and 'a system of rules facilitating international intercourse'²⁷ not only in the Cold War period but also in the multicultural era. It is so even though Grewe expressed his concern that '[i]f one adopted Huntington's view [of the clash of civilization], it would be impossible to rely on a future international community as the basis of new international law.'²⁸ Indeed, the following statement by Bull who described the value of international law in the Cold War era seems to be still valid in the era of Huntington's nightmare.²⁹

'In our times the area of consensus in international society has shrunk ... as a consequence of the expansion of international society beyond its originally European or Western base. The adherence of ... states both within and beyond the European cultural tradition, to some common terms of international law, ... has helped to maintain, in a period of inevitably contracting consensus, some elements of a common framework. The international law to, which, in some measure, all states in the global international system give their formal assent still serves to carry out its traditional functions of identifying the idea of a society of states as the operational principle of world politics, stating the basic rules of coexistence and facilitating compliance with those and other rules.'³⁰

Thus, legalism is the basis of the universal law of nations. Without this belief in law, people who

²⁶ Bull/1995/130.

²⁷ W./Beckett/1939/265.

²⁸ Grewe/2000/705.

²⁹ Huntington/1993/and/1996.

³⁰ Bull/1995/154-155.

have different cultures cannot make a common framework of international life. It is difficult to believe that Hall or Lorimer who strongly claimed the European character of international law, even if they had lived in the late 20th century, could have constructed the universal concept of international law in the era of multiculturalism. It was necessary for lawyers in the late 20th century to construct the normative theory of international law with a legalistic ideology for the sake of the universality of international law.

International lawyers, then, face the dilemma of legalism in international relations. On the one hand, international lawyers who claim the Rule of Law in international relations tend to 'build castles in the air' by disregarding international politics. The more they claim the International Rule of Law, the less convincing their theories become. Furthermore, legalism often becomes dangerous to international relations. As Kennan points out, legalism, if applied to serious political antagonism such as war, 'makes violence more enduring, more terrible, and more destructive to political stability than did the older motives of national interest.'³¹ However, some international lawyers who think that international legalism is not only inappropriate but also dangerous to international relations claim that international lawyers should overcome legalism.³² They deny the domestic analogy of international law by proving how international law is different from domestic laws. They try to establish international legal theories which are appropriate to international anarchy.³³ One consequence of their efforts is the politicisation of international legal thought. Bull correctly pointed out the seriousness of the politicisation of international legal thought by saying that 'if international lawyers become so preoccupied with the sociology, the ethics or the politics of international relations that they lose sight of what has been in the past their essential business, that is the interpretation of existing legal rules, the only result must be a decline in the role of international law in international relations.'³⁴ In other words, the denial of legalism is directly connected to the irrelevancy of international law as 'law' by losing international legal thought. It is because legalism

³¹ Kennan/1951/101.

³² Kasai/1981a/and/1981b.

³³ McDougal/1953-I/and/1960; McDougal-Lasswell-Reisman/1968; Higgins/1994.

is the attitude of lawyers to respect the autonomy of the 'legal' from the 'political.' It should be noted that it is no coincidence for Lauterpacht, who had too great a desire for the Rule of Law in the international community, to have fostered international legal thought by editing *International Law Reports* from the inter-war period.

How should international lawyers solve this dilemma of legalism? The answer may be seen in Morgenthau's words.

'This realist defense of the autonomy of the political sphere against its subversion by other modes of thought does not imply disregard for the existence and importance of these other modes of thought. It rather implies that each should be assigned its proper sphere and function.'³⁵

International lawyers should act in the same way as political realists do, in other words they should distinguish between, however difficult, between the sphere of law and the sphere of politics, if they wish to protect the 'legal' of international law. It is true that this dichotomy of law/politics has been severely criticised. Many anti-legalists such as policy-orientated approach lawyers or critical legal scholars criticised the dichotomy of law/politics by arguing that law is nothing but politics due to the false neutrality of law or the indeterminacy of law. Nevertheless, if the spheres of disciplines come from the difference of modes of thought,³⁶ it is still possible for lawyers to maintain the 'legal' of international law by distinguishing their own legal thought from political thought. International lawyers can construct international law in the same way as domestic law by the belief in legality. However, at the same time, they have to abandon the political agenda that international law should prevail over international politics in order to defend the 'legal' of international law.

In this context, it is necessary to reconsider a question which was the starting point of this thesis. Did legalism overcome power politics in international relations? It seems too optimistic to

³⁴ Bull/1995/153.

³⁵ Morgenthau/1993/15.

³⁶ See Morgenthau/1993/13-16; Shklar/1964/123.

think so. Lauterpacht undoubtedly tried to realise his ideal of the International Rule of Law. It cannot be denied that his ideal was superb. Nor is difficult it to disaffirm that he had the will and ability enough to realise his ideal. However, Lauterpacht's legalistic theory of international law sometimes became unpractical, when he theorised the international legal regulation of state sovereignty, because he intentionally disregarded the willingness of states to abide by international law. In this sense, it is difficult for him to escape from the criticism of being 'utopian.' On the other hand, it is not easy to deny that his 'liberal' theory was used by the major powers to conceal their national interests in the name of the international community in particular concerning the legal problems of war, when Lauterpacht accentuated the function of states as the organ of the international community. In other words, his legalism became an 'apology' at the same time insofar as it provided a theory of legitimising the power of hegemonic nations against their enemies. In both cases, the root of his problem is the same: his disregard of the *raison d'être* of sovereign states which try to maximise their interests.

Lauterpacht sometimes attributed such a post-war tendency of power politics to political realism. However, it is not the responsibility of political realists. The reason power politics has never been deleted from the international scene is not due to *raison d'état* as a fundamental notion of political realism but due to the *raison d'être* of states in that they have to protect their national interests. This does not mean that the so-called Hobbesian view which 'describes international relations as a state of war of all against all, an arena of struggle in which each state is pitted against each other'³⁷ is correct. States can co-operate insofar as their interests are harmonised. The co-operation of states may reflect the existence of the international community through creating international institutions. International lawyers can contribute to the co-operation of states by explicating rules and principles insofar as governments wish so. Provided that the governments can voluntarily co-operate with each other, it may be possible to realise Oppenheim's prediction that 'the progress of International Law depends to a great extent upon whether the legal school of

³⁷ Bull/1995/23.

International Jurists prevails over the diplomatic school.³⁸ However, once states found themselves in 'an arena of struggle,' there would be little room for international law to improve the situation, because although the normative foundation of international law may be independent of the will of states, the actual application of international law is definitively dependent on the political willingness of states. In such a situation, the legal school of international lawyers who claim the Rule of Law in the international community easily becomes 'over-zealous friends who have claimed too much.'³⁹

Lauterpacht, nevertheless, deleted the internal tension between the 'political' and the 'legal' in favour of the 'legal' in the fifth edition of *Oppenheim's*,⁴⁰ no doubt from his conviction that the balance of power was immoral. However, there is room to ponder whether or not his deletion of the internal tension between power politics and liberal legalism in *Oppenheim's* was appropriate to the development of international law and international legal studies. As Kissinger says, the balance of power is an artificial system in the sense that 'it works best when it keeps dissatisfaction below the level at which the aggrieved party will seek to overthrow the international order.'

'Theorists of the balance of power often leave the impression that it is the natural form of international relations. In fact, balance-of-power systems have existed only rarely in human history. ... For the greatest part of humanity, during the longest periods of history, empire has been the typical mode of government. Empires have no interest in operating within an international system; they aspire to *be* the international system. Empires have no need for a balance of power.'⁴¹

The next question occurs if the balance of power is denied; does an empire need to respect international law? This question was the concern of Oppenheim when he claimed that the balance of power was the first moral principle of international law: 'If the Powers cannot keep one another

³⁸ Oppenheim/1912a/80.

³⁹ Wild/1938/480.

⁴⁰ Oppenheim-Lauterpacht/1937/80-82.

in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law.⁴² The First World War strengthened his concern. Oppenheim continued to adhere to the balance of power even within the League of Nations.

‘[W]hen, as the World War, the Great Powers are divided into two camps which are at war, and the neutral States represent only a negligible body, there is no force which could restrain the belligerents, and compel them to conduct their warfare within the boundary lines of International Law. The existence of the League of Nations makes a balance of power not less, but all the more necessary, because an omnipotent State could disregard the League of Nations.’⁴³

Did Lauterpacht notice this problem when he edited out the balance of power as the first principle of international law in *Oppenheim's* in the name of the Rule of Law? When he claimed the Rule of Law in the international community, did Lauterpacht, who personified international law, consider the meaning of Carr's criticism of the personification of international law that ‘[t]here are men who govern, but there are no laws that govern’?⁴⁴ It is regrettable that the answers to these questions seem to be negative, taking all his works into consideration. With regard to this point, Bull's statement with regard to the comparison of Lauterpacht with Oppenheim seems to be correct.

‘Lauterpacht also argues that the Grotian conception of international society is a sound one and a morally admirable one; ... he contrasts it with the conception entertained by the nineteenth-century positivist international lawyers, particularly as their writings culminated in the writings of Oppenheim. Whereas I want to take unfavourable view of Grotius, and to try and rehabilitate the nineteenth-century positivists and the view particularly of Oppenheim, who given that he had the limitations of a lawyer thinking about international politics, seems to me to have written more sensibility about international relations than certainly many other

⁴¹ Kissinger/1995/21. Emphasis original.

⁴² Oppenheim/1912a/80.

⁴³ Oppenheim-Roxburgh/1920/94.

international lawyers and many other thinkers.⁴⁵

International law cannot replace diplomacy or international politics. What international lawyers can do is to help diplomats and politicians through their legal thought. As Warbrick indicates, international lawyers have to recognise that their role is 'to oil the wheels, not to build the engine.'⁴⁶ This point may seem to be a matter of course, but it is the matter that many lawyers who still desire the Rule of Law in the international community tend to forget. Although Warbrick says that international lawyers in England 'have been chastened by the over-optimistic claims made in the past for the decisive influences of self-interest and accommodation,'⁴⁷ we can see how Lauterpacht's ideal of the Rule of Law in the international community still influences the contemporary paradigm of international legal studies in a letter by famous international lawyers to the British government that '[a] decision to undertake military action in Iraq without proper security council authorisation will seriously undermine *the international rule of law*.'⁴⁸

The role of lawyers in international relations 'to oil the wheels' may be criticised from the viewpoint of idealism and progressivism. It may be described as 'the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest in which they find their true value.'⁴⁹ Nevertheless, however unobtrusive and feminine, this role of law cannot be negligible, and in fact is supported by legal practitioners such as William Beckett, Legal Advisor to the Foreign Office in the crisis of 1939, who wrote:

'While the success of any institution or system, set up to eliminate wars and settle international disputes peacefully, must be of the most vital interest to every thinking and conscientious citizen of the world, just as internal constitutional reforms must interest the citizens of the State, nevertheless it is not primarily as a lawyer,

⁴⁴ Carr/1945a/165.

⁴⁵ Bull/2000/119.

⁴⁶ Warbrick/1991/52.

⁴⁷ *Ibid.*

⁴⁸ See *Gardian*/07/03/03/1/and/29. Emphasis added.

but as a citizen, that he is interested in these things. Though in the framing and operation of systems for the prevention of wars the lawyers may increase if they succeed, this is a sphere of politics and diplomatic relations, and only secondarily within the sphere of the lawyer. In truth the scientific study of international law has suffered gravely because of its popular identification with movements and schemes for the establishment of world peace, and international lawyers have not made sufficiently clear to the world, and perhaps not to their own minds, when they were speaking or writing as lawyers and when as citizens or experts on international relations or diplomacy. But the distinction is important. International law as a scientific subject does not depend on the fortunes of the League of Nations, and the enthusiasm, which many of us have felt or still feel for the League, must proceed from a judgment made, not in our capacity as lawyers, but as citizens.⁵⁰

From such a viewpoint, it is difficult to say that Lauterpacht was correct in theorising his international legal utopia. In particular, he often overestimated the role of international lawyers from the progressive perspective of future. In this sense, Lauterpacht may be regarded as 'citizen' rather than 'lawyer' from Beckett's viewpoint.

It should be noted, however, that Lauterpacht was given a chance to realise his ideal as an academic authority, as a legal consultant to government officials and as an international judge. For better or worse, if we accept Martin Wight's explanation, Lauterpacht, who desired the Rule of Law in the international community, should be remembered as a person of the period 'in which actual international practice is most marked by disorder'⁵¹:

'[I]nternational law seems to follow an inverse movement to that of international politics. When diplomacy is violent and unscrupulous, international law soars into the regions of natural law; when diplomacy acquires a certain habit of co-operation, international law crawls in the mud of legal positivism.'⁵²

⁴⁹ Kennan/1951/54.

⁵⁰ W./Beckett/1939/266.

⁵¹ Bull/1995/145.

Just as Grotius wrote *De Jure Belli ac Pacis* as his ethical reaction to 'a lack of restraint in relation to war, such as even barbarous races should be ashamed of'⁵³ in the Thirty Years War, Lauterpacht's theory of international law is also his ethical reaction to two World Wars as the lack of humanity. In this sense, although he would have frowned upon a statement by a person he detested, there is no better expression for appreciating Lauterpacht than these words of Hegel, who wrote, 'The great man of the age is the one who can put into words the will of his age, tell his age what its will is, and accomplish it. What he does is the heart and essence of his age; he actualises his age.'⁵⁴

⁵² Wight/1968a/29.

⁵³ Grotius/1925/20.

⁵⁴ Hegel/1952/295.

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NOTE: This bibliography is divided into two parts. The first part is a general bibliography, which includes four sections, namely 'International Law and International Relations' (1.1.) 'Jurisprudence, History of Law and Legal Education, and Political Theory'(1.2.), 'Jewish Culture and Zionism' (1.3) and 'Other Disciplines' (1.4.). The second part is the bibliography of/on Sir Hersch Lauterpacht (2.). The bibliography of the writings of Sir Hersch (2.1.) consists of, his books (2.1.1.), his lectures in the *Hague Academy of International Law* (2.1.2.), his editorial works, including *Oppenheim's* (2.1.3.), his articles and notes (2.1.4.), his book reviews (2.1.5), his opinions as practitioner (2.1.6), his individual opinions as a judge of the International Court of Justice (2.1.7), and other writings (2.1.8). The bibliography of others' writings on Sir Hersch and his international legal theory (2.2.) includes others' articles and books on him and his theory (2.2.1), and others' reviews of his books which include *Oppenheim's* (2.2.2.).

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2.1.5. BOOK REVIEWS

Note: Lauterpacht usually used his initials ‘H. L.’ for his book reviews in accordance with the usage of book reviews in Britain. It is not so difficult to find and identify his book reviews in some periodicals, such as *British Yearbook of International Law* or *Cambridge Law Journal*, which Lauterpacht was clearly related to. It is still uncertain, however, which periodicals Lauterpacht contributed his book reviews to. *International Affairs* and *Journal of Society of Public Teachers of Law* are ascertained as journals in which his book reviews are clearly identifiable. It is unavoidable,

therefore, that there may be some omissions of his book reviews in this bibliography, although I tried to make a comprehensive bibliography as much as possible.

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