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# HERSCH LAUTERPACHT: AN INTRODUCTION[1]

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## INTRODUCTION

Seldom have authors produced such a longstanding impact on doctrine and practice for successive generations of international law scholars. The so-called "fathers" of international law, such as Grotius, Gentilli, Vitoria and Suárez, are frequently recalled as one wishes to quote the most influential scholars of the field, but if one should give international law a sense of dynamism, in the sense of observing it as a set of ideas that must affect reality, its "paternity" should be revalued regularly, and, dare I say, more constantly.

Like few, Hersch Lauterpacht knew that scholars do not communicate with the past through mere bonds of blood, but rather through loyalties that are constantly put to the test. In a major essay originally published in 1946, *The Grotian Tradition in International Law*, he intended to alert his colleagues to a series of duties of which Grotius had been reminding them since the 17th century. The historical moment for such a reminder could not have been more appropriate. In 1946, the world needed to be reconstructed, the projects of longstanding peace were a necessity of the common citizen, institutions and rules needed to warrant stability to the many social relationships that surpassed the borders of the states. Although many which had survived to both world wars could not give up on some level of comprehensible suspicion, there was patent urgency that international law scholars should be the "aerials of the kind". Grotius proportioned, as Lauterpacht said, a source of faith on law as it must be.[2] Today's reader, upon meeting such long essay, must ask himself whether the Grotian tradition is not truly

1 Translated by Raphael de Souza Camisão

2 LAUTERAPACHT, Hersch. The Grotian Tradition in International Law. In: LAUTERPACHT, Elihu (ed.). International Law: Being the Collected Papers of Hersch Lauterapcht. Vol. 2: The Law of Peace. Cambridge: Cambridge University Press, 1975, p. 363.

a Lauterpachtian tradition on international law. After all, to remember the father is also a way to kill him. As Carlos Drummond de Andrade would say, upon remembering his father in one of his most celebrated poems *A Mesa*, "many deaths are left to be long reincarnated on another dead".

On this tension between life and death, Lauterpacht definitely asserted himself, either in a truly Grotian tradition or as one of the new fathers of international law from his own death, in 1960. [3] Undoubtedly, his influence has been questioned or applauded in many fields in which he acted, either as a theorist or a practitioner of international law.[4]

Lauterpacht was a prolific author. His work consists of five books, two of them substantially reedited, plus over sixty articles, four courses ministered in The Hague Academy of International Law, reports presented to the International Law Commission, plus many other scholarly and professional writings, such as opinions emitted as a judge of the International Court of Justice. A large part of these writings – not including the books – was diligently compiled by his son, also a renowned international law scholar, Elihu Lauterpacht, in five substantial volumes.[5]

It would be virtually impossible to synthesize Lauterpacht's work in a few pages in all its complexity and extension. Therefore, this chapter will merely present the main theses defended by the author through his five books. Evidently, this would leave many important and influential writings of Lauterpacht behind, such as on jurisdictional immunity of the states, neutrality, continental platforms, treaty law or international organizations' law. The concentration in his books can be explained: Lauterpacht has always been known by his peers as an author endowed with high methodological rigor and coherence – in all his writings there is "fundamental unity", as, for example, his friend

3 It seems to be no coincidence that Martti Koskenniemi, one of the greatest living Lauterpacht scholars, has identified the decline of international Law as a profession – originally affirmed on 1869 with the creation of the Revue de droit international et de législation comparée and the Institut de Droit International – in 1960. It is also Koskenniemi who doubts the existence of a Grotian tradition (rather than Lauterpachtian) on international Law. See KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960. Cambridge: Cambridge University Press, 2001, p. 3-6, 406-411. Such doubt is also stressed in Lesaffer, who much attributes the Grotian tradition to Franciso de Vitoria. See LESAFFER, Randall. The Grotian Tradition Revisited: Change and Continuity in the History of International Law. British Yearbook of International Law. London. Vol. 73, 2002, p. 103.

4 For one of the most updated list of publications by the author, see LAUTERPACHT, Elihu. The Life of Hersch Lauterpacht. Cambridge: Cambridge University Press, 2010, p. 443-445.

5 Ver LAUTERPACHT, Elihu (ed.). International Law: Being the Collected Papers of Hersch Lauterapcht. 5 volumes. Cambridge: Cambridge University Press, 1970-2004.

and contemporary Wilfred Jenks pointed out. [6] It is on his books that one may find the theoretic and methodological ideas which significantly impacted all his writings. As well as some very brief biographical incursions, some impact left by his work on following generations of internationalists shall be assessed.

## 1. PRIVATE ANALOGIES

*Private Law Sources and Analogies in International Law* (henceforth *Private Law Analogies)* was the first monographic work published by Lauterpacht as a book. The work was originally presented as a doctoral thesis to the London School of Economics, under orientation of an important 20th-century scholar who would later on become one of his best friends, Arnold Duncan McNair. *Private Law Analogies* intended to prove, specially resorting to the doctrinal history of international law and many precedents of permanent and arbitration courts, that international law uses analogical thinking referencing to many institutes of private law abundantly, specially Roman.

In such work, dated from 1927, Lauterpacht was especially worried with establishing a defense of the general principles of law as sources of international law. Article 38(1c) of the Statute of the Permanent Court of International Justice, establishing as a rule of law to be applied by the Court "the general principles of law recognized by civilized nation", it would allow jurists to build a permanent bridge between the diversity of domestic laws and international law. The principles of Roman private law, as received by domestic law, would be directly applicable to international law by the force of the aforementioned article. The intellectual ambiance of such time, however, still profoundly marked by positivistic ideals, would leave little room for appliance of general principles of law. Positivists would bother to emphasize the unique character of international law – therefore deeply divergent from internal laws. Recognizing that international law was cultivated across history to be thought diversely from domestic law would be a form to destroy permanent bridges with domestic law, with domestic analogy to private law, and, conclusively, to deny applicability or mitigate the importance of general principles of law as a source of international law.[7]

Lauterpacht saw in basically all fields of international law of peace – referring to the old distinction between international law of peace and of war – the influence of private law. Rules on estoppels and *res judicata*, therefore, would have influenced international procedural

6 JENKS, C. Wilfred. Hersch Lauterpacht – The Scholar as Prophet. British Yearbook of International Law. London. Vol. 36, 1960, p. 3.

7 LAUTERPACHT, Hersch. Private Law Sources and Analogies of International Law. London: Longmans, 1927, p. 3-8.

law, the analogy between states and individuals was responsible for the appearance of the doctrine of fundamental rights of states, the law of international responsibility would relate to internal laws of extracontractual responsibility, the law of treaties would have derived from contract law many elements, rules on acquisition and loss of territory by a state had their own structure originated on rights *in rem* as seen at the level of domestic law. [8]

For our author, the forgetfulness of this influence of private law in international law was a direct result on the impact of positivist doctrines on international juridical science. If international law emanated only from the will of states, anything not included on such will – such as internal private law – ought to be rejected. The principles of private law had become principles of natural law, therefore not subjected to the will of sovereign states. [9] One of the main intentions of the work is to bring natural law back to international law through analogies and general principles of law.

On a scholarly point of view, Lauterpacht made efforts to demonstrate that analogical thought referring to the principles of private law are present in the "fathers" of international law. Even posterior positivist authors, according to him, used such analogy in their reasoning. [10]

The rest of the book aims to prove how seldom does the practice of international law – both contemporarily to the publication of the work and long before it – refrain from using private law analogy.

Martti Koskenniemi suggests that the work is informed by a double agenda: scientism and individualism. On one hand, scientism is outlined by analogy, which is "the jurist method to supplement the fragmentary or contradictory elements to secure systemic unity of law". [11] Individualism, on the other hand, is relevant to allow the sovereign state not to permanently obstruct the direct relationship which it must stablish between international juridical order and individual human beings. This is why direct attacks on sovereignty can be found both in *Private Law Analogies* and various other works by Lauterpacht. [12]

Such a reading, although much plausible, is reductionist on the impact of the book on Lauterpacht's ideas, especially if one considers his posterior works. Koskenniemi seems to see *Private Law Analogies* merely as a test tube of *The Function of Law in the International*

8 Idem, p. 6.

9 Ibidem, p. 7-8.

10 Ibidem, p. 8-31.

11 KOSKENNIEMI, Martti. The Gentle Civilizer, p. 364.

12 Idem, p. 365-366. On a straighter language, Jenks had already stressed a much similar reading when pointing that the first part of the book is na attack against positivism and sovereignty. JENKS, Wilfred. Hersch Lauterpacht, p. 4.

*Community*, which deals with the problem of non-justifiability of questions and gaps on international law. Analogies, therefore, would be primordially meant to allow the completeness of the system through domestic law.

Beyond solving the problem of gaps in international law, private analogies allow for a unified vision of domestic and international law: a monistic version, to be more precise. Beside the gaps, Lauterpacht was worried with granting international law more effectiveness, something difficult to be obtained, due to, among other factors, the refusal of judges and arbitrators to decide on certain questions. He affirms, therefore, that there should be no necessity to recur to domestic analogies of private law as long as "there is an international law ruling available". [13] The international juridical system, therefore, needs to recur to domestic analogies due to its primitive and fallible structures. It is precisely this primitivity that makes private, and not, say, constitutional analogy necessary. The contractual bases of international law allow for analogies with private law, but not with bodies of law with more explicitly subordinative character, such as criminal, constitutional or administrative law. [14]

In posterior writings, when Lauterpacht evokes the idea of federation of states, more developed points are put forth on the application of international criminal law – such as in Nurnberg – of human rights or those on the functionality of international organizations. In this moment, indeed, analogies to criminal, constitutional and administrative law are more evidenced. [15]

*Private Law Analogies* is, therefore, more than a mere anticipation of *The Function of Law*, but rather an anticipation of Lauterpacht's ideas in many other directions.

Before present-day eyes, the book provokes some disquiet and contestation, such as the eurocentrist blemish that might be attributed to the author due to his robust emphasis on juridical principles developed basically in a European context and imposed to multiple juridical systems around the world, or the failure of the idea of completeness of law (and thought) that was evidenced with the project of criticism of reason developed in the Post-War Era. Still, it is a book that, from the point of view of the proposed discussion, touches countless themes that

13 LAUTERPACHT, Hersch. Private Law Analogies, p. 34.

14 Idem, p. 35.

15 This is essentially connected to the posteriorly developed by Lauterpacht Idea of the imperative necessity of the creation of a global state, as it shall be further detailed. For a general overview of the theme, comparing similar propositions by Kelsen and Scelle, see GALINDO, George R. B. Revisiting Monism's Ethical Dimension, In: CRAWFORD, James and NOUWEN, Sarah. (ed.). Select Proceedings of the European Society of International Law, Vol. 3, 2010. Oxford: Hart Publishing, 2012, p. 141-153.

would be important for the comprehension of international law in the 20th century.

It should be no exaggeration to say that many contemporary discourses, based on the idea of "lack" or "ineffectiveness" of international law, seek to fulfill what they deem as problematic in the international juridical system through arguments, institutions or rules of internal law. Such is the case, for instance, of the many proposals of constitutionalization of domestic law, which draw much inspiration from constitutionalist ideas found in domestic law. [16] The same point could be made as for the project of the so called Global Administrative Law, as for the administrative ideas of domestic law. [17]

## 2. LAW AND ITS FUNCTION ON THE INTERNATIONAL COMMUNITY

*The Function of Law in the International Community* (henceforth *The Function of Law*) has once been considered the most influent English-language international law book of the 20th century. The present-day reader may detect some exaggeration on such an honor given the problem which Lauterpacht intends to explore: the alleged difference between juridical and political questions, justiciable and non-justiciable.

Along the 19th century, when arbitration arose in international law as a means of pacific settlement of controversies, several obstacles were created in order to diminish its effectiveness. The main proposition was that many questions did not fall under the rule of law, and therefore could not be assessed by arbitrators. These were the so-called non-justiciable disputes, as opposed to justiciable disputes, which would fall within the scope of arbitration. The turn to the 20th century and the creation of a permanent court, the Permanent Court of International Justice, would not bring relevant novelties to such opposition. The explanations on the need of distinction were many, but Lauterpacht, at the beginning of the book, traced an origin that led to the prime enemy: the doctrine of sovereignty. [18] At this point, he retook a project of critique to sovereignty that began vigorously with *Private Law Analogies* and would cover virtually all of his work. The doctrine of non-justiciability of

16 Sobre o tema, sob uma perspectiva crítica, ver GALINDO, George R. B. Constitutionalism Forever. Finnish Yearbook of International Law. Helsinki. Vol. 21, 2010, p. 137-170.

17 Ver KINGSBURY, Benedict, KRISCH, Nico, and STEWART, Richard B. The Emergence of Global Administrative Law. Law and Contemporary Problems. Durham. Vol. 68. Nº 1, 2005, p. 15-61.

18 LAUTERPACHT, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p. 4.

matters would perpetuate the rule that compulsory jurisdiction of courts is a merely voluntary restriction of sovereignty within the framework of a contractually established obligation. According to Lauterpacht, this would be the very negation of rule of law in the international society of states.[19]

On these terms, it may be perceived that the theme of the book is not strange to its title. To insist on the existence of matters outside the scope of law – and also of the courts – is to deny to law the important function of regulating the international community itself.

For Lauterpacht, there is no distinction between juridical and political questions, neither between justiciable and non-justiciable ones. Everything can be juridical, and, therefore, justiciable. The international juridical system, therefore, has no gaps. Its completeness – as that of the domestic juridical system – is a presumption of the rule of law. If the headstone function of law is to preserve peace, one cannot admit the inexistence of juridical answers to various situations.[20] Plus, the general principles of law – whose importance was highlighted in *Private Law Analogies* – would fulfill an essential role in providing means for the solution of controversies as long as a treaty or custom did not stipulate applicable rules to the case. The judge is commissioned with the duty of recurring to such principles in the name of completeness of the international juridical system.[21]

Much analytically, Lauterpacht confronts the main arguments for the maintenance of distinction. One example is the impartiality of the international judge, which he points out as one of the "most urgent themes of political organization of the international community".[22] The apprehensiveness of states in handing a specific matter to an international judge would be founded both in his origin – leading to clear bias on his decision – as in the will to expand or restrict jurisdiction to the detriment of state sovereignty.

Additionally, Lauterpacht defies the point that the maintenance of the distinction between justiciable and non-justiciable questions has any relation with the theme of "juridical change". International jurisdiction shall only be applicable considering the current state of the international organization and legislation. The modifications and increases on set law would be entrusted to an international legislator – who does not exist. The mostly contractual base of international law would lead it to a static tendency. Based on the analogy with the function of the domestic judge, Lauterpacht defends the thesis that the international judge has the function of adapting law to mutable

19 Idem, p. 44-45.
20 Ibidem, p. 64-65.
21 Ibidem, p. 85.
22 Ibidem, p. 201-202.

conditions. He did not see any hindrance in considering that the judge also crafts law, [23] may it be recurring to the general principles of law, may it be through the application of doctrines of abuse of law and *rebus sic stantibus*, among other methods.[24]

For our author, the defense of the existence of non-justiciable questions would also relate to the debate on the juridical natural of international law itself. The diversely valuable arguments denying that international law would have the characteristics of a juridical system as visible in the domestic dimension of the states would lower defense to the idea that there are issues uncovered by international law. Defending the juridical character of international law, Lauterpacht clearly sees the necessity that it should be led by a specific kind of social organization, such being found in domestic law. The importance and even desirability of domestic analogy returns and once again becomes explicit. He directly defends that, as long as international law more narrowly approaches domestic law, it should also approach the "moral and order patterns that ultimately fundament law". [25]

The importance of *The Function of Law* lies specially in seeking to attribute a central role to law in international relations. The existence of non-justiciable questions in doctrine not only caused the descoping of merit appreciation of controversy away from international courts: it also generated the effect of making law a mere partial regulator of social relations. Objectives such as justice, order and peace could not be fully achieved with such a limitation.

The centrality of the judge in a system with little legislative centralization was a solution crafted by Lauterpacht to make law more effective. As it was already pointed out by some authors, the idea is an approximation between international law and the common law system. Therefore, law would not be deemed a creation of an extrinsic agent, such as a legislator or even a judge. Such would be the cases that make law evolve. The international judiciary would be the oracle of law itself, which in turn would be a "repository of practical experience".[26]

Such loyalty towards common law, however, could not be taken to its ultimate conclusions. Before subscribing to any specific kind of juridical system, Lauterpacht, native to the Austro-Hungarian Empire and later a British citizen, seems to have absorbed the British sense of pragmatism. According to him, the main *telos* of international law was to reach a level of centralization through a sole legislator. This is why

23 Ibidem, p. 255.

24 Ibidem, p. 307.

25 Ibidem, p. 432.

26 SOMEK, Alexander. From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law. Constellations. New York. Vol. 18. Nº 4, 2011, p. 573.

he affirms that "the existent tendencies towards political integration of the community of states will later produce the consummation of mechanism of change through the work of an effective international legislator. This will diminish upon the judicial solution obligatory to pressure – partly true, partly imaginary – imposed to him due to the imperfections present in legislative procedure.[27]

The teleological thought of Lauterpacht – also highlighted in recent commentary to his work[28] – proves that he was more worried with making private law as centralized as domestic. The protagonism which he bestowed on the judge in *The Function of Law* was, in a certain way, provisory, until a central international legislator rose up to put forth more radical changes on international law. Such point strengthens the idea that *Private Law Analogies* is no mere appendix to *The Function of Law*. The existence of a global state presupposes unity between domestic and international law. Recurrence to analogies is an important way to practice the idea that there is only one juridical system and one rule of law to guide it. Lauterpacht, therefore, was only continuing his initial project of making international law a true *civitas maxima*, in order to encompass both domestic and international law.[29]

The legacy of such work is very noticeable nowadays. *The Function of Law* has influenced the following generations of international law scholars not only to attribute great importance to the judiciary, but also to international judges.

All enthusiasm in the 1990s with the creation of new international courts and their role in paving a way of progress for international law may certainly be traced back to *The Function of Law*. [30] Lauterpacht constantly associates the expansion of activities of the international judiciary to a way of progress, justice, peace and social order at an international scale. The judiciary solution is seen as somewhat more evolved in comparison with more political others. This is made clear, for instance, when he when it emphasizes clear advantage in the solution of controversies by courts, as opposed to conciliation.[31] Meanwhile, to the

27 LAUTERPACHT, Hersch. The Function of Law, p. 346.

28 Ver CAPPS, Patrick. Lauterpacht's Method. British Yearbook of International Law. London, 2012. Disponível em http://bybil.oxfordjournals.org/content/early/2012/06/09/bybil.brs001.full.pdf+html, p. 1-33.

29 On such sense, it is important to note that, as he refutes the argument that the nationality of the judge interferes on his independence, Lauterpacht stresses the necessity that the international judge creates the "consciousness of citizenship toward a civitas maxima", rather than loyalty to nation states. LAUTERPACHT, Hersch. The Function of Law, p. 233.

30 Sobre o tema, ver SKOUTERIS, Thomas. The Notion of Progress in International Law Discourse. The Hague: TMC Asser Press, 2010, p. 159-216.

31 LAUTERPACHT, Hersch. The Function of Law, p. 268-269.

extent that this enthusiasm with the courts has mingled,[32] Lauterpacht's influence in the theme of preponderance of the judicial solution over the others has been losing strength.

Such attribution of importance to judges may be perceived on the emphasis that many international law scholars have given to exegesis, [33] including as a possible escape to the problems which the so-called fragmentation of international law has brought forth, such as the principle of systemic integration in the general rules of interpretation of the Vienna Convention on the Law of Treaties.[34] In Lauterpacht, the judge must appreciate whether a matter is political or juridical, therefore non-justiciable or justiciable. Such choice will follow na individual hermeneutical effort that seeks to find the best answer to such question. This is why Koskenniemi argues that The *Function of Law* is the last book on theory of international law – the theory of the non-theory – because the international law scholar (specially the judge) is forced to abandon the general theory of law or other great theories to focus on interpretative practice. Such practices, however, are not liberal or enlightening per se, since they make the scholar "hostage and limited to the conventions and ambitions" of his profession. [35] They may mask the political decisions of the choice makers, but they do not eliminate such characteristic.

## 3. RECOGNITION OF STATES

In 1947, *Recognition in International Law* [henceforth Recognition] was published. It seems that such book was written before the beginning of World War II, upon a direct invitation by Arnold McNair.[36]

Once again, Lauterpacht deliberately explored the relationship

32 See, for instance, the lucid criticism by Alvarez to the functioning of international criminal courts ad hoc: ALVAREZ, José A. Rush to Closure: Lessons of the Tadic Judgment. Michigan Law Review. Ann Arbor. Vol. 96, No. 7, 1998, p. 2031-2112. On the Interamerican Court of Human Rights and its solutions prejudicing domestic juridical acommodations, ver VEÇOSO, Fábia Fernandes Carvalho. Entre absolutismo de direitos humanos e história conceitual: Aspectos da experiência da Corte Interamericana de Direitos Humanos [Tese de Doutorado]. Universidade de São Paulo: Circulação Interna, 2012.

33 See VENZKE, Ingo. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford: Oxford University Press, 2012.

34 See, specially, MCLACHLAN, Campbell. The principle of systemic integration and Article 31 (3) (c) of the Vienna Convention. International and Comparative Law Quarterly. London. Vol. 54, No. 2, 2005, p. 279-320.

35 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960). In: BEATSON, Jack and ZIMMERMANN, Reinhard (ed.). Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain. New York: Oxford University Press, 2004, p. 623

36 LAUTERPACHT, Elihu. The Life, p. 84-85.

between law and politics. The book's project is clear and repeats the tone of *Function of Law*: what he intended was to make recognition – especially of states, governments and belligerent parts – a juridical act. Yet in the preface, Lauterpacht recognizes that there is probably no other theme in international relations in which law and politics intersect the most. Such finding would lead many to defend that it was not properly a theme of international law. There would be no recognition as a result of juridical duty, but rather of national interest. [37]

As in *The Function of Law*, Lauterpacht will not simply deny that the theme has deep political contours, as other kinds of controversy do in international law. What he seeks is to co-opt politics to the field of law as he affirms that the act of recognition is a juridical duty with political consequences, taking place as certain conditions are fulfilled. This is when he disconnects himself from both more widespread theses on the theme – declaratory and constitutive – which traditionally deny that recognition involves any juridical duty. The separation between politics and law would be a source of positivist influence on international law. Positivism, according to Lauterpacht, "elevates the arbitrary will of states not only to the authority of a source of particular rights of states, even if fundamental, but also of its own appearance and existence". For him, it would be logical, for instance, that champions of the declaratory thesis defended that there is a juridical duty of recognition, but they would not advance on such direction specially due to some "positivist orthodoxy" that did not see the influence of law in the act of recognition, but only in its consequences. [38]

For our author, the disconnection between law and politics in such a theme had a strong resemblance with the way that war was treated in international law for centuries: a prerogative of the will of the state, therefore outside the realm of law. Therefore, just like the proscription of war as a means of solution of controversies had been established by many international documents – such as the then recent United States Charter – the same should pass with recognition. It seems clear that there is a deliberate strategy of associating the cry for pacifism typical of periods immediately posterior to great wars to sensitize scholars and even the global public opinion on matters such as recognition. Ultimately, Lauterpacht identifies that the pacific organization of the international community relies on a new perspective on how states practice the act of recognition. [39]

It is important to remember that the declaratory thesis traditionally maintains that recognition is only the declaration of an already real situation, in which facts prevail over the will and consent of other states, which would merely have the function of declaring a given situation. For the constitutive thesis, it is the act of recognition by

37 LAUTERPACHT, Hersch. Recognition in International Law. Cambridge: Cambridge University Press, 1948, p. v.

38 Idem, p. 1-3, 77.

39 Ibidem, p. 3-4.

other states that creates a new state – and therefore its personality – and not the process through which it became independent. Diversely from the declaratory thesis, the will and consent of other states would be essential. [40]

Lauterpacht saw a variety of problems on the admission on each of the traditional theses. On one hand, the declaratory thesis made the simple existence of facts a condition for the creation of a state, while one knows that it is not a mere creation of nature. On the other hand, it would be exaggerated to subscribe to the constitutive thesis, as it eliminates the importance of facts in the name of a pure act of will with no necessary connection with reality.

For this reason, our author argues that the act of recognition has both a declaratory and a constitutive dimension. It is not, however, a mere admission of a third way, since the separation between law and politics is criticized in both prior theories. For him, "recognizing a political community as a state means to declare that it fulfills the conditions of stateness as required by international law. If such conditions are present, the states have the duty to grant recognition. In the absence of a competent international organization to certify and imperatively declare the presence of the criteria of full international personality, the already established states fulfill such function in their capacities of organs of international law". Recognition declares facts, and such declaration, made in the fulfillment of a juridical duty, is constitutive of both rights and duties. "Such rights and duties, before recognition, only exist to the extent that they have been either explicitly granted or legitimately established, referring to imperious rules of humanity and justice, both by existing members of the international society and the people that requires recognition." [41]

Along his work, Lauterpacht seeks to persuade the reader that his vision on recognition can already be found in the practice of states, although it could not easily be identified. [42] Most of the examples presented, however, are circumscribed to the United States and the United Kingdom, only representing a small fraction of actual practice, not necessarily allowing for a safe way for further development on the subject. On the other hand, as he defends, some principles already established on international law, such as the prohibition of precocious recognition, would exemplify that recognition must be seen as a juridical duty of the state not only towards another collectivity, but also to the international community itself as a whole[43]. According to him, there is

40 Ver, v.g., SHAW, Malcolm. International Law. 5th ed. Cambridge: Cambridge University Press, 2003, p. 368-369.

41 LAUTERPACHT, Hersch. Recognition, p. 6.

42 Idem, p. 3.

43 Ibidem, p. 74.

a connection between the duty towards the state that suffered secession and the obligation towards the collectivity requiring recognition.[44]

Lauterpacht's thesis on the both declaratory and constitutive character of the act of recognition, however, is a kind of palliative towards what he considered to be imperfections of the international juridical system. Here, teleology has again a strong role, connecting itself to the project of constitution of a *civitas maxima* that appears since from *Private Law Analogies*, being further articulated in *The Function of Law*. Lauterpacht is clearly a champion of what he calls the "collectivization of the recognition procedure". His declaratory-constitutive thesis is one to be provisionally defended until a "high level of political integration of the international community in the form of an international organization of states" is achieved. He further adds: "the recognition of states, although consisting of the application of a juridical principle and the certification of the existence of conditions of stateness disposed by the international law could – and, due to its political implications, should – be laid in the sphere of competence of the superior executive authority and, to some extent, of judicial organs of the international organization. Such collectivization procedure would only be possible if the international organization were both universal and compulsory." [45]

Regarding recognition, Lauterpacht granted a subsidiary place for the international judiciary. Differently from what *The Function of Law* may suggest on the chapter on resolution of disputes, he did not intend, on this field, that judges should "rule the world".[46] The role of courts, in the decision on recognition, could be prejudicial to the international system due to its high political connotation, such as in cases, for instance, in which the act of recognition involves territorial loss for a state. He even visualizes that a court should be called to testify on the theme as advisory opinion . A centralized executive authority, however, should be more appropriate for the decision on recognition of a new state. [47] One can once more see that Lauterpacht did not defend some kind of disappearance of politics on recognition, but rather a preponderance of law on it.

The book still regards some other kinds of recognition, such as that of governments and the state of belligerence. Similarly, his declaratory-constitutive thesis, in which there is a duty of recognition, is seen as more adequate for a decentralized system that does not yet count with a structure of collectivization of recognition. [48] As for the

44 Ibidem, p. 11-12.
45 Ibidem, p. 67-68, 78.
46 KOSKENNIEMI, Martti. The Function of Law, p. 366.
47 LAUTERPACHT, Hersch. Recognition, p. 69-70.
48 Idem, p. 165-170, 253-255.

recognition of insurgents, one cannot see the same duty due to the inexistence of a state of insurgence, but rather mere rights and duties conceded by states on an individual and specific basis.[49]

*Recognition* clearly makes an effort to find space for law in a field on deep interference of political factors. Lauterpacht did not delude himself as for the difficulty of such a duty. The book frames itself, as aforementioned, to the presuppositions of the construction of more centralized structures on international laws. Centralization, therefore, would be the antidote against politics – or at least against the excesses of politics.

Apparently, the greatest of Lauterpacht's merits was not to have identified an alternative way to conceive recognition on international relations. Despite his insistence to fund the thesis on the practice of (some) states, it did not fundament itself properly on the way that states face the recognition of collectivities that intend to affirm themselves as their peers. It is well true that, across the years, some other authors have based their theses on the necessity of collectivization of the process of recognition, thereby associating, for instance, the procedure of new members on the United Nations to some kind of analysis of such a theme.[50] Recent cases involving the independence of more diverse peoples (such as Kosovo, for instance), [51] however, show how tortuous it is to identify a uniform practice on the field, and even more a duty of recognition.

His greatest merit seems to have been to show how law and politics are interlinked on such matter, to the point of producing unsatisfactory solutions to ordain the theme at a minimum. Modern commentary well perceives such lesson when affirming that "there was almost no change on the reality of international law as compared to the one described by Hersch Lauterpacht 64 years ago – 'recognition of states is not a matter governed by law, but rather a matter of politics'", [52] or that there is a "distorted relationship between law and politics on

49 Ibidem, p. 270-271.

50 For a skeptical summary of such propositions, see WORSTER, William Thomas. Law, Politics, and the Conception of the State in State Recognition Theory. Boston University International Law Journal. Boston. Vol. 27. No. 1, 2009, p. 163-168.

51 Ver INTERNATIONAL COURT OF JUSTICE. Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion). Disponível em *www.icj-cij.org/docket/files/141/15987.pdf*. Importante mencionar que a opinião separada do Juiz Cançado Trindade nesse caso cita expressamente o livro de Lauterpacht, mas não para encampar sua tese declaratória/constitutiva de um dever de reconhecimento. Ver Separate Opinion of Judge Cançado Trindade, para 132. Disponível em http://www.icj-cij.org/docket/files/141/16003.pdf.

52 QUERIMI, Querim. What the Kosovo Advisory Opinion Means for the Rest of the World. Proceedings of the American Society of International Law. Washington. Vol. 105, 2011, p. 273

the procedure of recognition of states and the way that this is reflected on recent practice". [53]

More recently, the way that Lauterpacht analyzed the practice of states seeking the formation of a customary rule on the duty of recognition has deserved some attention due to its fundament on eminently teleologically perspective. Although many do criticize the partial form through which Lauterpacht saw such practice (mostly English and North American), authors such as Patrick Capps understand that this was coherent with the way that Lauterpacht saw the role of international law itself. Therefore, he analyzed the practice of states intending to realize certain objectives: a substantive orientation (protection of human rights) and a functional one (pacific resolution of controversy and coordination of international relations). [54] Although such recent reading of Lauterpacht must still be confirmed in comparison with his more general work, it opens possibilities both to understand our author in a different way and to shed light on new methods to comprehend the practical element on the formation of international customs.

## 4. HUMAN RIGHTS

*International Law and Human Rights*, from 1950, is the synthesis of Lauterpacht's thoughts on the role of the individual in international law. Ever since *The Function of Law*, a certain concern with such issue can be identified. [55] After all, one of the possible consequences for his severe criticism of sovereignty would be to emphasize the position of those who are traditionally obscured by the state: human beings. This is the path drawn by several authors, contemporaries to Lauterpacht, who suggested a revision of the whole chapter of subjects of international law, such as Hans Kelsen, his former professor in Vienna Georges Scelle, or James Brierly.[56]

The book is actually the extended version of a work published in the suggestive year of 1945: *An International Bill of the Rights of the Man*. This first version was commissioned by the American Jewish Committee. Lauterpacht, during his youth, especially in his years as a student at the University of Vienna, stood out as an important Zionist

53 RYNGAERT, Cedric and SOBRIE, Sven. Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia. Leiden Journal of International Law. Leiden. Vol. 24. No. 2, 2011, p. 490

54 CAPPS, Patrick. Lauterpacht's Method, p. 19-20

55 Elihu Lauterpacht recognizes such worry as dating back to the early years of his father in Vienna. LAUTERPACHT, Elihu. The Life, p. 251.

56 The interwar interest on individuals by this authors is well understood by NIJMAN, Janne Elisabeth. The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law. The Hague: T. M. C. Asser Press, 2004, p. 85-244.

leader, even though he was never a rather religious man.

The first part of the book deals with persistent legal, political and philosophical issues that used to stop international law from directly dealing with relations between private individuals, guaranteeing their rights and punishing them for certain types of offenses.

Lauterpacht identified in state practice over a long period several levels of treatment of the subject of the individual as a subject of rights. According to himself, however, the UN Charter was the first consecration of the individual as having fundamental human rights and freedom. [57] On the other hand, the creation of the Nuremberg Tribunal and the recognition of crimes against humanity proved the passive personality of the individual to be imputed in violations of international law. In fact, he saw a strong correlation between both developments, since "to prescribe that crimes against humanity are punishable means therefore to establish the existence of human rights based on a right superior to the law of the state."[58]

Recognition of the subjectivity of the individual was linked, among other aspects, to the integration of international society in the form of a supranational world federation, which he considered to be "a development that should be considered as the ultimate rational postulate of the political organization of man". The realization of such a purpose should happen gradually, through the adoption of the principles of a federal government. Thus, if individuals are directly subordinated to federal law, they should also be subordinate to international law, which roams towards a certain federal organization.[59]

The mere recognition of the personality of individuals was not sufficient for the development of international law. Lauterpacht saw no obstacle in international law of its time to recognize the procedural capacity of individuals to sue against states in the sphere of treaties to which they had subscribed[60].

A set of rights should be recognized for individuals by international law due to a change of character and function of the latter. While traditional international law had a formal character, in which it was primarily concerned with delimiting the competence of states, the surge on interdependence began to require more substantive rules.[61] At this point, it is possible to affirm that Lauterpacht perceived the necessity of a type of domestic analogy other than that of private law: the analogy of public law. The constant references to the desire for

57 LAUTERPACHT, Hersch. International Law and Human Rights, London: Stevens, 1950, p. 33.

58 Idem, p. 36.

59 Ibidem, p. 46.

60 Ibidem, p. 51-56.

61 Ibidem, p. 62-63.

the construction of a federal world state make this clear. If private law plays a formal role of regulating the autonomy of the individual will, public law aims, among other things, to guarantee rights to citizens. Consequently, sovereignty needed to be relativized, and our author, who had little sympathy for it, saw a great opportunity in the consecration of human rights, since the "fundamental rights of human beings are rights superior to the law of the sovereign state. [62]"

Naturalistic tendencies – a much explored theme in the work of Lauterpacht - appear in *International Law and Human Rights*. While recognizing that natural rights were not sufficient for the guarantee of rights, they are "the foundation of its ultimate validity and [...] a standard for its approximation of justice."[63]Also, he tries to identify in natural law the basis of rights and freedoms in history. In the exercise of what may today be considered a historical anachronism - to see in the past typical characteristics of the present - Lauterpacht traces a path from Greek civilization, going through the Roman and Stoic, into the Middle Ages and the Protestant Reformation until the advent of modern constitutions to prove his thesis of the relationship between natural law and domestic positive law[64].

Besides the aforementioned relationship, international law has, in Lauterpacht's view, a close relationship with natural law ever since its origins. Furthermore, the latter has acted through the ages as "the main vehicle of the development of international law". If natural law owes "much of its appeal, its reason for being and its very origin to its connection with the affirmation of the rights of man", our author logically concludes that "international law is therefore bound to the notion of inherent human rights".[65]

Lauterpacht dedicates the second of his book to explaining the configuration of human rights within the framework of the United Nations in the 1950s. Many of its positions are dated because of the great modification and expansion through which the global system of human rights protection passed in such organization. Anyway, its foundations demonstrate essential aspects of the author's perspective on the role and functions of international law. It is the case of his uncompromising defense to see in the Charter clearly juridical obligations addressed to states on the protection of human beings or, still related to this same theme, the inapplicability of the reserved clause of the states in the obligations concerning human rights.[66] He saw potentialities in the protection organs then created, such as the Commission on Human

62 Ibidem, p. 70.
63 Ibidem, p. 74.
64 Ibidem, p. 73-113.
65 Ibidem, p. 115.
66 Ibidem, p. 213-220.

Rights, which should have broader powers than, for example, the mere drafting of texts of declarations and treaties. Measures should be taken to ensure in these bodies some form of enforceability of the right of individual petition which, although not expressed in the Charter, should be inherent to a human rights system.[67]

The third part deals with issues relating to an international bill of rights man. Lauterpacht recalls that, during the drafting of the Charter of the United Nations itself, a mandatory instrument, including rights in the international sphere, has been proposed, although it has not been put in practice. Such failure to enforce the document, however, did not make it less important and urgent, but rather revealed that it should be in the hands of individuals for the establishment of an effective right of petition to an international commission or council, without which the problems of effecting an international charter of rights would remain insoluble. This, however, did not abstract from Lauterpacht the desire for a judicial system to be developed in the future for the application of the bill of rights.[68]

It is in this very part of the book that the author presents his proposal for an international charter of human rights. Especially comprehending individual rights - and some social and economic ones - the project stressed the institutional apparatus as a means of guaranteeing consecrated rights. A non-judicial body with powers of investigation and recommendation that should act previously to the judicial analysis of the case was visualized. The International Court of Justice or an International Court of Human Rights to be created, at the convenience of states, would serve as the final decision-making body in the case.[69]

Perhaps the most well-known aspect of the book is the harsh criticisms made against the Universal Declaration of Human Rights. The choice of the "declaration" form to argue about rights at the international level did not serve Lauterpacht even as a palliative because of the lack of a mandatory instrument on the subject. For him, the Declaration could not be seen as an interpretation of the Charter of the United Nations, since it was not obligatory, unlike the Charter itself, nor could it be seen as a formulation of general principles of law, because it had not been drafted for that purpose. Similarly, he argued that it was unnecessary to see it as recognition pf part of the state's "public policy", and thus be enforceable by domestic courts, since some states had already denied this possibility. Likewise, Lauterpacht did not consider the argument of seeing directly in the declaration, as a recommendation of the General Assembly, obligatory character - which, in his perspective, did not exist.

67 Ibidem, p. 221-223, 229-234, 244-251.

68 Ibidem, p. 286-292.

69 Ibidem, p. 313-321.

Last but not least, the Declaration could not be regarded as binding on the organs of the United Nations because they could not treat as binding an instrument which does not have such a characteristic. In short, our author suggests that the Declaration would simply be "outside international law", and not even morally would the instrument hold any authority since, for example, it did not limit the freedom of states and had unclear and unauthoritative redaction. Lauterpacht preferred to see in the UN Charter itself a minimum framework for the protection of rights, to be supplemented when a binding instrument, such as the international charter of rights, came into force.[70]

In the final chapter, Lauterpacht discusses proposals for the creation of the European Commission and the European Court of Human Rights. He looked at them rather sympathetically, not knowing that they would come to fruition, and, after a few years, consecrate a high degree of judicialization of human rights on the continent, in such a course that would probably please him.[71]

The last pages of the book are dedicated to linking the matter of human rights to the preservation of world peace and the necessity of appearance of an international federation of states to warrant such objective. Such a development would not lead to the elimination of state sovereignty, but rather to a reconfiguration of its content, since the recognition and protection of rights implies a reduction of sovereignty. Investigating federative theory, he saw no imperative to eliminate sovereignty, despite the historical experience of federalism. Against this background, more localized initiatives for the development of a human rights system, such as the European one, were welcomed because they both provided a regional link in the evolution towards a global federation and represented a gradual acceptance of institutions essential to a federal system. [72] This is why Lauterpacht concluded: "inasmuch as regional experience is a stage of the evolution towards the more complete integration of international society, the recognition and protection of human rights themselves can become a significant factor contributing to the consummation of the organized *civitas maxima*, with the individual human being at the very center of the constitution of the world". [73]

It is truly impressive for today's eyes to perceive the similarities between the arguments set on *International Law and Human Rights* and

70 Ibidem, p. 408-428.

71 Ibidem, p. 435-456.

72 Ibidem, p. 456-463.

73 Ibidem, p. 463. It is important to note that the idea of a world state seemed to come from a truly genuine belief by Lauterpacht, as demonstrated by some correspondency exchanged with his wife, Rachel Lauterpacht, reproduced in LAUTERPACHT, Elihu. The Life, p. 236-237.

the widespread general vocabulary of human rights specialists. They are all present: criticism against the sovereign will of states, the need for institutions that objectively guarantee, protect and make human rights effectives, distrust of the state, and a belief in multilateralism and the capacity of international tribunals. [74] Koskenniemi is fully correct when he claims that, if the book is not the starting point of scholarly concern with human rights, it is the first exhaustive treatment of the subject by an international law scholar, as well as being responsible for creating a sub-discipline in the field.[75]

The book is also responsible for establishing an intrinsic link between human rights protection and international criminal law.[76] Identifying a correlation between active and passive individual subjectivity and its linkage with the development of the international legal system, Lauterpacht placed on the same side interests that can often be countered, such as individual criminal prosecution and the guarantee of rights. [77] The impact of positions such as this one can be felt today when, for example, the Rome Statute, when setting the law applicable in its judgments, requires compatibility "with internationally recognized human rights".[78]

By associating human rights to a substantive agenda that must be defended by international law scholars, as opposed to a purely formal agenda – a position that would characterize more traditional international law – Lauterpacht's ideas influenced a discourse that became majoritarian in international law, assessing values rather than what he claimed to be some kind of obsession with form. The promotion of such values involves "the virtual elimination of reciprocity, the contraction of domestic jurisdiction and the operation of law not between theoretically equal sovereign entities, but rather between

74 For a history of the international human rights movement and its priorities, see NEIER, Aryeh. The International Human Rights Movement: A History. New Jersey: Princeton University Press, 2012.

75 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 643-644. Brian Simpson additionally affirms that Lauterpacht's contribution was important to the establishment of the practical possibility of protection of individual human rights itself. SIMPSON, A. W. Brian. Hersch Lauterpacht and the Genesis of the Age of Human Rights. Law Quarterly Review. London. Vol. 120. No. 1, 2004, p. 79.

76 On Lauterpacht's contribution to international criminal law, see KOSKENNIEMI, Martti. Hersch Lauterpacht and the Development of International Criminal Law. Journal of International Criminal Justice. Oxford. Vol. 2. No. 3, 2004, p. 810-825.

77 The relationship between international criminal prosecution and the international protection of human rights in Lauterpacht's work is well perceived in VRDOLJAK, Ana Filipa. Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law. European Journal of International Law. Firenze. Vol. 20. No. 4, 2009, p. 1163-1194.

78 Art. 21 (3) do Estatuto de Roma. Decreto n. 4.388/2002, DOU de 26.09.2002.

duty-bound governments and individuals benefiting from rights".[79] It is still commonplace, therefore, to hear statements such as that human rights have made international law shift its focus to individuals rather than states, [80] or that human rights promoted a "Copernican twist" in international law. [81]

Such distrust towards the state and sovereign power, however, meets its limits when confronted against the assumption that the decentralization of international law is directly linked to its lack of effectiveness. Lauterpacht himself recognized that the primary agent for applying the international charter of rights ought to be the state and its organs.[82] The state, with this double face of Janus, protector and violator of rights, makes the construction of the *civitas maxima* possible at the same time that it makes it extremely difficult, given that it pushes it towards a very uncertain future - if thesState is also a protector of rights, one cannot eliminate it immediately.

It is at this very point that Lauterpacht's teleology becomes one with the present, as it opens little space for the reimagining of human rights outside protective-violating state schizophrenia. Koskenniemi lays the question in similar terms, seeing a tension in the book, which "both appeals to the primacy of individual rights over potentially hostile public power and becomes a cry for a specific institutional arrangement (public power!) in order to support individual rights".[83]

If there is little room for reimagination, the role of the international law scholar will become increasingly irrelevant in the eyes of those who seek a peaceful alternative international organization. It will be outside international law that proposals for solutions will emerge more easily.

A case can also be made that criticism made against the Universal Declaration of Human Rights has underestimated the political potential of the instrument to produce very perceptible legal effects. Lauterpacht's position seems to have produced in jurists a vision of the declaration as a document that bordered uselessness (both juridically and politically). After a few years of its adoption, however, and by the direct influence of important political personalities, the instrument began to be gradually

79 MERON, Theodor. International Law in the Age of Human Rights. Recueil des Cours de l'Académie de Droit International de la Haye. La Haye. Tome. 301, 2003, p. 21.

80 Idem, p. 22.

81 See RENSMANN, Thilo. Munich Alumni and the Evolution of International Human Rights Law. European Journal of International Law. Firenze. Vol. 22. No. 4, 2011, p. 973-991.

82 LAUTERPACHT, Hersch. International Law and Human Rights, p. 287.

83 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 644. Such tense relationship between human rights and the (sovereign) state is present not only in doctrine, but also in the general human rights movement. For a series of worries coming from such tensions, see KENNEDY, David. The International Human Rights Movement: Part of the Problem? Harvard Human Rights Journal. Cambridge. Vol. 15, 2002, p. 101-125.

seen as establishing customary obligations to states. [84] Today, the statement, however flawed it may be seen, is constantly invoked as a legal norm and parameter for the creation of many others. If this is not enough, at least it shows that the creation and application of international law goes through many tortuous paths, which may escape teleological imagination.

## 5. THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT

On 1958, about two years before his death, Lauterpacht published what would be his last book, *The Development of International Law by the International Court* [henceforth *The Development*]. By the end of 1954, he had been elected to a judge's seat in the International Court of Justice. Nothing could more appropriate for someone who considered the courts a key element in overcoming the various shortcomings of the international legal system. Lauterpacht could now put into practice his postulates on international justice that he had long been defended, or at least feel the real difficulties to operate changes inherent to exerting such a function.

Indeed, the book is the reprint of a series of lectures which the author had given at the Graduate Institute of International and Development Studies in Geneva in 1933, which had been published under the title *The Development of International by the Permanent Court of International Justice*. The new – rather extended – version had a small difference, which Lauterpacht himself recognized in addition to the number of pages: it was now written by a judge of the International Court of Justice, who, exerting his functions, was restrained from commenting on cases judged by such institution. In my view, this has significantly compromised the critical character of the work, and it is not uncommon to find, in several of its parts, an apologetic tone for the International Court of Justice's exercise of jurisdiction (whether contentious or advisory). There is no reason, however, to reject the whole book. It is an astonishingly analytical and sophisticated analysis of virtually all cases judged by the Permanent Court of International Justice and the International Court of Justice from different angles.

The work's aim is to present a series of problems that affect international judicial function. Ever since the publication of the first version of the book, more than twenty years had gone by and examples

84 Such track is more noted in more detail, including reference to the important influence of Lauterpacht on his time's international law scholars, by VON BERNSTORFF, Jochen. The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law. European Journal of International Law. Firenze. Vol. 19. Nº 5, 2008, p. 903-924.

have multiplied, even if recognized that the International Court - a term encompassing both the Permanent Court of International Justice and the International Court of Justice – administers a set of rules much less clear than that found in domestic law.[85]

As in *The Function of Law*, Lauterpacht believes that the Court is an important agent in the development of international law. By associating this development with the maintenance of international peaceful relations, however, he admits that the Court has not been a significant instrument for the maintenance of peace – assuming a more pessimistic[86] tone and a probable response to Kelsen, who, in the 1940s, proposed a model of peace through the right to recognition of the compulsory jurisdiction of an international court.[87] The old enemies here return to justify this lack of effectiveness: the low degree of centralization of the international legal system, if compared to that of the state, and national interests, several times overlaid with the mask of sovereign power. Even in this context, Lauterpacht believes that the Court has played an important role in the development and clarification of the norms of international law. [88]

In *The Development*, Lauterpacht could already find a Court which was structured around precedents that it had itself created, which made it flirt, among other elements, with the certainty and stability necessary for proper administration of justice. Also, where there are no codes or a generally recognized system of law, as in common law countries, courts play an important role in identifying (and, in some cases, creating) law. Our author could already identify this. [89]

Lauterpacht certainly welcomed the tendency of the International Court in, whilst dealing with a given topic, to do so in an exhaustive manner, touching on the various preliminary and merit matters of the case. [90] This was the most complete proof that, from the method's point of view, there are no gaps in international law. Exhaustion of any case means that the international court has the apparatus necessary to answer a variety questions, whether through the use of treaties and customs or of general principles of law. It also means that, in dealing with an issue with exhaustion, the Court is fulfilling its role of developing international law. [91]

85 LAUTERPACHT, Hersch. The Development of International Law by the International Court. Cambridge: Cambridge Universtiy Press, 2011, xiii.

86 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 654.

87 KELSEN, Hans. Peace through Law. Chapel Hill: University of North Carolina Press, 1944.

88 LAUTERPACHT, Hersch. The Development, p. 3-5.

89 Idem, p. 14.

90 Ibidem, p. 37-43.

91 SCOBBIE, Iain G. M. The Theorist as Judge: Hersch Lauterpacht's Concept of the

It was also sympathetically that Lauterpacht defended the position of the International Court of contention and retention in involving itself in academic disputes and redundancies in controversial subjects,[92] something that is perceived until the present day. After all, for him, the technique used by the Court has repercussions on the very development of international law and its aims. [93] It is from this very teleological framework that Lauterpacht strives to justify several decisions that use extreme caution when interpreting international law, but he also sees an opposite effect of judicial stewardship, proper to the international legal system: the need to modify rigid, unjust and obsolete rules in the absence of international legislature. This caused, on one hand, judicial caution, and, on the other, "the desire to create the appearance of caution".[94] Such caution, therefore, is "bound up with the present, temporary and intrinsically unsatisfactory character of international society".[95]

Hesitation may arise from caution, and Lauterpacht, with extreme parsimony, identified subjects in which the International Court demonstrated such tendency, as in the cases on usage of preparatory works in the interpretation of treaties. He urged a more precise position on the subject with... the necessary caution proper to an international judge occupying this very function![96]

Additionally to contention, restraint and hesitation, the Court has yet appeared indecisive, says Lauterpacht, especially recalling the case of diplomatic asylum. Here, however, he stresses that it was only an appearance of indecision. An old enemy returns as justification for the Court's criticized position in the case: the imprecision of international norms on the subject, which certainly stems from an imperfect legal system. [97]

A subject that already appeared prominently in *The Function of Law* returns strongly in *The Development*, which is that of judicial legislation. The diagnosis is quite similar. Cases regarding judicial creation of law arise from the desire to improve an imperfect system, massively pressed by the sovereignty of states and the consequent restriction of the international judicial function. Although he did not consider it a panacea for the evils of the international system, Lauterpacht saw judicial legislation as "healthy" and "inevitable". The International

International Judicial Function. European Journal of International Law. Firenze. Vol. 2. No. 2, 1997, p. 278.

92 LAUTERPACHT, Hersch. The Development, p. 61.

93 Idem, p. 70.

94 Ibidem, p. 77.

95 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 655-656.

96 LAUTERPACHT, Hersch. The Development, p. 140-141.

97 Idem, p. 152.

Court had, in different ways, already engaged in this exercise - such as when it applied generalized principles of law or, by not identifying rules governing a situation, it established principles to govern a matter. It is also sympathetically that the author explains the occurrence of such examples, although he minimizes their impact, as he understands that the Court has never completely disregarded the principles and restrictions that govern it by virtue of the sovereign states that created it.[98]

The book also deals with several other aspects of exert of the international judicial function, such as the principle of effectiveness as an element that guides the Court's action in various fields, such as the interpretation of the treaty or the clauses of submission of controversies to its own judgment.[99]

The fifth and final part of the work is completely linked to the way that the International Court views the principle of state sovereignty. The author offers a number of examples in which the Court was more or less close to securing sovereign interests of states. For him, this showed once again the constant tension between the trend of centralization of the international system and its maintenance around the sovereign national interests of the same states that make up that system. Thus, he summarized, although the consequences of state sovereignty "express their weakness [of international law] as a legal system, they are nevertheless part of it".[100]

More than twenty years after the publication of The Function of Law and the series of lectures that had composed the first version of The Development, international law had changed profoundly - as did Lauterpacht's own individual position.

Even though he recognized difficulties in exerting judicial function, Lauterpacht managed to peacefully identify a body of rules and principles that structured the actuation of the International Court. Although this did not represent the realization of a state in a global scale, it meant that international law was already endowed with a significant level of sophistication. The dense book is an attempt at proving that it is possible to trace back a series of themes and issues relative to judicial function in both domestic and international law. It is only due to the international law scholar, with an open spirit and endowed with a good systematization rigueur, to identify such themes and issues.

As in all books written by Lauterpacht, the specter of *civitas maxima* is quite present. It is the result that is intended to overcome the deleterious effects to the dogma of sovereignty – which, by the way, puts constant pressure on the work of the International Court, which is

98 Ibidem, p. 200-225.
99 Ibidem, p. 227-293.
100 Ibidem, p. 334.

not simply allowed to despise him. Here, however, Lauterpacht seems to be more aware than ever that it is not enough to aspire to *civitas maxima* or to prove that it is rationally the best option for the peaceful organization of the world; one must prove that the doctrine and practice of international law are prepared for it, something evidenced by a sophisticated scholarly systematization of jurisprudence made in *The Development* and the cases tried by the International Court, some of them by the author himself as a judge.

Here there is no clear distinction between Lauterpacht the scholar and Lauterpacht the judge. Such figures are confounded because they ought to be. The scholar and the judge must both communicate in the same *telos*: the development of international law through the creation of centralized structures – among which the courts – towards a world state. This seems to be one of the problems of the work, which left a relevant legacy for successive generations of internationalists: that the scholar should join power rather than opposing it. Certainly Lauterpacht would not see power clearly in the hands of judges, but rather in the sovereignist policies that restrict the courts' performance. Time, however, has made it clear that there is, as there has always been, a lot of power around an international judge. For instance, the current debate on trans-judicialism in the field of human rights, by extolling the role of dialogue between different courts, distorts the central focus of the issue, such as "understanding the sociology of violations".[101] Judges, seeing themselves in a global community of courts, can certainly dismiss the concrete effects of their decisions on an ever-increasing number of groups. Additionally, the environment in which the international judge is involved today is extremely complex, and often way too close to power.[102]

The role of the international law scholar is also, though not only, to stand against power, and his conception of the development of international law does not need to be in tune with that of the judge. In this sense, it is important to realize that contemporary international law has reached a moment in which the paradigm of compulsory international courts is replacing the paradigm of consensuality – which has marked the International Court of Justice from Lauterpacht until today. Acceptance of treaties is increasingly meaning automatic acceptance of the jurisdiction of courts. This change, which would be certainly welcomed by Lauterpacht, did not necessarily bring about a

101 TOUFAYAN, Mark. Identity, Effectiveness and Newness in Transjudicialism's Coming of Age. Michigan Journal of International Law. Ann Arbor. Vol. 31. No. 2, 2010, p. 382.

102 There is some timid but interesting more sociological literature regarding the international judge. See TERRIS, Daniel; ROMANO, Cesare; SWIGART, Leigh. The International Judge: An Introduction to the Men and Women who Decide the World's Cases. Oxford: Oxford University Press, 2007.

greater order or centralization of the international legal system. On the contrary, it has made it more complex, with a number of new problems to be faced. It is, in other words, a development of international law that many may dislike.

Nevertheless, *The Development* consecrates the coherence of presuppositions and an important step on Lauterpacht's so clearly exposed convictions ever since at least *Private Law Analogies*.

## CONCLUSION

The essay above has sought to trace, in a narrow way, the themes presented and the assumptions on which the five Hersch Lauterpacht books are based (apart from two that have undergone modifications and updates).

It is a substantive and sophisticated work, which had a decisive impact on the doctrine and practice of 20th-century international law, with still strong traits being carried on. Lauterpacht's political project, however, is not difficult to identify, despite his intervention in virtually all important public international law issues of his time. The perception that international law was an instrument incapable of promoting the peace and well-being of individuals led him to mirror the structure of domestic law: it is no mere coincidence that his first book deals precisely with defending the use of sources and analogies of private (domestic) law in international law. The construction of a *civitas maxima* essentially went through the realization that domestic law and international law make up the same legal system equally subject to the rule of law. While such *civitas maxima*, as subsequently conceived by him from a federation of states, would not take place, much had to be done: to spread the understanding that any international controversy could be covered by international law; to remove political arbitrariness from the process of recognition of states, transforming it into a legal duty; to strengthen the human rights dimension as a direct link between the individuals who make up the state and the international community; and to prove that the international judiciary is endowed with a high degree of sophistication in its structure and that its contribution to the development of international law depends on the constant elimination of the dogma of sovereignty and its correlates.

Even in light of his strong subscription to an Enlightenment reason that modernity itself has shown to be based on endless contradictions and a significant tendency to regard the world as a reflection of typically European ideas and institutions, it is difficult not to feel sympathy for the work and the person of Hersch Lauterpacht. There is a sense of nonconformity and a desire for change worthy of admiration on him, especially if one has in mind the deprivations that he underwent as a

politically active Jew and a subject of the Austro-Hungarian Empire expatriated in the United Kingdom. Of all the legacies, this seems to be the greatest that Lauterpacht has left: that international law must serve important purposes, such as peace, justice, human rights, order, and that all must fight for them. Even if some of the ways he found to carry out such purposes may now seem dated, inconvenient, or socially undesirable, it matters more to recall the sense of personal courage which he carried with him when he wore the judge's robe or joined the war effort in the city of Cambridge; when he was away from his son and wife, who were in the United States, for much of the war period; when he ceased to receive news of his family who had stayed in the territory of today Poland, because almost all were dead in concentration camps or in conflicts.

More than fifty years after his death, Lauterpacht teaches us that it is impossible for one to be a boneless international law scholar, refraining from the discomfort that propels one to change and sensibility towards death and suffering; that is true faith – even if secular – that the world can become, at last, a better place.