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APPENDIX

LIMITATION OF THE JUDICIAL FUNCTION IN DISPUTES BETWEEN STATE-MEMBERS OF COMPOSITE STATES

THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY: INTRODUCTION

Martti Koskenniemi[*]

I

In the recent advisory opinion by the International Court of Justice on the lawfulness of the unilateral declaration of independence of Kosovo, several States confronted the Court with the argument that in one way or another this was a 'political question' to which it was impossible or at least inappropriate to give a legal response. This claim has been made in most advisory proceedings at The Hague, and many States finding themselves in the position of respondent in contentious cases have used it to challenge the Court's jurisdiction. The Court answered in 2010 as it had done in all those prior cases. It stated that '[w]hatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law'. The Court continued by stressing that, 'in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have'.[1]

This is a response that Hersch Lauterpacht might have given, and it is likely to have been inspired by his insistence on the point. The claim that the 'political' nature of some issue—the way it touched the 'vital interests and honour' of a State—will automatically exempt it from legal settlement had been frequently heard in late nineteenth and early twentieth-century arbitral practice and *The Function of Law in the International Community* was conceived as an extended refutation of it. In

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[1] ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion of 22 July 2010), 13 (para 27).

particular, Lauterpacht wanted to reject the view that the reservation for 'essential interests' in an arbitration clause or a declaration of compulsory jurisdiction would operate in a self-judging way. Today, this question has arisen anew in the context of investment treaty arbitration. For example, the 2004 model treaty of the United States contains a clause according to which:

> Nothing in the Treaty shall:
> … preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[2]

The operative phrase here is: 'that it considers necessary'. Similar types of expression are now included in many investment treaties, inspiring or prompting to inspire what would be a fully 'Lauterpachtian' debate. Does such a formulation (or equivalent formulations) prevent an arbitral tribunal from examining whether the conditions in the State actually concerned its 'essential security interests' or at least whether the determination by the State that they did was made in good faith? Lauterpacht's response to such questions would have been a resounding 'of course not'.

The problem raises a series of perennial questions regarding the relationship between international law and that which at least prima facie appears outside it: political judgment. These questions have rarely been discussed in more detail or with more sense of urgency than here. This is no surprise. *The Function of Law in the International Community* was written at a time when persistent economic problems in the world had precipitated a constitutional crisis in many European countries as well as endangered international peace. A pressing need to clarify the relationship between law and politics had emerged. Many jurists, especially in the German realm, contributed to this debate, a fact that is visible on practically every page of this book. The work is thus much larger than a mere commentary on a technical aspect of the law concerning the jurisdiction of international tribunals. The author himself regarded it as his most important work. It is understandable why he would think so. The book is a restatement of practically all the important principles of law

[2] Article 18 of the Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004 Model BIT), <http://ita.law.uvic.ca/documents/USmodelbitnov04.pdf>.

in which Lauterpacht's generation of European international lawyers put their faith. It is an interwar book, no doubt, in many senses of that well-worn expression. But many of us still regard those principles as important, even as we no longer feel we can restate them with equal directness or sense of self-evidence. The book can in any case be read from two perspectives: as a masterful analysis of a problem of international jurisdiction, and a statement of a legalistic cosmopolitanism—'Rule of Law'—that continues to exert influence in the debates over the sense and direction of globalization today.

II

What was the world like into which *The Function of Law in the International Community* appeared?

Fifteen million Americans were out of work as President Roosevelt took office in 1933. A World Monetary and Economic Conference met in the summer to debate a programme of currency stabilization and adjustment of inter-governmental debts. Even contemporaries tended to describe this as a 'period of crisis'.[3] They were right. 1933 was the year of Hitler's accession as *Reichskanzler* and Europe's definite turn to the path of darkness. By now Hitler had been joined by Mussolini who insisted that Italy should be treated as a Great Power, especially in terms of its colonial designs in Eastern Africa. Japan's attack on China had led to the establishment of the puppet regime of Manchukuo. Diplomats kept on talking about non-recognition and economic sanctions but with little effect. The Soviet Union turned unexpectedly away from the policy of world revolution. In the following year it would join the League where it would become a staunch opponent of 'revision'.

The League of Nations was in a bad way. The Manchurian situation had demonstrated the fragility of the Covenant's collective security provisions. The Disarmament Conference had been undermined by Hitler's accession and Japan's withdrawal. No country had worked more to support the conference than Britain. Against a general atmosphere of hopelessness, Prime Minister Ramsay MacDonald suggested in the spring a new draft convention with definite levels of materiel and

[3] G.M. Gathorne-Hardy, *A Short History of International Affairs 1920–1939* (4th edn, Oxford University Press, 1950), p 258.

provision for conference in case of threatened violations of the peace.[4]

The League's Codification Conference had ended three years earlier in general disappointment. No significant progress had been made in the conclusion of multilateral treaties in order to solidify the basis of international law. Two years earlier the Permanent Court of International Justice had been faced with the trickiest problem it had so far encountered, namely the legality of the planned Austro-German customs union. Was the union or was it not contrary to the pledge of neutrality Austria had made in the Peace of Saint-Germain of 1919? The case immediately raised the problem that formed the main subject of *The Function of Law in the International Community*—namely the relationship between political developments and legal rules: was the growth of German hegemony in Europe a justiciable matter?[5]

III

In 1933 Hersch Lauterpacht was 36 years old. He had received his doctorate in Vienna in 1922 and had arrived in Britain with his wife Rachel in the following year. He enrolled in the London School of Economics (LSE) where he began to collaborate with Arnold McNair and to prepare his London dissertation, *Private Law Sources and Analogies of International Law*. The work was published in 1927, and in the same year Hersch received an assistant lectureship that was upgraded to full lectureship in 1930. In the following year, he received British citizenship.[6] At that time, he was busily giving lectures and publishing articles on international law matters, including the treatment of the Manchurian situation by the League organs. In Lauterpacht's view, the organs had not strictly speaking violated the Covenant in failing to take affective action. The Covenant did leave them discretion. But they had failed in their *political* obligation to use that discretion so as to give effect to the purposes of the League.[7]

[4] See eg F.S. Northedge, *The League of Nations. Its Life and Times 1919–1946* (Leicester University Press, 1986), pp 130–1.

[5] PCIJ, *Customs Regime between Germany and Austria*, Series A/B, No 41 (1931).

[6] On these biographical facts, see my 'Hersch Lauterpacht 1897–1960' in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford University Press, 2004), pp 604–16. See also now, Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht* (Cambridge University Press, 2010).

[7] Hersch Lauterpacht, 'Japan and the Covenant' (1932) 3 Political Quarterly pp 174–94; Eli Lauterpacht (ed), International Law; Collected Papers, Vol 5 (Cambridge University Press, 2004), 409–423.

No doubt owing to his readiness to speak on politically interesting topics, Lauterpacht's lectures were widely attended by students not working toward a law degree. He also collaborated actively with the professor of international relations at the LSE, C.A.W. Manning. Even if the British legal community did not hold international law in very high value, a persistent strand of interwar political idealism did. In the course of the 1930s, Lauterpacht worked to support the Disarmament Conference and participated in the drafting of the abortive Peace Act, proposed by Labour's Arthur Henderson and Lauterpacht's LSE colleague, Philip Noel-Baker. In a predominantly positivist legal environment, Lauterpacht was a natural lawyer—albeit one whose views were more evident in his critique of sovereignty than in any well-formulated normative theory. Unlike the Professor of International Law at the LSE, H.A. Smith, Lauterpacht was not a predominantly technical international lawyer but returned constantly to the foundational questions. In 1932, for example, he lectured to the LSE's famous Sociological Club on 'Is International Law Different in Nature from Other Law?'—a text that became the basis of chapter XX of *The Function of Law in the International Community*.

IV

The Function of Law in the International Community (hereinafter *The Function of Law*) joins a wide European debate about the relationship between the 'political' and the 'legal' in the international world—a debate that had by that time received particular acuity in problems relating to the application of the League Covenant. After all the Covenant's system of dispute settlement was based on the distinction between two types of disputes—those that were 'suitable for arbitration or judicial settlement' (Covenant 13.1 Article) and those that were not and were therefore to be directed to political organs such as the Council. The question of the 'nature' of particular disputes, and therefore of their justiciability, had been raised in practically every case in the Permanent Court that had not been submitted to it as a result of special agreement. It had been conventionally accepted that arbitration or judicial settlement were unsuitable for dealing with disputes over 'vital interests and honour', and many arbitration treaties contained a specific reservation to that effect. Although Lauterpacht dealt with the topic as it arose in the international realm, he was well aware that it was a general

problem of jurisprudence, in particular the kind of jurisprudence that had been developed in German public law and that had peaked in the legal debates in Weimar Germany about the nature of sovereignty and the role of the republican constitution in times of economic and political crisis.

In a significant sense, much of the way we speak about international law has been received from German public law as it developed from constitutional commentaries about the nature of the Holy Roman Empire in the seventeenth century to the natural law of the eighteenth and the public law formalism of the nineteenth centuries. No legal tradition in this period compares with the German in the depth, complexity, or sense of urgency of its questions. Lauterpacht had been brought up in that tradition. One of his teachers in Vienna had been Hans Kelsen who at the time of the first publication of *The Function of Law* was intensively engaged in a debate about the relationship between law and political sovereignty under the Weimar Constitution—the application of the infamous Article 48 on emergency powers so as to strengthen the position of the Reich, and in particular the *Reichskanzler*, against deviating factions in the realm. The debate concerned the foundations of the legal-constitutional order. For the legalists with Kelsen as their spokesman, law itself regulated the limits of its validity. When and how emergency powers, for example, could be used was a question of legal interpretation properly within the jurisdiction of the Constitutional Court. For Kelsen's opponents—led by the *Kronjurist* of the regime, Carl Schmitt—the foundation of the constitutional order must necessarily lie outside that order itself. In particular, it must lie in a political sovereignty that can guarantee the efficiency of the constitution, if necessary by sending in the police.[8] For Kelsen, in other words, the political decisions needed to uphold the law must be received from the law (constitution). For Schmitt, the constitution is powerless in itself—its force and effect must lie in a prior political *decision* about whether to follow the constitution or to make an exception to it.

The question of the respective relations of law and politics in the international world had also been frequently dealt with in the German academia. For instance, Karl Strupp in Frankfurt had devoted a good quarter of his 1922 *Habilitation* on State responsibility to the question of *Notrecht* and gave his trial lecture

[8] For one brief but useful description of this debate, see David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Clarendon Press, 1997).

on precisely Article 48 of the Weimar Constitution.[9] More significantly, the question of the respective roles of law and politics in international dispute settlement was taken as the object of his 1929 doctoral dissertation by Strupp's most famous student, Hans Morgenthau, the future father of the discipline of international relations in the United States.[10] Morgenthau had argued that there were two kinds of international conflict: 'disputes' that focused on well-defined single issues that could be made the object of legal settlement, and what he chose to call 'tensions' that implicated a wider—political—antagonism and that could not usefully be submitted to legal mechanisms. There was no general rule by which the two could be identified. The 'political' nature of a problem depended simply on how intensely a State felt about it. When the intensity was high enough, a legal procedure would not only be useless but quite harmful.[11]

The Function of Law could only have been written from within the German tradition, from a vivid sense of the urgency of the question of the legal system's ultimate foundation. Things seemed completely different in Britain. The validity of the British constitution, or of the legal system, was an unreflective second nature of British politics and in no need of elaborate doctrinal defence. In the troubled waters of the German and the international world of the 1930s, no such self-evidence was present. *The Function of Law* is thus German, not only in its sentence structure, but in the sensibility it transmits to its readers. In an early essay on Spinoza, Lauterpacht had written that '[i]t is the ultimate results of the theory of the state which are resorted to by international lawyers as the foundation of their systems'.[12] Few assumptions can be more un-English, in fact more German, than

[9] For Strupp's treatment of the legal disputes/political disputes distinction in his various later works, see Sandra Link, *Ein Realist mit Idealen—Der Völkerrechtler Karl Strupp (1886–1940)* (Nomos, 2003), pp 241–7.

[10] Hans Morgenthau, *Die internationale Rechtspflege. Ihr Wesen und ihre Grenzen* (Noske, 1929).

[11] For Lauterpacht's positive review, see (1931) XII *BYIL* 229. For the grounding of Morgenthau's sceptical attitudes towards law and legal institutions in his professional experience in the Weimar Republic, see William E. Scheuerman, *Morgenthau. Realism and Beyond* (Polity Press, 2009), pp 12–24. See now also Oliver Jütersonke, *Morgenthau, Law and Realism* (Cambridge University Press, 2010) (highlighting the importance for Morgenthau of his 'debate' with Lauterpacht), pp 37–74.

[12] Hersch Lauterpacht, 'Spinoza and International Law', (1927) VIII BYIL 368; Eli Lauterpacht (ed), *International Law: Collected Papers*, vol. 2 (Cambridge University Press, 1975), p. 366–383.

the view that the law emerges as deductive inferences from the political philosophy of statehood.

This, however, is the perspective adopted in *The Function of Law*. It asks the question about the proper role of law in the international world, especially vis-à-vis that which is 'politics', often appearing under the vocabulary of 'sovereignty'. For, as Lauterpacht states at the outset of the book, the 'limitation of the place of law [is] an expression of the theory of sovereignty'.[13] The question is not approached in an openly philosophical or a political theory vocabulary, however, but through a technique of legal argument that almost presupposes the answer that Lauterpacht will produce by it. The perspective taken here is legal-institutional. What, *The Function of Law* asks, is the (legal) force of the claim, often raised in the practice of judicial and arbitral tribunals, that some disputes cannot be dealt with by law—that they are 'non-justiciable'—owing to their nature as 'political' disputes?

V

The Function of Law is an attack on the commonly held view that there were two types of international conflict—legal and political disputes—and that, consequently, only some of them are justiciable whereas others are not. Lauterpacht has no sympathy for these distinctions. For him, they are unfounded in logical, jurisprudential, as well as practical terms. In fact, as he puts it, the distinctions are simply ideological, being '… first and foremost, the work of international lawyers anxious to give legal expression to the State's claim to be independent of law'.[14] Lauterpacht agrees—perhaps surprisingly, but in fact quite coherently—with Morgenthau and Schmitt that it is impossible to draw a clear distinction between the political and the legal by a determinate rule. Anything can, from some perspective, be labelled 'political'. In particular, as he puts it with special reference to Morgenthau's dissertation, '[t]he State is a political institution, and all questions which affect it as a whole, in particular in its relations with other States, are therefore political'.[15] But surely the mere fact that all disputes are 'political' in this way does not provide a reason for regarding them as non-justiciable. In fact, Lauterpacht writes, 'it is the refusal of the State to submit the dispute to judicial settlement, and not the

[13] *The Function of Law*, p 3. [14] Ibid, p 6. [15] Ibid, p 161.

intrinsic nature of the controversy, which makes it political'.[16] This is what it means to say that the theory of non-justiciability is a consequence of the doctrine of sovereignty—it defers to the sovereign will of the State itself. But if the will of the State were a *conditio sine qua non* for a dispute being justiciable, then it would always remain open for a State to opt out from the law's constraint. Like Morgenthau and Schmitt, Lauterpacht believes that the distinction between legal and political disputes, combined with the principle that its application is dependent on the State's own view ('self-judgement'), would lead international law beyond the vanishing point of jurisprudence. But where Morgenthau would conclude that this was indeed the case, and that the absence of a delimiting rule meant that everything was *politics*, Lauterpacht draws the contrary conclusion. For him:

> all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules.[17]

In other words, the fact that a State may feel strongly about some matter—for example, that it relates to its 'vital interests'—does not exempt the matter from the law but, on the contrary, calls for the application of legal rules concerning precisely those types of (important) matters. The State will not have a veto. The last word remains, and must remain, with the judge. *The Function of Law* then goes methodologically through each of the four non-justiciability doctrines that Lauterpacht is able to identify in the international debates, showing how each attempt to delimit a realm of the 'political' outside the 'legal' in international affairs will eventually become an apology for unlimited freedom of action of States and thus impossible to accept within a system of law.

The first item dealt with is the claim that when there is 'no law' at all a matter must be dealt with in a political way. To treat this issue Lauterpacht chooses the jurisprudential vocabulary of 'lacunae'. What force is there to the argument that in cases of 'gaps', judicial and arbitral bodies must decline jurisdiction and declare '*non liquet*'? As he had already done in his London doctoral dissertation of 1927, Lauterpacht shows that, as far as legal practice is concerned, courts and tribunals appear constantly to decide cases by analogy, by general principles of law,

[16] Ibid, p 172. [17] Ibid, p 166.

balancing conflicting claims or having recourse to abstract points about the needs of the international community.[18] The alleged novelty of a dispute has never prevented a tribunal from giving a legal answer to it.[19] Of course, situations must arise every now and then for which the legislator has provided no prima facie applicable solution. No legislator will have prepared for every contingency. But the fact of there not existing positive (in the sense of 'posited') law on every conceivable aspect of human behaviour has not, at least not in practice, led to a wide acknowledgement of the correctness of the theory of 'gaps'.

But Lauterpacht does not merely wish to demonstrate the absence of cases of *non liquet* in international practice. He derives this state of affairs from a wider principle—namely the jurisdictional axiom 'that the judge is bound to give a decision on the dispute before him'.[20] There are no gaps for Lauterpacht. This does not follow from the (naive) assumption that the legislator would have foreseen everything. The completeness of the law is, instead, 'an *a priori* assumption of every system of law, not a prescription of positive law'. Though particular laws or particular parts of the law may be insufficiently covered, '[t]here are no gaps in the legal system as a whole'.[21] This is not a result of arguing from formal completeness of the Kelsenian type—that is to say, from the perspective of the assumption that in the absence of law, the plaintiff has no valid right and that *ergo*, his claim must be rejected.[22] For Lauterpacht, the very notion of 'law's absence' is untenable. For it presumes that law consists of isolated acts of State will that may or may not have extended to the matter under consideration. But this is not at all how Lauterpacht understands the law. He is, after all, a natural lawyer; although for good prudential reasons he refrained from trumpeting this in his British legal environment. But it led him to suggest that 'gaps' were in fact only *primae impressionis* difficulties to decide cases. If law is thought of in terms of general principles, judicial balancing, and social purposes—as Lauterpacht held it to be—then there is no principled difficulty to respond to novel situations in the end.[23] Even 'spurious gaps' may be filled: an unsatisfactory single rule may be bypassed to give effect to a major principle of law, the intention of the

[18] Ibid, pp 118–43. [19] Ibid, pp 113–43. [20] Ibid, p 143.
[21] Ibid, p 72. [22] Ibid, pp 85–6, 93–112.
[23] Hence McNair's apt characterization of Lauterpacht's writing as 'constructive idealism': A. McNair, 'Hersch Lauterpacht 1897–1960' (1961) Proceedings of the British Academy 378.

parties, or the purposes of the legal system as a whole. In this way, even legal change is regulated by the law.[24]

A second, widely held view presupposed that only technical or otherwise minor disputes were amenable to legal settlement, while 'important' issues needed to be dealt with in a political vein. *De maximis non curat praetor.* This was the view on which Morgenthau had written his doctoral dissertation, and had proposed the distinction between political 'tensions' and legal 'disputes'.[25] Sometimes, Morgenthau wrote, even a minor issue must be understood as a 'tension' rather than a dispute because it has become a *symbol* of the antagonism between the relevant States: the real issue is the political conflict, not the legal form it takes. Again, Lauterpacht begins by noting that since the *Alabama* case (1872), tribunals have dealt with a wide number of important questions.[26] Having surveyed the practice of the Permanent Court of International Justice, he concludes that adhering to this principle 'would mean the speedy and radical liquidation of the activities of the Court'.[27] Again, however, the main argument is not about what tribunals may have done in practice. An issue of principle is involved. Lauterpacht agrees—perhaps surprisingly—with Morgenthau and even with Carl Schmitt that whether a matter touches on the State's 'vital interests' or 'honour' cannot be decided in abstraction from the State's own view of it.[28] These are purely subjective notions. If important issues were excluded from judicial settlement, and if the determination of the 'importance' of an issue were left to the party itself, then there would in fact exist an unlimited right to opt out from third party settlement. And this would be absurd.

On the other hand, Lauterpacht does not want to overlook the importance of arguments about 'vital interests' or 'honour'. It is true that they had been widely used in arbitration treaties and that they do reflect important State concerns. To discard or ignore them would be unrealistic and counterproductive. To avoid the absurdity of self-judgement, however, the decision on whether a matter might in fact touch on the 'honour' or 'vital

[24] *The Function of Law*, pp 87–95, 262–5 and *passim*. Cf also 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals' (1930) XI BYIL 134, 144–54.
[25] Morgenthau, *Die internationale Rechtspflege*, above n 10.
[26] *The Function of Law*, pp 153–61.
[27] Ibid, p 163.
[28] Ibid, p 167.

interests' of a State must be allocated to the tribunal itself in which the claim has been made. That is to say, it should be dealt with no differently from any other claim made by a party regarding a treaty provision or customary law principle. As such, it is tantamount to calling for a decision on the merits of the claim. But this means, of course, that the matter is fully justiciable.[29] For instance, it is often held that issues of immigration are non-justiciable. 'In fact', responds Lauterpacht, 'they are a typically appropriate subject for judicial settlement. An international court will in most cases invariably presume that the claim will be dismissed.'[30]

The third group of arguments that presumed a distinction between legal and political disputes concerned the need for accommodating the needs of change in law. Sometimes—and Lauterpacht must have had the debate about the revision of the Versailles peace settlement in mind—law might represent an obsolete political situation, a status quo that no longer exists. An arrangement made long ago may have come to seem too burdensome or otherwise unjust for a party. Owing to the absence of an international legislature, it may often be impossible to correct the matter by formal means. In such cases—so the argument goes—it would be unjust, counterproductive, or even dangerous to insist on the application of the law.[31] For Lauterpacht, however, arguments about the clash between law, on the one hand, and justice or peace, on the other hand, are completely vacuous. Political realists mistake complexity for conflict. Problems of the obsolete or unjust rule may always be tempered by reference to the larger purposes of the law, *rebus sic stantibus*, abuse of rights, or principles of equity or reasonableness.[32] The view that law lags behind and must therefore sometimes be offset by new 'political' objectives that provide a better response to the requirements of the moment is again based on the old (positivist) idea that law is a matter of a definite number of legislated rules—typically rules laid out by the sovereign legislator—that are carved in stone and become inevitably outdated as the reasons for their enactment have disappeared.

Yet it is a primitive legal theory that views the law in such a way, Lauterpacht argues. For as legal practice shows, judges and arbitrators have not lacked means to apply the law in innovative ways, and to set aside rules that appear to be obsolete or unjust:

[29] Ibid, pp 361–9.
[30] Ibid, p 182.
[31] Ibid, pp 253–355.
[32] Ibid, pp 278 et seq.

'much of this amending process is actually and necessarily performed by international judges in the ordinary course of their judicial function'.[33] It is a matter of the normal interpretation of the rules, often by reference to their object and purpose. Rules operate in normative environments in which there are many kinds of interpretative techniques, principles of proportionality, and reasonableness, as well as other argumentative resources that enable the adjustment of the law according to important needs. The concerns of realism are incorporated in the law, for example, by the State's undoubted right to determine the conditions of self-defence for itself and in the exception to the vitiating effect of duress in the law of treaties. The realists' main concern is that law might sometimes fail to give due regard to the liberty and the fundamental rights of the State. As Lauterpacht responds, however:

> It is not sufficiently realized that fundamental rights of States are safe under international judicial settlement, for the reason that they are fundamental legal rights.[34]

The fourth and last group of arguments seeking to uphold the law/politics distinction referred to here points to a difference between 'disputes as to rights' and 'conflicts of interest'. This, too, is an empty distinction for Lauterpacht. Every right worth having makes reference to some interest, and merely having an interest in something is not a legitimate ground for imposing the burden of a legal duty on someone. Legitimate and illegitimate interests, and the connected duty on someone to contribute to the fulfilment of legitimate interest, can only be identified by making the distinction between 'raw' interests and interests upgraded into (legal) rights. If a State demands a piece of territory from another because this is vital for its development, it is easy to understand why it may want to deal with this as a conflict of interests rather than as a conflict of rights (because it has no right). But if it were entitled to do this unilaterally—that is to say, if it had the opportunity to change the terms of the debate from 'rights' to 'interests' by an *ipse dixit*—then, of course, this would violate the interests of its opponent in a way that would be absurd. In fact, Lauterpacht says, to presume such a distinction 'very nearly amounts to a rejection of the institution of obliga-

[33] Ibid, p 352.
[34] Ibid, p 181, and generally pp 185–90, 279.

tory judicial settlement'.[35] For the same reason, proposals to set up specialized institutions to deal with 'conflicts of interest' cannot be accepted. As 'interest' is not amenable to objective determination, this would only create a unilateral veto from juridical settlement and an authorization to discard the rights of others.[36]

VI

The refutations of the distinction between legal and political disputes in *The Function of Law* turn on Lauterpacht's hermeneutic view of the law—the assumption that no event is 'essentially' or in itself a legal or a political event. Its character as such is the result of projection, interpretation from the particular standpoint of the speaking subject. If the distinction were upheld, it would always allow a State to present its unwillingness to submit itself to the legal process as a result of its 'application' of the distinction. And:

> An obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition of the existence of the duty, does not constitute a legal bond.[37]

That the problem of self-judgement (or auto-interpretation) becomes the central problem of Lauterpacht's doctrinal work follows from his view that the law is always relative to interpretation. This was a basic tenet of German legal theory; both Kelsen and Schmitt shared it, as did such new streams of continental jurisprudence as Hermann Kantorowicz's 'free law'.[38] If rules do not have essential meanings but those meanings result from interpretation, then the project to chain States

[35] Ibid, p 363.
[36] Ibid, pp 380–5.
[37] Ibid, p 197. This is, paradoxically, the very point E.H. Carr makes against Lauterpacht. Precisely because there can be no distinction between law and politics, the latter will always prevail: E.H. Carr, *The Twenty-Years' Crisis 1919–1939* (2nd edn, Macmillan, 1981 [1946]), p 195.
[38] In *The Function of Law* there is only one reference to the free law school or to Kantorowicz himself. Nevertheless, Lauterpacht's discussion of 'spurious gaps'—that is, gaps that result from the unsatisfactory character of clear rules—is practically indistinguishable from 'free law' arguments. For Lauterpacht, too, the distinction between 'real' and 'spurious' gaps is 'relative' (just like, he says, the difference between the legislator and the judge), and cases 'may occur in which a decision, which at first sight is *contra legem*, can be brought within the pale of law conceived as a whole'. Like Kantorowicz, Lauterpacht refrains from associating judicial freedom with arbitrariness. 'It is freedom within the law conceived as something more comprehensive than the sum total of its positive rules': *The Function of Law*, p 88.

into the rule of law by legislation is insufficient. Instead, 'Who judges?' (*Quis judicabit?*) becomes the key question. In *The Function of Law*, the lawyer—as judge and arbitrator—becomes the foundation of the rule of law. This is why Lauterpacht is led to focus on their impartiality and to examine their ability to interpret the law so that everyone's vital interests are secured.[39] To us, an inquiry into judicial honesty and competence seems a somewhat facile solution for world peace. But Lauterpacht's rule-scepticism is ours, too. Our own pragmatism stands on the revelation that it is the legal profession (and not the rules) that is important. As Lauterpacht puts it:

> There is substance in the view that the existence of a sufficient body of clear rules is not at all essential to the existence of law, and that the decisive test is whether there exists a judge competent to decide upon disputed rights and to command peace.[40]

The Function of Law puts forward the image of judges as 'Herculean' gap-fillers by recourse to general principles and the law's moral purposes that is very similar to today's Anglo-American jurisprudential orthodoxy.[41] Moreover, it heralds the end of jurisprudence and grand theory in the same way legal hermeneutics does, by focusing on the interpretative practices of the legal profession.[42] Simultaneously, however, it remains hostage to and is limited by the conventions and ambitions of that profession. In this sense, *The Function of Law* is the last book on international theory—the theory of non-theory, the sophisticated face of legal pragmatism.

VII

And what has *The Function of Law* to say to us today? As pointed out at the beginning, the distinction between 'legal' and 'political' disputes remains an important consideration—or at least it is often invoked to decide (that is, to exclude) the jurisdiction of international bodies or agencies. Moreover, many, though by no means all, constitutional systems subscribe to the distinction and

[39] Ibid, pp 210–49.
[40] Ibid, p 432.
[41] I have argued about the essential similarity of Lauterpacht's constructivism and Ronald Dworkin's jurisprudence in my *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press, 2005), pp 52–6.
[42] This point is emphasized in Anthony Carty, 'Why Theory? The Implications for International Law Teaching' in P Allott et al, *Theory and International Law: An Introduction* (BIICL, 1991), pp 77, 78–99.

exempt issues of foreign policy from the jurisdiction of domestic supreme courts.[43] The 'political questions doctrine' followed by the US Supreme Court is one well-known, though controversial, example of the view of foreign policy being essentially non-justiciable.[44] A counter-example is provided by Germany in which important foreign and even defence policy issues are regularly submitted to the scrutiny of the Constitutional Court (*Verfassungsgericht*).[45] In Britain, the matter came up in the *Pinochet* case where it was pointed out by Lord Nicholls that any suggestion that the matter might be non-justiciable was mooted by the Parliament's having specifically legislated for it.[46] This presumes (*contra* Lauterpacht) that when there is no such (positive) legislation, there is also no jurisdiction. But, in fact, non-justiciability reaches further. In a 2006 case the Court of Appeal highlighted 'a general principle of the separation of powers between the executive and the courts, including the principle that there remain some areas which are essentially matters for the executive and not the courts'.[47]

International lawyers may have thought that the settled practice by the International Court of Justice of dismissing claims by parties according to which the Court would not enjoy jurisdiction owing to the 'political' nature of the case, should have finished with the matter internationally. The Court, it appears, also from the *Kosovo* case cited above, has endorsed Lauterpacht's position, and routinely asserts that the fact that a case has political implications does not mean that the Court could not pronounce on its legal aspects.[48] A small dent in that practice is constituted by the partial *non liquet* given by the Court in the 1996 Advisory Opinion on the *Legality of the Threat and Use of*

[43] See e.g. Thomas M. Franck, *Political Questions / Judicial Answers. Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press, 1992).

[44] For a recent case, see *Schneider v Kissinger* 412 F3d 190 (DC Cir 2005).

[45] For a recent case concerning the violation of parliamentary procedure in a contribution by Germany of troops for a NATO operation in Turkey in 1983, see BVerfG, 2 BvE 1/03 (7 May 2008).

[46] *Ex parte Pinochet (No 1)*, Lord Nicholls (2002) 119 ILR 96.

[47] *R (on the application of Gentle and Clarke) v Prime Minister, Secretary of State for Defence and Attorney General* (12 December 2006) (2008) 133 ILR 752 (para 75).

[48] The 'Lauterpachtian' language is particularly clear in the *Tehran Hostages* case where the Court pointed out that 'disputes between sovereign States by their very nature are likely to occur in political contexts' and that if the Court 'contrary to its settled jurisprudence' were to see this as a reason for refusing to deal with the case, 'it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes': ICJ, *Tehran Hostages*, Reports 1980, 20 (para 37). The most exhaustive discussion of the matter is now in ICJ, *Construction of a Wall* (Advisory Opinion), Reports 2004, 155–6 (para 41).

Nuclear Weapons.[49] Moreover, the debate in the 1990s over judicial review of Security Council decisions highlighted many of the aspects of the old debate and although it remained inconclusive, there has been marked hesitation (to put it no higher) among international lawyers to affirm the Court's jurisdiction over Council activities.[50] In the European Union, the exclusion of the jurisdiction of the European Court of Justice (ECJ) from matters of common foreign and security policy and, a fortiori, common security and defence policy, reflects precisely the types of arguments against which Lauterpacht wrote *The Function of Law*. Nevertheless, when the jurisdiction of the ECJ has been triggered in matters that are related to foreign policy—such as in the application of economic sanctions—a remarkable development has taken place, from an outright refusal to deal with such matters to a close scrutiny of sanctions from the perspective of their conformity with human rights and due process standards under the novel *Kadi* jurisprudence.[51] The European Court of Human Rights (ECtHR), too, has frequently dealt with cases in which respondent governments have claimed that the matter pertained to the exclusive jurisdiction of the domestic authorities. The Court has never adopted a formal non-justiciability doctrine—indeed, it would be hard to see how such would work in a human rights context. But it has often been sensitive to the concerns of member governments endowing them with a wide margin of appreciation when they were conducting policies intended to safeguard national security.[52]

[49] Here the Court concluded that 'in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake': ICJ, *Threat or Use of Nuclear Weapons* (Advisory Opinion), Reports 1996, *Dispositif*, 266 (E).

[50] Out of the huge literature, see eg Kamrul Hossain, *Limits to Power? Legal and Institutional Control over the Competence of the United Nations Security Council under Chapter VII of the Charter* (Acta Universitatis Lapponiensis, 2007).

[51] For an overview of the attitude of the ECJ until 2002, see my 'Judicial Review of Foreign Policy Discretion in Europe' in Petri Helander, Juha Lavapuro, and Tuomas Mylly (eds), *Yritys eurooppalaisessa oikeusyhteisössä* (Turun Yliopisto, Oikeustieteellinen tiedekunta, 2002), pp 155–73. For the *Kadi* cases, see Case T-306/01 and Case T-315/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (21 September 2005) and the overturning of the judgment of the CFI by the Grand Chamber of the ECJ in its Judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat v Council of the European Union* (2008) 3 CMLR 41.

[52] In an early case, the Court held that 'having regard to the high responsibility that a government bears to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion—a certain margin of appreciation—must be left to the government': ECtHR, *Lawless* case, Series B, 1960–61, 82 (para 90). In a 1993 case

If the terms of the interwar debate are applied to the question about the jurisdiction of the ECJ or the ECtHR, it is possible to see that behind the apparently conceptual problem of the limits of the 'political' vis-à-vis the 'legal' there is a more pragmatic concern about who should have the final say about foreign policy—and thus occupy the place political theory has been accustomed to calling 'sovereignty'. Kelsen, Schmitt, and Lauterpacht all had much to say about this, and very little that would have been both new and intelligent has been added to the topic thereafter. But to phrase this debate as being about 'sovereignty'—the 'Weimar' perspective—does not really lead far towards resolving it. In a pluralist world, there is simply no such 'ultimate' place from which authoritative direction could be received for any and all disputes. Perhaps the whole question should be rather brought down from conceptual abstraction and the inconsequential debates about the 'nature' of particular grievances. Perhaps it could be examined in terms of the subtle institutional politics that we witness in national administrations as well as international institutions—the jurisdictional tug of war between technical experts, lawyers, and policy-makers. A question of economic sanctions, for example, can be described and dealt with from the perspective of politics, economics, security, human rights, development, and international legality. Accordingly, it may trigger the expertise and jurisdiction of political and economic experts, security institutions, human rights bodies, and development organizations—as well as, of course, international judicial or arbitral tribunals. Who should be entitled to decide? Framed in these terms, drawing a line between 'legal' and 'political' (or indeed, other fields such as 'economics', 'security', 'human rights', etc) by an abstract rule begins to seem increasingly less important than to accept that, however it is done, the matter will remain controversial and will require attention to such institutional safeguards as representation, transparency, and accountability. Each of these various institutions and forms of expertise appears to itself as the 'ultimate' point from which matters ought to be decided. For those outside the relevant institution—the expert committee, the council of diplomats, the court, or tribunal—however, it may be anything

concerning terrorism and the derogation from rights under Article 15 of the Convention under public emergency, the Court affirmed that 'a wide margin of appreciation should be left to the national authorities'. Nevertheless, this margin was not unlimited and its use was examined by the Court: ECtHR, *Brannigan and McBride*, Series A, No 258 B, 49 (para 43).

but self-evident which of them should have jurisdiction and the privilege to decide. This highlights the importance of what could be called a 'politics of re-description': the constant effort exercised by legal and other experts to describe important matters in the language of their particular expertise so as to achieve the allocation of decision-making power on that matter to their preferred institution—the one in which they, or their values, are well represented.[53]

Hersch Lauterpacht was committed to the belief that international lawyers, in particular international judges, should rule the world. This was a part of what I have elsewhere called the project of gentle civilizing. It was a legal but also a political project. Putting trust in the good sense and responsibility of lawyers for resolving international disputes has its advantages, of course. But judicalization also has its well-known disadvantages. It prefers some interests against others; some voices are easily heard in courts and tribunals whereas other voices only with difficulty, if at all. There is still much work to be done on how interests and preferences come to be filtered in different institutions and thus contribute to form the structural bias of such institutions. I have said this before and I will say it again: *The Function of Law* is the most important English-language book on international law in the twentieth century. It is not so because of the invulnerability of its arguments but because of the acute sensitivity it shows to institutional choices for the distribution of spiritual and material values in the world. We know now that neither lawyers nor diplomats should have the final say in the absolute terms of the old debate. There is surely room for both. Instead, we should choose the available vocabulary, and the institutional alternative that it supports, with a keen eye on the foreseeable effects that this will have in the global games of power in the twenty-first century. It is hard to think of a better way to prepare for them than by reading this book.

[53] See further my 'The Fate of International Law: Between Technique and Politics' (2007) 70 Modern Law Review 7–9 and *passim*.