

# Koskenniemi's Lauterpacht: A 'Gentle Civilizer'?

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## Abstract

*Lauterpacht's normative project has been subject to a number of excellent studies in the past, most notably by Martti Koskenniemi. The central image of the latter's 'Lauterpacht' is, famously, that of a backward-looking thinker: Lauterpacht is portrayed as a 'natural lawyer' who nostalgically looks back into the nineteenth century, as the last representative of a 'Victorian tradition' in international law. This article wishes to critique and challenge this influential intellectual portrait. In order to do this, it revisits Lauterpacht's rich academic oeuvre in three sections. Section 2 begins with a reconstruction of Lauterpacht's understanding of the judicial function – a function on which much of Koskenniemi's Lauterpacht hinges. Section 3 explores the legislative function within Lauterpacht's international legal order, while Section 4, subsequently, investigates the 'function' given to natural law in Lauterpacht's normative project. Section 5, finally, offers a critical challenge to Koskenniemi's 'Lauterpacht' and re-evaluates the place he should be given within the history of twentieth-century international law. A Conclusion contends that Lauterpacht is best characterised as a utopian international federalist, whose supranational legacy has largely remained unredeemed.*

## 1. Introduction

There are few legal scholars that have shaped a historical period; and fewer still that are remembered for it. Hersch Lauterpacht represents such a rare and magisterial figure, whose thinking has significantly influenced international law in the twentieth century and whose works continue to be studied and admired today.<sup>1</sup>

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<sup>1</sup> During his lifetime, Lauterpacht published six major monographs, namely: 'Private Law Sources and Analogies of International Law' (1927); 'The Function of Law in the International

Born into the fin-de-siècle Austro-Hungarian Empire, with early studies in Lemberg (Lviv) and Vienna, Lauterpacht moved to London in the early 1920s.<sup>2</sup> It was in England that he pursued all of his academic career and where he was, after a decade working at the London School of Economics, elected to Cambridge's Whewell Chair of International Law.<sup>3</sup> Keenly interested in the legal problems arising out of the Covenant of the League of Nations (1919) from its beginnings; and, after the Second World War, deeply attentive to the Charter of the United Nations (1945), Lauterpacht rose to become a judge at the International Court of Justice in 1955.<sup>4</sup> When he died in 1960, his intellectual inheritance as a 'scholar' and as a 'judge' was immense – so immense that no other figure, not even his mentor Hans Kelsen, could claim to have influenced international legal thinking more profoundly in the short twentieth century.<sup>5</sup>

Lauterpacht's legal project and broader philosophical outlook have been subject to a number of excellent and extensive studies in the past,<sup>6</sup> most notably by Martti Koskenniemi.<sup>7</sup> The

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Community' (1933); 'The Development of International Law by the Permanent Court of International Justice' (1934), which was substantially revised and re-published as 'The Development of International Law by the International Court' (1958); 'An International Bill of the Rights of Man' (1945); 'Recognition in International Law' (1947); and 'International Law and Human Rights' (1950). Many of his numerous articles, chapters, and Hague Lectures can today be found in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Volumes 1-5 (1970-2004) that were posthumously published. Not all of Lauterpacht's publications are however collected there, and this article will often refer to the original publication. For a complete bibliography of Lauterpacht's academic, editorial and judicial works, see: E. Lauterpacht, *The Life of Hersch Lauterpacht* (infra n.2), Appendix 1.

<sup>2</sup> For the definitive biography of Hersch Lauterpacht's life, see: E. Lauterpacht, *The Life of Hersch Lauterpacht* (2012), esp. Chapters 1-3.

<sup>3</sup> *Ibid.*, Chapter 4.

<sup>4</sup> *Ibid.*, Chapter 11.

<sup>5</sup> On Kelsen's thinking and his influence on twentieth-century international law, see: J. v. Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2014).

<sup>6</sup> Among the older and general evaluations, see: Jenks, 'Hersch Lauterpacht – The Scholar as Prophet', 36 *BYIL* (1960) 1; Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge' – Part I/II, 37 *BYIL* (1961) 1 and 38 *BYIL* (1962)1; Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', 55(4) *AJIL* (1961) 825. *EJIL* has published a remarkable retrospective on Lauterpacht's work and influence as part of the Journal's 'European Tradition of International Law' rubric, see (1997) Volume 8(2) of the Journal with contributions by Koskenniemi, Scobbie, Herzog, Jennings, Schwebel, Kelsen, and Elihu Lauterpacht. For a useful list of biographical writings on Hersch Lauterpacht until 2009, see *supra* note 2., Appendix 2. For more recent contributions, see also e.g.: Capps, 'Lauterpacht's Method', (2012) 82 *BYIL* 248 as well as Loeffler, 'The 'Natural Right of the Jewish People': Zionism, International Law, and the Paradox of Hersch Zvi Lauterpacht', in: J. Loeffler and M. Paz, *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century* (2019), 21.

<sup>7</sup> See Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', (1997) 8(2) *EJIL* 215, which forms the original basis of the chapter of the same name in: 'The Gentle

central image that the celebrated legal historian of international law here imparts is that of Lauterpacht as a *backward*-looking thinker: ‘Lauterpacht looks back into the middle of the nineteenth century and hopes to resuscitate its liberal rationalism and its ideal of the rule of law, its belief in progress, its certainty about the sense and direction of history – Proust’s *bonne ange de la certitude*.’<sup>8</sup> Lauterpacht is consequently cast as a ‘Victorian’ scholar, ‘a traditionalist for whom the war of 1914-1918 ... as well as the twenty-year crisis that followed it, constituted an irrational rupture in the peaceful and inherently beneficial international developments associated with the nineteenth century’.<sup>9</sup>

Koskenniemi’s subsequent conceptual link between this ‘Victorian tradition’ and the rise and fall of ‘modern’ international law between 1870 and 1960, established in his ground-breaking ‘The Gentle Civilizer of Nations’ (2001), is as intriguing as it is counterintuitive – especially when viewed through Lauterpacht’s collective oeuvre.<sup>10</sup> All, of course, here depends on what is meant by ‘Victorianism’. Koskenniemi uses the term metaphorically to refer to the nineteenth century ideals of ‘objectivism’, ‘liberalism’ and ‘optimism’.<sup>11</sup> These markers, however, still prove rather abstract, and his later characterisation of the ‘Victorian faith’ in terms of its ‘rationalism’, ‘individualism’, ‘cosmopolitanism’, and ‘sentimentalism’ hardly offers more precision.<sup>12</sup> For many, if not all, of these ideals and values can be found in an earlier enlightenment tradition.<sup>13</sup>

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Civilizer of Nations: The Rise and Fall of International Law 1870–1960’ (2001), 353–412. See also: ‘Hersch Lauterpacht (1897-1960)’, in: J. Beatson and R. Zimmermann (eds.), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (2004), 601; ‘Hersch Lauterpacht and the Development of International Criminal Law’. 2 *Journal of International Criminal Justice* (2004) 810; ‘The Function of Law in the International Community: 75 Years After’, 79 *BYIL* (2008) 353 as well as ‘Introduction’ to H. Lauterpacht’s ‘The Function of Law in the International Community’ (2011), xxix-xxvii; and finally, ‘A Closet Positivist: Lauterpacht between Law and Diplomacy’, in: J. Loeffler and M. Paz (eds.), *The Law of Strangers*, *supra* note 6, at 43.

<sup>8</sup> Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 7, at 355.

<sup>9</sup> *Ibid.*, 355-6 (emphasis added).

<sup>10</sup> Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 7, at 4. Koskenniemi has candidly stated that the book developed out of the ‘Sir Hersch Lauterpacht Memorial Lectures’ given at the University of Cambridge in 1998, which themselves built on his earlier 1997 EJIL article on Lauterpacht (*ibid.*, 2): ‘The 1998 lectures were an extension of that essay, an exploration of why Lauterpacht came to hold the positions he did and what happened to the heritage he left.’

<sup>11</sup> Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 7, at 360.

<sup>12</sup> Koskenniemi, *Hersch Lauterpacht*, *supra* note 7, at 603. Sentimentalism is here equated with ‘a faith in human goodness’ and a belief in human progress (*ibid.*, 604).

<sup>13</sup> Emblematically, Koskenniemi’s metaphorical understanding of ‘Victorianism’ is deliberately based on that of the cultural historian Carl Schorske, who – somewhat

What about *Lauterpacht's* specific 'Victorian' features? Koskenniemi is here less elusive; and three defining elements are identified. First, and as mentioned already, Lauterpacht is said to be a 'traditionalist' longing to return to the nineteenth century. For Koskenniemi, this stands for 'a liberal historicism that sees in public opinion, interdependence, [and] common interests' central forces and in which the task of international law is 'to liberate history's intrinsic rationality by a legal ordering of international affairs'.<sup>14</sup> This characterisation brings Lauterpacht relatively close to the philosophical project of the German Historical School;<sup>15</sup> yet Koskenniemi thinks it better to define the early Lauterpacht as 'a natural lawyer'.<sup>16</sup>

This strikingly contrasts with Koskenniemi's later Lauterpacht, who is found to be a 'modernist' because his 'non-essentialist epistemology' rejects the objective and external nature of law. Lauterpacht's 'nominalism', Koskenniemi proclaims, sees him place significant stress on 'the primacy of interpretation to substance, of process to rule'; and Lauterpacht is therefore found to have held 'the view that law is always relative to interpretation': 'Law is how it is interpreted.'<sup>17</sup> This endorsement of judicial creativity now brings Lauterpacht close to 'today's Anglo-American jurisprudential orthodoxy' that 'heralds the end of jurisprudence and grand theory in the same way legal hermeneutics does, by focusing on the interpretative practices of judges'.<sup>18</sup> For in this rule-sceptical and realist-legal world, '[t]he judge's task becomes that of the pragmatic manager of conflicting interests'.<sup>19</sup>

The transformation of the early Lauterpacht's Victorian 'legal naturalism' (utopia) into his later-day American 'legal realism' (apologia) is, importantly, not caused by the international move-to-institutions that some have considered the key legacy of the first part of the twentieth

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postmodernistically – equated it with 'latter-day Voltairism' (ibid., 406). Voltaire (1694-1778) was, of course, one of the most important eighteenth-century Enlightenment figures.

<sup>14</sup> Ibid., 358-9.

<sup>15</sup> For recent overviews here, see: Schütze, 'German Idealism after Kant: Nineteenth-Century Foundations of International Law', 25(1) *Journal of the History of International Law* (2023) 105; as well as Schütze, "'Victorian' Traditions: British International Law Scholarship, 1830-1914', 74 *British International and Comparative Law Quarterly* (2025) 409.

<sup>16</sup> Koskenniemi, 'Preface', in: Lauterpacht, *The Function of Law*, supra note 7, xxxiii: 'In a predominantly positivist legal environment, Lauterpacht was a natural lawyer.'; as well as Koskenniemi, Hersch Lauterpacht, supra note 7, at 656: 'Lauterpacht is commonly classified as a natural lawyer. And he viewed himself as such[.]'

<sup>17</sup> Koskenniemi, *The Gentle Civilizer of Nations*, supra note 7, at 357 and 368.

<sup>18</sup> Ibid., 369. Koskenniemi continues: 'In this sense, *The Function of Law* is the last book on international theory – the theory of non-theory, the acceptable, sophisticated face of legal pragmatism.'

<sup>19</sup> Ibid., 405.

century.<sup>20</sup> Rather, and in line with the ‘Gentle Civilizer’'s master thesis, it is the academic profession’s increasing inability ‘to imagine’ international order that matters. It is the decline in the *legal imagination* – the idealistic belief-structure of the Victorian ‘men of 1873’ – that ultimately causes the ‘fall’ of modern international law because it ‘used up its emancipatory potential in the doctrinal struggles of the 1930s; became eclectic after the Second World War and was institutionalised as the normal discourse of law and diplomacy in the 1960s’.<sup>21</sup> And Lauterpacht is here *the* pivotal and pivoting figure in this story, because his professional evolution is seen to personally symbolize the rise and fall of modern international law.<sup>22</sup> For having started as a ‘Gentle Civilizer’, a twentieth-century ‘Westlake’, he is said to embrace, by the end of his life, ‘a depoliticised legal pragmatism’ that was ‘alien to theory and doctrine’.<sup>23</sup> This article wishes to critique and challenge this famous intellectual portrait. It revisits Lauterpacht’s rich academic oeuvre in an attempt to highlight the *non*-Victorian and *non*-naturalist elements of the early Lauterpacht as well as the *non*-realist and *non*-pragmatic foundations of his later theory of international law. To give this counter-portrait contours, Lauterpacht’s project will be explored in three core sections with each section concentrating on a particular legal ‘function’ within the international community.

Section 2 begins with a reconstruction of Lauterpacht’s understanding of the *judicial* function – a function on which much of Koskenniemi’s ‘Lauterpacht’ hinges. Thereafter, Section 3 explores the *legislative* function within Lauterpacht’s international legal order. The centrality of international legislation within his work is often underrated; but to him, the problem of ‘peaceful change’ within the international community could only ever be resolved through an international legislature. Section 4 investigates the ‘function’ given to *natural law* in Lauterpacht’s project. It will be shown there that, despite his early emphasis on the individual

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<sup>20</sup> Kennedy, ‘The Move to Institutions’, 8 *Cardozo Law Review* (1987) 841.

<sup>21</sup> Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 7, at 411.

<sup>22</sup> *Ibid.*, 411-412: ‘I have interpreted Lauterpacht’s work in terms of a movement that started as a theoretical-doctrinal effort to imagine an international legal order resembling the structures of the liberal State and ended up in celebrating the virtues of a legal pragmatism that is alien to theory and doctrine. (...) Where *The Function of Law* completed the work of theoretical reimagination, *Recognition* hoped to bridge the gap between that theory and practice, *Human Rights* instituted an abstract justification for the legal project, and *Development of International Law* inaugurated pragmatism as the culture of future generations of international lawyers.’

<sup>23</sup> *Ibid.*, 4 and 406 and 411.

as the ultimate unit of international law, only in a second phase of his career was a novel conception of international human rights born.

Having re-constructed Lauterpacht's intellectual project, Section 5 finally aims to directly engage with four key assumptions underpinning Koskenniemi's 'Lauterpacht'. In view of the main results of the three preceding sections, it will be claimed that Koskenniemi's 'Lauterpacht' must be resolutely recast. Far from ever being a backward-looking 'Victorian' naturalist, the early Lauterpacht ought to be seen as a forward-looking international federalist – who never subscribed to the nineteenth-century belief in the organic and natural development of international law and the constitutive role of lawyers in that development. And instead of Koskenniemi's declinist thesis, which sees Lauterpacht as an idealist-turned-realist, it is argued that Lauterpacht never lost his utopian belief in a supranational Federation with proper legislative as well as judicial powers; on the contrary, the Second World War here rather *reinforced* his views on the vital need for an international 'Bill of Rights' for individuals. A *Conclusion* synthesises the central findings and further reflects on the post-1960s legacy of Lauterpacht's federalist project.

## **2. The Judicial Function and the Normativity of International Law**

Lauterpacht's academic life begins in the shadow of the Covenant of the League of Nations in 1919.<sup>24</sup> To him, the philosophical and legal change introduced by the Covenant was 'radical'.<sup>25</sup> The League represented the first international organisation on a universal scale; and the establishment of its Permanent Court of International Justice (PCIJ), here promised to establish

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<sup>24</sup> The Covenant was signed on 28 June 1919, as part of the Peace Treaty of Versailles; and it became effective on 10 January 1920. Lauterpacht's first academic work, his 1922 Viennese doctoral thesis, was entitled 'Das völkerrechtliche Mandat in der Satzung des Völkerbundes' (The International Mandate under the Covenant of the League of Nations).

<sup>25</sup> For example, see already: Lauterpacht, 'Westlake and Present Day International Law', 15 *Economica* (1925) 307 at 307 fn.2. The radical nature of the '1919' break is a general theme of almost all of Lauterpacht's work. A book review of the fifth edition of Lauterpacht's 'Oppenheim' (1937) even chastised Lauterpacht for his 'exaggerated' reading of the 'Covenant break' (Deak, 'Review of Oppenheim's 'International Law'', 32 (3) *AJIL* (1938) 622 at 623.) However, Lauterpacht doubled down on the importance of '1914-1918' in the 1955 edition of 'Oppenheim' (see 'International Law: A Treatise' (1955), 4 fn.2).

the rule of international law after the ‘Great War’. Article 38(3) of the PCIJ-Statute,<sup>26</sup> in particular, constituted ‘the outstanding and, to a certain extent, revolutionary contribution made by the Statute to international law as a whole’;<sup>27</sup> and Lauterpacht’s first English-language monograph, enigmatically entitled ‘Private Law Sources and Analogies of International Law’ (1927), was designed as a commentary and celebration of that provision. Let us therefore look at it in more detail.

### ***A. Article 38(3) and the ‘General Principles’ of International Law***

For Lauterpacht, Article 38(3)’s acknowledgement of the existence of ‘general principles’, as a formal source of international law, had once and for all disqualified the positivist view that ‘rejects the taking over of rules and precepts from sources other than international custom or treaties’.<sup>28</sup> To him, this view had always suffered from two fatal defects. Theoretically, it just could not provide coherent normative foundations for international law;<sup>29</sup> and, ironically, it also suffered from an empirical problem because it had ceased to reflect the actual reality of international practice.<sup>30</sup> With the official recognition of general principles as a third source of international law, the League had thus officially confirmed that international law was

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<sup>26</sup> Article 38 of the PCIJ stated: ‘The Court shall apply: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States; 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.’ On the drafting history of the provision, see: Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (Washington: Carnegie Endowment, 1920), 106-111.

<sup>27</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Archon, 1970), viii.

<sup>28</sup> *Ibid.*, 7.

<sup>29</sup> *Ibid.*, 54: ‘What is urged here is that the rigid modern positivism as it appears in its current theoretical formulation does not furnish a suitable basis upon which a coherent system of international law can be built, and that positivist writers themselves are unable to follow it in their exposition of international law.’

<sup>30</sup> *Ibid.*, 60-71.

‘embodying not only positive rules set by sovereign States, but also principles of legal justice, reason, and equity’.<sup>31</sup>

But where did these general principles come from? To Lauterpacht, the jurisprudence of (inter)national tribunals was the institutional fountain of such legal principles; yet their ultimate source was the common ‘private law’ within nations, expressed especially through Roman law.<sup>32</sup> In an extensive commentary of Article 38(3), he explained the meaning of that provision and the nature of general principles:

*‘These ‘general principles’ are not, as such, principles of moral justice as distinguished from law; they are not rules of ‘equity’ in the ethical sense; nor are they a speculative law conceived by way of deductive reasoning from legal and moral principles. (...) They are principles arrived at by way of a comparison, generalisation and synthesis of rules of law in its various branches – private and public, constitutional, administrative, and procedural – common to various systems of national law. They are the modern *ius gentium* in its wider sense. In the sense here suggested, they are no more than a modern formulation of the law of nature which played a decisive part in the formative period of international law and which underlay much of its development. For there is no warrant for the view that that law of nature was mere speculation which gave a legal form to deductive thinking on theology and ethics. It was primarily a generalization of the legal experience of mankind.’<sup>33</sup>*

Unlike Verdross,<sup>34</sup> Lauterpacht here locates the normative origin of the international legal order’s general principles not in moral ‘theory’ but in legal ‘practice’. As *legal* principles, they are derived from the common *legal* traditions of States,<sup>35</sup> and not from non-legal morality. And

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<sup>31</sup> Ibid., 49. To Lauterpacht, this view was mainly an achievement of a British-American conception of international law of which Westlake is celebrated as ‘foremost representative’ (ibid., 49 – fn1).

<sup>32</sup> Ibid., 297.

<sup>33</sup> Lauterpacht, ‘International Law – The General Part’, in: E. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume 1 (1970), 1 at 69 and 74 (emphasis added).

<sup>34</sup> Verdross, ‘Les Principes Généraux du Droit dans la jurisprudence internationale’, 52 *Collected Courses of the Hague Academy of International Law* (1935) 191.

<sup>35</sup> This explains why Lauterpacht is, through the ‘Annual Digest of Public International Law Cases’ (later: ‘International Law Reports’), passionately collecting extracts from national and international court decisions concerning international law.

importantly: the general principles in Article 38(3) are, when compared to the other two sources of international law, only a ‘supplementary’ or ‘subsidiary’ source: ‘The will of States as expressed in treaties, or failing that, in international custom, remains thus the primary source of law.’<sup>36</sup> General principles must be used to fill the ‘gaps’ in the international legal order; and in one of Lauterpacht’s most brilliant moves, the completeness of a legal system is itself seen as a ‘general principle of law’.<sup>37</sup>

But there is a still deeper relation between the (postulated) completeness of the international legal order and the judicial function in international law. This deeper relation had already surfaced in his ‘Private Law Sources’ (1927); yet a fully-fledged ontological reading of the judicial function only emerges in Lauterpacht’s second book: ‘The Function of Law in the International Community’ (1933). Here, he now investigates to what extent *courts* are an essential and necessary condition of any proper conception of ‘law’, and especially international law.<sup>38</sup>

## **B. The ‘Judicial Function’ and the Objectivity of International Law**

What does it mean to speak of the *legal* character of international law? To Lauterpacht, much of the norm-creation within the international legal order of his day had remained – through treaties and customs – in the hands of the States.<sup>39</sup> This state-dependence, as regards law-creation, however, meant that the essential quality of ‘law’ – its externality or objectivity – was still largely missing for international law:

‘The law’s external nature may express itself in the fact that it is a precept created independently of the will of the subjects of the law, or that it is valid and continues to exist in respect of the subjects of the law independently of their will. Of these two aspects of the external character of law, the second is the more conspicuous and, accordingly, more important in practice. ...In international society there is lacking to a

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<sup>36</sup> Lauterpacht, *Private Law Sources*, *supra* note 27, at 69.

<sup>37</sup> H. Lauterpacht, *The Function of Law in the International Community* (2011), 68.

<sup>38</sup> *Ibid.*, esp. 431- 446. For a similar argument, see also: Lauterpacht, ‘General Rules of The Law of Peace’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 1*, *supra* note 30, 179-444 at 193-200.

<sup>39</sup> This is of course confirmed by Article 38(1) and (2) of the PCIJ Statute.

large extent that feature of the external character of law which consists in its being created regardless of the will of those who are subject to it. That shortcoming must probably remain so long as there is no international legislature in existence – a development practically identical with the establishment of what is usually called a super-State. *The other manifestation of the legal nature of international law, namely, the objective ascertainment of right by courts, is one which could be effected within the frame of the existing practice and doctrine of international law. To acquiesce in the permanent absence also of that aspect of international law is to strain its legal character to the breaking point.*<sup>40</sup>

Lauterpacht's complex line of argument in the above passage can be summed up as follows. Building on the Kantian distinction between 'law' (external, objective) and 'morality' (internal, subjective), the external and objective character of law must manifest itself via its *independence* from the subjective wills of its subjects. In most modern societies, especially those organised as 'states', this independence is already guaranteed by positive legislation, because the latter can objectively bind even dissenting subjects and here manifest its *external* character. Yet in the absence of a majoritarian legislature in international society, the external nature of international law cannot be guaranteed in this way (not even through customary law); and it therefore follows that solely the existence of an international judiciary can guarantee the externality and normativity of international law 'as law'.<sup>41</sup>

Lauterpacht consequently rejects past authors that 'maintain that the existence of courts is not an indispensable condition' for a conception of (international) law; and he discards the 'false' view that 'law preceded the establishment of regular tribunals'.<sup>42</sup> Such a naturalist or historicist position is mistaken, because for international law the institutional existence of judicial

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<sup>40</sup> Lauterpacht, *The Function of Law*, *supra* note 37, 433-434.

<sup>41</sup> Lauterpacht here tacitly turns against British authors, such as Westlake (and Brierly), who had argued that the absence of an international legislature ought to also imply the absence of compulsory adjudication (J. Westlake, *International Law – Part I: Peace* (1910), 300-306). In his insightful 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals', 11 *BYIL* (1930) 134, that came to inform much of Part V of the 'Function of Law', he thus contradicts Westlake (and Brierly) by 'insisting that the difficulty arising from [the absence of an international legislature] cannot be solved by rejecting obligatory arbitration altogether, that is by aggravating one evil through perpetuating another of even graver and more anarchical consequence' (*ibid.*, 155).

<sup>42</sup> Lauterpacht, *The Function of Law*, *supra* note 37, at 431-432 (with specific reference to Bergbohm, Bluntschli, Heilborn, Strupp).

tribunals or courts is a *minimalist* condition for that law's external objectivity. Indeed, without the judicial function, the internal-subjective elements within the law-creating sources of international law (treaties, custom, natural law) would 'strain its legal character to the breaking point'.

It is against this normative-ontological commitment to international courts, as an *institutional* precondition for the possibility of international law, that Lauterpacht's 'Function of Law' offers a magnificent argument against the classic doctrine that international disputes are 'necessarily divided into two categories variously described as 'legal' and 'political', as 'justiciable' and 'non-justiciable'.<sup>43</sup> For once it is shown 'that there is no merit in a classification which is based in the opinion that certain categories of disputes are not amendable to judicial settlement',<sup>44</sup> all rules of international law can and must be subject to an – external – judicial determination. The 'externality' (and objectivity) of all international law is thus guaranteed through its *justiciability*; and since all international disputes are, according to Lauterpacht, intrinsically justiciable, all international law is law properly-so-called.

What, however, justifies the binding nature of that law? Having made his definition of international law contingent on its *independence* from its state subjects (externality), Lauterpacht cannot – of course – locate the reason for its validity in the (then) prevailing 'pacta sunt servanda' idea.<sup>45</sup> The latter's state-voluntarist essence is, he points out, already stretched beyond breaking point when applied to customary international law;<sup>46</sup> and when trying to justify an objective judicial function above states, it is simply inadequate. In search for a better philosophical justification, he therefore chooses something else: the general will of the international community. In Kelsenian language, he explains:

'An initial hypothesis expressed in the terms of *voluntas civitatis maximae est servanda* would point, as the source of law, to the will of the international society expressing

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<sup>43</sup> Ibid., ix. In the course of the monograph, Lauterpacht goes through the four major non-justiciability doctrines so as to prove them all wrong. Part II deals with the objection that there is no law (non liquet), which is countered by his completeness theorem and its assertion that there are no gaps in international law – already established in his first monograph. Part III concerns 'political disputes' in which vital state issues are said to be excluded. Part IV deals with the problem of change in international law, while Part V finally discusses the idea that there is a distinction between rights and interests (or tensions) with the latter not being capable of judicial resolution.

<sup>44</sup> Lauterpacht, *The Function of Law*, *supra* note 37, at ix.

<sup>45</sup> Lauterpacht, *The Function of Law*, *supra* n.37, at 424-428. Hans Kelsen, Dionisio Anzilotti and Alfred Verdross had all subscribed to the idea in one form or another.

<sup>46</sup> Ibid, 429.

itself in contractual agreements between its constituent members, in their customs, and in the general principles of law which no civilised community can afford to ignore; it would refer to the *civitas maxima* as meaning that super-State of law which States, through the recognition of the binding force of international law *qua* law, have already recognized as existing over and above national sovereignties, it would be comparable with the fact that the authority of that super-State extends, so far, not so much to the creation of new concrete rules as to the maintenance and respect of obligations already expressed or contracted by implication.’<sup>47</sup>

This communitarian position considers ‘the existence of the international community [as] the true basis of international law’;<sup>48</sup> yet unlike the nineteenth-century Historical School,<sup>49</sup> this international community is not a ‘natural’ or ‘moral’ community based on (rationalised) custom. Instead, Lauterpacht’s hypostatized community is ‘the totality of human beings inhabiting the earth’;<sup>50</sup> and he particularly mentions Grotius and Wolff as inspirations for this view. A more direct inspiration behind Lauterpacht’s ‘initial hypothesis’ however was undoubtedly Hans Kelsen, who had – only a few years earlier – evocatively revived the idea of a cosmopolitan *civitas maxima* and linked it to the idea of a ‘super-state’.<sup>51</sup>

### 3. The Legislative Function and the Organisation of Peaceful Change

The modern international community is, through the League of Nations, an *organised* community with the 1919 Covenant establishing a ‘higher law’ – the ‘Constitution’ of

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<sup>47</sup> Ibid., 429-430.

<sup>48</sup> Ibid., 430.

<sup>49</sup> For some literature here, see *supra* note 15.

<sup>50</sup> Lauterpacht, ‘General Rules of The Law of Peace’, *supra* note 38, at 193.

<sup>51</sup> Lauterpacht, *The Function of Law*, *supra* note 37, at 431 – fn2 expressly refers to Kelsen’s ‘Das Problem der Souveränität und die Theorie des Völkerrechts’ (1920). For Lauterpacht’s own thoughts on the similarities and differences with Kelsen’s international law theory, see: Lauterpacht’s ‘Kelsen’s Pure Science of Law’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume 2 (1975), 404-430.

international society.<sup>52</sup> The creation of the League indeed signified to Lauterpacht, as well as many others,<sup>53</sup> a revolutionary break with the old ‘Victorian’ legal order and on the basis of which a ‘new’ international law had emerged. The Covenant was a higher law, because ‘the substance of its law differs so radically from other international conventions in its scope and significance as a purposeful instrument in the process of the political integration of mankind’.<sup>54</sup> Article 20 of the Covenant in particular had, Lauterpacht thinks, established ‘the absolute primacy of the Covenant over any other treaty engagements of Member States of the League’;<sup>55</sup> and the future development of international law would thus have to take place *within the constitutional framework set by the Covenant*.

The greatest problem for the Covenant was however this: how to organise peaceful change and through what channels? Lauterpacht’s answer to this question operates on two parallel levels. He first analyses the *de lege lata* provisions for legal change under the Covenant (3.1.), before he subsequently explores the *de lege ferenda* conditions of possibility for future international legislation (3.2.).

### **A. The De Lege Lata Channels for Peaceful Change in the Covenant**

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<sup>52</sup> Lauterpacht, ‘The Covenant as the Higher Law’, 17 *BYIL* (1936) 54. A reference to the Covenant as the ‘Constitution’ of international society can also be found in Lauterpacht’s editions of ‘Oppenheim’.

<sup>53</sup> The historical literature on the epoch-making break of ‘1914’ is enormous. Let me only refer to R. Albrecht-Carrié’s ‘A Diplomatic History of Europe since the Congress of Vienna’ (1958), esp. 300. Most interwar scholars of international law (Jitta, Politis, Hudson, McNair – to name just a few) think that after ‘1919’ a ‘new’ international law had emerged, whose novel conceptual structure marked a new epoch in the history of the discipline.

<sup>54</sup> Lauterpacht, ‘The Covenant as the Higher Law’, *supra* note 52, at 64-65.

<sup>55</sup> *Ibid.*, 55. Article 20 stated: ‘The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.’ For Lauterpacht, the provision was not only ‘a knife blunted by cutting of the dead wood of inconsistent treaties in force when states enter the League’; it was rather ‘a perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members, whenever concluded’ (*ibid.*, 58-59). This effect would also, *mutatis mutandis*, apply to treaties concluded between members of the League and third states (*ibid.*, 60).’

The problem of peaceful change had, for some time, troubled Lauterpacht. For with ‘war’ as the Hegelian instrument of historical change ‘collectivised’ by the 1919 Covenant,<sup>56</sup> and formally outlawed by the 1928 Kellogg-Briand Pact,<sup>57</sup> the international community must, Lauterpacht claims, urgently ensure that ‘something else is put in place of the proscribed institution of war as an instrument of change’.<sup>58</sup> The central question for modern international law, therefore, becomes this:

‘What is peaceful change as an effective institution of international law or of international society? It is the acceptance by States of a legal duty to acquiesce in changes in the law decreed by a competent international organ. It is the existence of a legislature imposing, if necessary, its fiat upon the dissenting State. This, it is submitted, is the only proper meaning of peaceful change as an effective legal institution of the international society. Undoubtedly peaceful change may be brought about, in individual cases, in various other ways... [However], peaceful change as an effective part of the constitution of the international society means international legislation, not in its popular, loose sense of multilateral treaties of a general character but in the sense of an overriding external will.’<sup>59</sup>

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<sup>56</sup> See Article 11 of the League Covenant: ‘Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.’

<sup>57</sup> For Lauterpacht, the 1928 General Treaty for the Renunciation of War (Kellogg-Briand Pact) represented a ‘revolutionary event in the history of international law’ (Lauterpacht, ‘Peaceful Change – The Legal Aspect’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume 5 (2004), 7 at 10). The importance Lauterpacht attaches to the 1928 Treaty can clearly be seen in the 1935 Preface to Volume II of the Fifth Edition of ‘Oppenheim’.

<sup>58</sup> Lauterpacht, *Peaceful Change*, *supra* note 57, at 10. He explains: ‘Prior to that [1928] Treaty the system of international law, glaringly inconsistent in many matters, was symmetrical in one respect: while it made no provision for institutional peaceful change, it permitted war as an instrument for changing the existing legal position. Every State had the right, by formally going to war and this risking its own existence, to alter the status quo either by annihilating the defeated opponent or by dictating to him the conditions of peace.’

<sup>59</sup> *Ibid.*, 11-12. For a very similar argument see also Lauterpacht’s 1937 Hague Lectures ‘General Rules of the Law of Peace’, *supra* note 38, whose Chapters 12 and 13 are entitled ‘The Organization of Peace and the Revision of the ‘Status Quo’.’ For his critique of the ‘loose’ metaphorical use of the term ‘legislation’, see: *ibid.*, 414.

What channels for legislative change had the League provided for? For Lauterpacht, the Covenant's existing institutional channels were disappointing; yet he nonetheless finds in its Article 19 'the first deliberate attempt to create an institution of peaceful change within the framework of a comprehensive system of legal organisation'.<sup>60</sup> The wording of the provision seemed hardly promising.<sup>61</sup> Nevertheless, to Lauterpacht '[t]here ought to be no doubt' that 'the article is wide enough to embrace all claims for the change of the existing status quo out of a treaty or otherwise' and that a '[r]evision of the law is thus constituted a task and legitimate object of the League as a whole'.<sup>62</sup> However, the League's weak legislative organs, and especially its insistence on unanimity voting had not yet given the international community a functioning international legislature.

Lauterpacht, consequently, turns to a second option and moves to explore those Covenant procedures 'falling short of an international legislature'; and, he here specifically looks at the possibility of legal change through judicial organs.<sup>63</sup> This possibility is, with Kelsen, unreservedly accepted; and again following his Viennese mentor, the concept of 'judicial legislation' is thus equally endorsed:

'Judicial law-making is a general legal phenomenon in societies where justice is administered by judicial tribunals. Accordingly, like courts within the state, so also international tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law. When applying the necessarily abstract rule of law to concrete cases, they create the actual legal rule for the individual case before them. The actual operation of the law in society is a process of gradual crystallization of the abstract legal rule beginning with the constitution of the state, as the most fundamental and abstract body of rules, and ending with the concrete shaping of the individual legal relation by a judgment of a court[.]'<sup>64</sup>

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<sup>60</sup> Lauterpacht, 'Peaceful Change', *supra* note 57, at 20.

<sup>61</sup> Article 19 of the League Covenant stated: 'The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.'

<sup>62</sup> Lauterpacht, 'Peaceful Change', *supra* note 57, at 18 and 20.

<sup>63</sup> *Ibid.*, 12.

<sup>64</sup> Lauterpacht, 'The Absence of an International Legislature', *supra* note 41, at 144.

Due to the absence of a proper international legislature, the need for such judicial law-making will be ‘considerable’; yet, Lauterpacht categorically insists that any judicial legislation ‘is actually and necessarily performed by international judges *in the ordinary exercise of their judicial function*’.<sup>65</sup> The judicial function is, consequently, seen to have strict limits: ‘Legislation cannot be let in by a backdoor by transforming the nature of the judicial function;’<sup>66</sup> and it therefore follows that ‘international judicial and arbitral organs cannot legitimately play a prominent part in the process of peaceful change’.<sup>67</sup>

The gradual and concrete development of international law is, nevertheless, an important task of the International Court;<sup>68</sup> and Lauterpacht therefore not only subscribes to a *de facto* doctrine of judicial precedent,<sup>69</sup> he also comes to consider judicial legislation as a *de facto* source of international law.<sup>70</sup> But does this acceptance of judicial legislation make Lauterpacht a ‘pragmatic’ rule-sceptic and ‘realist’ denier of the objective nature of international law? Serious doubts are in order. For while he accepts, with Kelsen, a law-creating role for the judiciary;<sup>71</sup> and while he is, again with Kelsen, sceptical towards technical methods of judicial interpretation,<sup>72</sup> Lauterpacht nonetheless appears to believe that there can be ‘one correct interpretation of the law’ by a court:

‘[The judicial] function, far from being limited to discovering the meaning of a text, may legitimately impart to it a meaning by reference to the paramount principle of the completeness and the rational development of the law and of the requirements of justice in the light of the purposes of the treaty viewed as a whole. *This does not mean that the judgment thus given is based on ‘political’ considerations and that when confronted*

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<sup>65</sup> Ibid., 145 and 155 (emphasis added).

<sup>66</sup> Lauterpacht, ‘Peaceful Change’, *supra* note 57, at 14.

<sup>67</sup> Ibid., 16.

<sup>68</sup> See especially: H. Lauterpacht, *The Development of International Law by the International Court* (1958).

<sup>69</sup> To Lauterpacht, this was best achieved by constructing Article 59 of the ICJ-Statute narrowly by claiming that ‘the limiting terms of Article 59 refer to the actual ‘decisions’ of the Court, i.e., to the operative part as distinguished from the reasoning underlying the decision and containing the legal principles on which it is based’ (ibid., 8).

<sup>70</sup> Ibid., 21.

<sup>71</sup> Ibid., 156 (emphasis added): ‘Judicial legislation, *so long as it does not assume the form of a deliberate disregard of the existing law*, is a phenomenon both healthy and unavoidable.’; and, ibid., 399: ‘While all these considerations bring into relief the element of judicial discretion, they must not be allowed to obscure the fact – which is ultimately of overriding importance – that such discretion is circumscribed by the duty to apply the existing law [.]’

<sup>72</sup> H. Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, 26 *BYIL* (1949) 48 at 53.

*with a variety of possible interpretations the judicial decision is in the last resort a political act. For although there are many possible interpretations of a disputed provision there is in theory – in what is believed to be the accurate legal theory – only one correct interpretation of the law.*

The balance in favour of that correct interpretation may be indeed slight and the merits of alternative interpretations may be considerable, but to say that in every case there are a number of *equally* correct legal interpretations and that the choice between them is – legitimately, avowedly, and consciously – the result of a political decision or of political predilections of the judge is to put forward an assertion which denies the very existence of the judicial function in a society under the rule of law.’<sup>73</sup>

Nevertheless, and in view of the strict limits imposed on the judicial function,<sup>74</sup> the urgent need to establish an international legislature to fully ensure peaceful change emerges once more very clearly. Yet having resigned to the dysfunctional ‘reality’ of the League by the mid-1930s, Lauterpacht began, especially after 1937, to play with an ‘utopian’ thought-experiment that was to explore the conditions of possibility for international legislation. He thereby takes, as his transcendental starting point, ‘the view that no progress is possible in relations of States without an organic provision for the change of the law; to take, accordingly, the principle of supranational legislation as the starting point of inquiry; and to try to discover on what conditions and subject to what limitations that principle has at present a rational claim to and a reasonable chance of acceptance by States’.<sup>75</sup>

Let us explore this ‘transcendental’ idea in more detail.

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<sup>73</sup> Ibid., 81-82 (emphasis added). The original passage contains a reference to Kelsen’s ‘The Law of the United Nations’ (1950), xvi. See also: Lauterpacht, *The Development of International Law*, *supra* note 68, at 21: ‘International tribunals, when giving a decision on a point of international law, do not necessarily choose between two conflicting views advanced by the parties. They state what the law is.’

<sup>74</sup> H. Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, *supra* note 72, at 83: ‘The law-creating autonomy and independence of judicial activity may be an unavoidable and beneficent necessity. But they are so only on the condition that the judge does not consciously and deliberately usurp the function of legislation.’

<sup>75</sup> Lauterpacht, ‘Peaceful Change’, *supra* note 57, at 22.

## **B. The ‘Conditions of Possibility’ for Future Change through Legislation**

What are, *de lege ferenda*, the conditions of possibility for peaceful change? Lauterpacht’s ‘General Principles of the Law of Peace’ (1937) insists that the key to peaceful change lies in the idea of international legislation ‘in its primary and non-metaphorical sense’, that is: a law adopted by ‘[a]n international legislature [as] the organ of a supra-national authority’.<sup>76</sup> That ‘revolutionary innovation’, he quickly admits, however meant accepting a ‘World State’ in that it would imply that individual States could be overruled because the very concept of legislation implied the abandonment of the principle of unanimity.<sup>77</sup>

Some further thinking on the legislative function in the international community emerged in ‘Sovereignty and Federation in International Law’ (1939).<sup>78</sup> Yet his most remarkable study of the conditions of possibility for peaceful change through international legislation can be found in ‘The Principles of International Organization’ (1942/43).<sup>79</sup> In this posthumously published masterpiece, Lauterpacht comes to list ten core principles that he considers necessary for a viable future World Organisation – only two of which shall interest us here.<sup>80</sup> As regards an international legislature, Lauterpacht states:

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<sup>76</sup> Lauterpacht, ‘General Rules of the Law of Peace’, *supra* note 38, at 433.

<sup>77</sup> *Ibid.*, 435.

<sup>78</sup> Lauterpacht, ‘Sovereignty and Federation in International Law’, in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume 3 (1977), 5. This piece appears to be a transitional piece in which Lauterpacht wished to engage with the theory of federalism analytically. In it, he not only discussed the US American theory of divided sovereignty (*ibid.*, 9) but also the European theory of undivided sovereignty and the resultant two federal formats of ‘Federal State’ and ‘Confederation’ (*ibid.*, 10). He originally rejects the idea of a European Federation State (*ibid.*, 18 and 24); yet he also recognizes, like Kelsen, that ‘the typical forms of unions of States are to a large extent a matter of degree’ (*ibid.*, 25).

<sup>79</sup> Lauterpacht, ‘The Principles of International Organization’, in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume 3 (1977), 461. The piece was posthumously published; yet it is central for an understanding of Lauterpacht’s general international law project.

<sup>80</sup> Lauterpacht’s ten principles are: (1) Universality, (2) Continuity, (3) Prohibition of war and of armed force; (4) Obligatory rule of law; (5) Collective security and enforcement of law; (6) Peaceful change and international legislation; (7) The principle of majority rule; (8) International recognition and protection of the rights of man; (9) Coordination of international administration; (10) The constitution of the international organization and the peace settlement. In the following analysis, I will only look at (6) and (7).

‘Effective organs of peaceful change are indispensable to the satisfactory functioning of any political society, including that of the society of nations. (...) No substantial and sustained progress in the legal organization of international society and of international peace is likely unless States agree to international legislation thus conceived and implying a limitation of sovereignty more considerable than the principle of obligatory judicial settlement or renunciation of the right to resort to war or armed force. For these reasons, no scheme of international organization can be regarded as adequate which does not include constructive provisions for effective machinery for peaceful change as well as for international legislation in general. Neither can any such scheme be regarded as adequate if, though apparently providing for international legislation, it uses that term in its loose and metaphorical connotation as is the case when unanimity of all or some of the legislative organs is postulated as a condition of valid legislation.’<sup>81</sup>

The concrete conditions of possibility for international legislation thereby are: First, there must be clear competence limits to any international legislative function.<sup>82</sup> Second, while unanimity voting must be abandoned immediately<sup>83</sup> any transition to majority voting ‘must be gradual’ and should thus pass through ‘the adoption of the principle of a qualified majority’;<sup>84</sup> but once sufficient time has passed, ‘[t]he governing principle in international organizations must be that of a [simple] majority vote’.<sup>85</sup> This move to majoritarianism must – thirdly – also mean that the political equality of states be reconsidered: ‘The abandonment of the principle of unanimity and the adoption of majority rule – simple or qualified – can have useful application only if the future international organization is successful in discarding that aspect of the doctrine of equality of States which expresses itself, among other things, in equality of voting power.’<sup>86</sup>

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<sup>81</sup> Ibid., 485.

<sup>82</sup> Ibid., 486: ‘There would, of course, be nothing new in limiting, however drastically, the legislative powers of the international authority. The delineation of the respective legislative competencies of a federation and of its member States is a constant feature of federal constitutional practice.’

<sup>83</sup> Ibid., 491. Lauterpacht states, without quoting Rousseau, that ‘the principle of liberum veto, is a manifestation of anarchy’.

<sup>84</sup> Ibid., 487.

<sup>85</sup> Ibid., 492.

<sup>86</sup> Ibid., 492. He further explains: (ibid., 493): ‘It is of no consequence whether unanimity is frustrated by one dissenting vote or twenty. The position is altogether different when a majority, simple or qualified, becomes the governing principle. When that happens, equality

Any move to majority voting ought, consequently, go hand in hand with a renunciation of the representational equality of states, because the latter is ‘incompatible with the requirements of an effective and progressive international organization’.<sup>87</sup> Differential representation within a future World Assembly could, Lauterpacht – fourthly – adds, also give rise to ‘the possibility of the gradual acceptance of the principle that the delegates to the general Assembly ought to be the representatives not only of their Government but also of the nation at large’, which could turn the proposed general Assembly into ‘a true Parliament of Man’.<sup>88</sup>

Was this – utopian – international federalism, elaborated between 1937 and 1943, abandoned by a ‘pragmatic’ and ‘realist’ Lauterpacht after World War II? That this was really *not* the case is confirmed by the inclusion of very similar thoughts in Lauterpacht’s last ‘Oppenheim’ in 1955.<sup>89</sup> Here he unconditionally confirms that the constitutional features of a future (universal) international organisation must not fundamentally differ from those of traditional States.<sup>90</sup> The international community should thus have a collective executive force, a compulsory judicial process and a proper majoritarian legislature; and all three governmental functions, Lauterpacht admits, will require the surrender of vital attributes of state sovereignty.<sup>91</sup> This had not yet happened in 1955, but it must, according to him, ‘*be regarded at present as the principal political goal, of compelling urgency, incumbent upon human society*’.<sup>92</sup>

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of voting power may mean that a majority of small or diminutive States, representing an insignificant fraction of the population or of the surface of the world, may be in a position to impose their will upon three or four Great Powers representing the bulk of the population of the world and of its resources. It may mean that a minority of small or diminutive States may, when a qualified majority is required, prevent measures of vital importance and urgency to international society.’

<sup>87</sup> Ibid., 493. Lauterpacht proposes a system of weighted votes for states that takes account of their population size, the extent of their territory, their political importance etc., and even offers a table of voting strength in a future Council and General Assembly (ibid., 495).

<sup>88</sup> Ibid., 496.

<sup>89</sup> See Lauterpacht, *Oppenheim: International Law*, *supra* note 25, whose Part I, Chapter IV, Section I is entitled ‘The Principles of International Organisation’ and is clearly inspired by Lauterpacht’s unpublished earlier piece of the same name.

<sup>90</sup> Ibid., 371.

<sup>91</sup> Ibid. Lauterpacht has now come to fully accept the US American idea of divided sovereignty (ibid., 122); and concludes: ‘As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.’

<sup>92</sup> Ibid., 373 (emphasis added).

To achieve this urgent goal, no pragmatic half-measures help. For considering that each governmental function is intrinsically connected to another,<sup>93</sup> Lauterpacht believes that solely the parallel and simultaneous, even if only partial, transfer of all three functions *at once* could lead to a successful World Organisation. And he leaves no doubt, too, that ‘an essential purpose’ of that World Organisation must be the protection of international human rights.<sup>94</sup> This relation between international organisation(s) and human rights deserves, therefore, our attention next.

#### 4. The Natural Law ‘Function’ and International Human Rights

All his life, Lauterpacht resolutely rejected the state-positivists’ view that only states – and not individuals – could be subjects of international law.<sup>95</sup> To him, that view simply did not accord with legal practice;<sup>96</sup> and it contradicted his normative belief that individuals were the ultimate subjects of all law, including international law.<sup>97</sup>

His early position on individuals did, however, not yet provide for an explicit conception of ‘international human rights’. The concrete contours of this novel idea indeed only emerge after 1937 and particularly during the Second World War.<sup>98</sup> Here, Lauterpacht underwent a significant change of ‘sensitivity’ – a change that the emergence of the totalising State had

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<sup>93</sup> Ibid., 374. To Lauterpacht, the renunciation of war is intrinsically linked to the existence of compulsory adjudication; and the latter would, in turn, only be viable if there was an international legislature; with an international legislature requiring, in turn, the partial renunciation of the principle of the sovereign equality of States!

<sup>94</sup> Ibid., 371: ‘[T]he political organisation of mankind must give effect to the most fundamental of all legal and political principles, namely, that the individual human being is the ultimate unit of all law. This means that it must be considered an essential purpose of the organised society of States to assist in securing – and, in the long run, to secure – the freedom of the individual, in all its aspects, by means of comprehensive and enforceable obligations binding upon the members of the Organisation.’

<sup>95</sup> Lauterpacht, ‘Westlake and Present Day International Law’, *supra* note 25, at 309-315.

<sup>96</sup> Ibid., 310.

<sup>97</sup> Lauterpacht’s favorite quote from Westlake, taken from the latter’s ‘Principles of International Law’, is that within the ‘society of states’, states are its ‘immediate’ but men are its ‘ultimate’ members in that ‘[t]he duties and rights of states are only the duties and rights of men who compose it’ (ibid., 314).

<sup>98</sup> Lauterpacht, ‘General Rules of the Law of Peace’, *supra* note 38, at 295-304.

caused.<sup>99</sup> Lauterpacht's changed sensibility henceforth expresses itself in a new 'Grotian' balance in which natural rights move to the centre stage (4.1.), but in which – importantly – the *legal* nature of human rights must always be guaranteed by international institutions (4.2.).

### **A. Lauterpacht's Neo-Grotian Balance and the Centrality of Human Rights**

In his 'Principles of International Organisation' (1942), Lauterpacht had already begun to explicitly argue for '[t]he necessity of making the protection of the fundamental rights of man part of the *positive law* of the society of nations';<sup>100</sup> and he therefore urged that any future World Constitution 'ought at the same time to adopt as an integral part an International Bill of the Rights of Man to be framed and adopted concurrently'.<sup>101</sup> But where would these human rights come from? His 1942 Grotius Lecture offers some valuable insight into his new thinking:

'On the face of it, the effective international protection of the rights of man is *independent of any doctrine of natural law and natural rights*. For it would appear that the main reason for any such radical innovation as is implied in an International Bill of the Rights of Man is the inadequacy of the notion of natural rights as the sole safeguard of the rights of man. But there is room for the view that to eliminate the ideas of natural law and natural rights from the study of the question of the international protection of human rights is to renounce the faculty of understanding their growth in the course of history and their association with that law of nations which is now to become its ultimate sanction.'<sup>102</sup>

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<sup>99</sup> The influence of the Second World War and the rise of the 'total state' (and total war) in Lauterpacht's conception of human rights is clearly expressed in Lauterpacht's two books on human rights. In his 'International Law and Human Rights' (1950), for example, Lauterpacht makes clear that (ibid., 112) '[t]he renaissance of the law of nature at the beginning of the twentieth century was not yet another theory of the judicial function' but rather 'the unmistakable result of the urge to find a spiritual counterpart to the growing power of the modern State'.

<sup>100</sup> Lauterpacht, 'The Principles of International Organization', *supra* note 79, at 497 (emphasis added).

<sup>101</sup> Ibid., 499.

<sup>102</sup> Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man', 29 Transactions of the Grotius Society (1943) 1.

In the above quotation, human rights are – crucially – *not* identified with the subjective and speculative natural law of the past. Instead of the idealist rationalism of Wolff or Kant, Lauterpacht’s human rights were *not* to derive from human reason; rather, they were – like the general principles of Article 38(3) PCIL Statute, discussed in Section 2 – to emerge out of ‘generalizations from actual experiences’.<sup>103</sup> He uncompromisingly prefers *positive* rights to natural rights; yet the latter must always inspire the former: ‘The law of nature must, as it has done in the past, supply much of the spiritual basis and much of the political inspiration of that elevation of the rights of man to a legal plane superior to the will of sovereign States’.<sup>104</sup> For since the law of nature has, in its historic development, aimed at the ‘vindication of the rights of man’,<sup>105</sup> it offers ‘an ever-present impulse and a fertile source of vitality and improvement’ for the positive law. Nevertheless: ‘[i]f the enthronement of the rights of man is to become a reality, then they must become part of the *positive law of nations* suitably guaranteed and enforced’.<sup>106</sup>

This midway position between ‘positivism’ and ‘naturalism’ had been named ‘Grotian’ by Oppenheim; and it is this ‘Grotian tradition’ that Lauterpacht comes to endorse and celebrate after World War II.<sup>107</sup> Behind this new self-identification however hid a significant shift in Lauterpacht’s intellectual sensibility that had now moved *closer* towards the naturalist pole. This ‘neo-Grotian’ compromise was characterised by a number of core features,<sup>108</sup> with the second one (‘The Acceptance of the Law of Nature as an Independent Source of International

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<sup>103</sup> Ibid., 15. This point is repeated in Lauterpacht’s ‘International Law and Human Rights’, *supra* note 99, at 98: ‘From the very inception the theories of natural law were generalizations from actual experience. They were attempts to put in the form of general law the fact of a uniformity as ascertained by observation and study of evidence – although it was not always the kind of evidence that would satisfy the modern mind.’

<sup>104</sup> Lauterpacht, *The Law of Nations, the Law of Nature and the Rights of Man*, *supra* note 102, at 30.

<sup>105</sup> Ibid., 20.

<sup>106</sup> Ibid., 31 (emphasis added).

<sup>107</sup> H. Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *BYIL* (1946) 1.

<sup>108</sup> The eleven features are: (1) ‘The Subjection of the Totality of International Relations to the Rule of Law’, (2) ‘The Acceptance of the Law of Nature as an Independent Source of International Law’, (3) ‘The Affirmation of the Social Nature of Man as the Basis of the Law of Nature’, (4) ‘The Recognition of the Essential Identity of States and Individuals’, (5) ‘The Rejection of ‘Reason of State’’, (6) ‘The distinction between Just and Unjust Wars’, (7) ‘The Doctrine of Qualified Neutrality’, (8) ‘The Binding force of Promises’, (9) ‘The Fundamental Rights and Freedoms of the Individual’, (10) ‘The Idea of Peace’, (11) ‘The Tradition of Idealism and Progress’.

Law') here offering the perhaps deepest insight into Lauterpacht's post-1945 thinking. He writes:

'The fact is that while within the state it is not essential to give to the ideas of a higher law -of natural law - a function superior to that of providing the inarticulate ethical premiss underlying judicial decisions or, in the last resort, of the philosophical and political justification of the right of resistance, in the international society the position is radically different. There -in a society deprived of normal legislative and judicial organs - the function of natural law, whatever may be its form, must approximate more closely to that of a direct source of law. In the absence of the overriding authority of the judicial and legislative organs of the state there must assert itself-unless anarchy or stagnation are to ensue-the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of states. (...) Undoubtedly the law of nature has often been resorted to in support of causes dubious and retrogressive. But this ambivalence of the ideology of natural law is only slightly relevant in the field of international law. There, by and large, it has acted as a lever of progress.' <sup>109</sup>

In the absence of fully functioning legislative and judicial organs within the international community, the function of natural law is here seen as different to its role in modern states. For instead of only providing a philosophical justification for positive law, natural law must – within the international legal order – more closely approximate a formal source of law. This recognition of natural law, 'as a source of law different from and, in proper cases, superior to the will of sovereign states',<sup>110</sup> cannot – of course – rely on the behaviour of States; its substance must, instead, derive from the 'moral', 'rational' and 'social' nature of man.<sup>111</sup> Yet the function of natural law is not to replace positive law, as Lauterpacht considers, citing Bentham, natural law to be legally inadequate: '*The law of nature and natural rights can never be a true substitute for the positive enactment of the law of the society of States.*'<sup>112</sup>

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<sup>109</sup> Ibid., 22 -24.

<sup>110</sup> Ibid., 24.

<sup>111</sup> Ibid., 27: 'In fact, one of the most decisive features of the teachings of Grotius is the close analogy of legal and moral rules governing the conduct of states and individuals alike'.

<sup>112</sup> H. Lauterpacht, *An International Bill of the Rights of Man* (1945), 3.

The reasons for Lauterpacht's preference of positive law over natural law are clear. World War I had shown the imperative need to positively 'organise' world society through international institutions, and World War II had further demonstrated that the 'protection of the fundamental rights of man must be an integral part of any rational scheme of world order'.<sup>113</sup> The *institutional* protection of human rights must therefore, Lauterpacht thinks, be based on the 'revolutionary innovation' of a *positive* International Bill of the Rights; as only such an – enforceable – legal instrument can ensure the proper protection of human rights in the international sphere.<sup>114</sup>

### **B. From Natural to Positive Rights: The International Bill of Rights**

The development and drafting of an international Bill of Rights becomes a central concern in Lauterpacht's later academic life.<sup>115</sup> His 'International Law and Human Rights' (1950) offers, in this context, the most comprehensive and mature exposition of the subject. Written against the historical backdrop of the recently created United Nations (1945), the book is, in equal measure, a history-cum-theory of human rights law as well as a critical analysis of the institutional structures of the UN Charter.

With the United Nations, Lauterpacht claims, the *institutional* recognition of human rights had become a reality.<sup>116</sup> For while the original text of the Charter had not expressly incorporated

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<sup>113</sup> *Ibid.*, v.

<sup>114</sup> *Ibid.*, 3.

<sup>115</sup> After his 1937 Hague Lecture, *supra* note 38, and his 1943 Grotius Lecture, *supra* note 102, Lauterpacht published his first monograph on the matter in 1945 as 'An International Bill of the Rights of Man', *supra* note 112). After the Second World War, his thinking on human rights would be further developed in his Hague Lectures on 'The International Protection of Human Rights', 70 *Collected Courses of the Hague Academy of International Law* (1947) 1, as well as in two articles on 'The Subjects of the Law of Nations' in the *Law Quarterly Review* (Part I: 63 LQR (1947) 438, and Part II 64 LQR (1948) 97) and an article on 'The Universal Declaration of Human Rights', 25 *BYIL* (1948) 354. The intellectual culmination of this extensive engagement with international human rights would be his magnum opus 'International Law and Human Rights', *supra* note 99, in 1950. On the originality of Lauterpacht's conception of international human rights, see: Simpson, Hersch Lauterpacht and the Genesis of the Age of Human Rights, 120 LQR (2004) 49-80.

<sup>116</sup> The 1945 UN Charter expressly referred to 'fundamental human rights' and 'the dignity and worth of the human person' in its preamble; and see also: Articles 1(3), 13(1), 55, 62 and 68, 76.

an international ‘Bill of Rights’; the latter was, Lauterpacht insists, ‘inherent in it’.<sup>117</sup> The actual drafting of that Bill had however been delayed; and, in the meantime, a ‘Universal Declaration of Human Rights’ had been adopted instead. Yet this ‘Declaration’ was without legal force and the ‘natural law’ philosophy underlying it, Lauterpacht bitterly laments, therefore represented a serious step backwards that violated the very spirit of the Charter.<sup>118</sup>

What institutional qualities should a future – positive – international Bill of Rights thus have? Lauterpacht’s early work on the judicial function here suggests a straightforward plea in favour of judicial review; but despite believing this to be the ‘logical’ solution, he had originally considered it to be ‘unsound and impracticable’.<sup>119</sup> In 1950, this pragmatic view was however quickly replaced by a much more idealist conviction: ‘in the long run an International Court of Human Rights must be regarded as an essential part of the Bill of Rights’.<sup>120</sup> Only an international court could, Lauterpacht now insists, make human rights ‘positive’ rights; and he therefore, radically, demands that individuals ought to be allowed to become parties to international cases.<sup>121</sup>

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For Lauterpacht, this textual recognition of human rights constituted a fundamental difference between the League of Nations and the United Nations (see: Lauterpacht, ‘The International Protection of Human Rights’, *supra* note 115, at 5).

<sup>117</sup> Lauterpacht, *International Law and Human Rights*, *supra* note 99, at 273. The inclusion of an ‘International Bill of Rights’ in the UN Charter had been rejected by the United States due to the fear that it would not pass ratification by the US Senate.

<sup>118</sup> For Lauterpacht’s critical assessment of the Declaration see his phenomenally critical ‘The Universal Declaration of Human Rights’, *supra* note 115, where he bitterly complains (*ibid*, 356): ‘The delegates gloried in the profound significance of the achievement whereby the nations of the world agreed as to what are the obvious and inalienable rights of man – so obvious and fundamental that they considered the very proposal to describe them as grounded in nature to impart to the Declaration an undesirable element of controversy and confusion – but they declined to acknowledge them as part of the law binding upon their states and governments. (...) [T]he refusal to recognize them as juridically binding in the sphere of conduct was fully resolved by the acknowledgement of their validity in the realm of conscience and ethics.’ And (*ibid*. 369): ‘Not being a legal instrument, the Declaration would appear to be outside international law.’

<sup>119</sup> Lauterpacht, *An International Bill of the Rights of Man*, *supra* note 112, at 173-174.

<sup>120</sup> Lauterpacht, *International Law and Human Rights*, *supra* note 99, at 382. He adds: ‘In 1945 [my original objections] led me to the conclusion that an International Court of Human Rights is not practicable. They can no longer be regarded as decisive.’

<sup>121</sup> For Lauterpacht’s thoughts on the standing of private parties before international courts and tribunals, see Part I of his ‘The Subjects of the Law of Nations’, *supra* note 115, at 450-460, esp. at 453: ‘It would thus appear that there is nothing inherent in the structure of international law which prevents individuals and, generally, persons other than States from being parties to proceedings before international tribunals. The matter is one of machinery and of the determination of governments in any given case.’ Lauterpacht goes even further (*ibid*, 459):

Yet the UN system, even once given an International Bill of Rights and an international court, was only ‘the first step in the inauguration of a new period in the mutual relations of the State, the individual and the international society’, because its ultimate development depended ‘upon a more radical change in the political and moral conceptions’.<sup>122</sup> This radical change implied, according to Lauterpacht, a complete re-thinking of all core concepts of international law: sovereignty, federation and the rights of man. And since these concepts are – again – seen as inherently interconnected,<sup>123</sup> they could only be reconceptualised together! The ending of his ‘International Law and Human Rights’ thus returns to a theme already discussed in Section 3:

‘In this connexion it is fitting to draw attention, by way of general conclusion, to the intimate relation between the three central issues of international law and organisation: the idea of sovereignty, the notion of the *civitas maxima* conceived as a World Federation of States, and the international recognition and protection of the rights of man. It is the abiding lesson of history and a compelling postulate of reason that a world – embracing Federation—of which regional Federations may be a necessary stage—is, in the words of Immanuel Kant, the only means of attaining perfect internal government, which is, in turn, the essential condition of the realisation of the moral and intellectual capacities of mankind. If that is so, then the idea of an all-embracing Federation of States must be regarded not as an infinite ideal but as an object of a moral duty of positive action and as a practical standard of human endeavour.’<sup>124</sup>

The political and legal integration of mankind, under a federal constitution, may seem utopian; yet the US American conception of ‘the division of sovereignty between the Union and the

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‘Any developments on the lines suggested may pave the way for a change even more far-reaching. That change would consist in conceding a right of appeal before the highest international authority to the State’s own nationals against any violations of their rights under international law. A truly revolutionary change of that nature would presuppose one even more radical and fundamental- the previous acknowledgment of rights enjoyed by the State’s own subjects as originating in international law. We are not at liberty to regard any such development as purely chimerical.’ For Lauterpacht’s active proposal to change the Statute of the ICJ to include private party applicants, see: ‘The Revision of the Statute of the International court of Justice’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume V (2004), 112-183 at 163-166.

<sup>122</sup> Lauterpacht, ‘The Subjects of the Law of Nations’, *supra* note 115, at 459 and 460.

<sup>123</sup> The same point, it may be recalled, was made in the context of the future delegation of governmental functions to a world organization. See *supra* note 93 above.

<sup>124</sup> Lauterpacht, *International Law and Human Rights*, *supra* note 99, at 456.

Member States' had shown that 'a single and undivided sovereign will, as propounded in Austinian jurisprudence, is not essential to the State'; and that '[t]he very idea of federation, inasmuch as it postulates a direct relation with the individual human being, receives a decisive accession of strength from the recognition, through effective institutions, of the rights of man'.<sup>125</sup>

In order to achieve that federal solution, two different routes were thereby available: a universal route and a regional one. The former is, thanks to its cosmopolitan character, morally and legally superior, yet the regional route would also offer a valuable 'link in the chain of the evolution leading ultimately to a true Federation of the World under the rule of law'.<sup>126</sup> In the special context of human rights, it was thus hoped that '[i]n so far as regional experience is a stage in the evolution towards the more complete integration of international society, such recognition and protection of human rights may in itself become a significant contributory factor in the consummation of the organised *civitas maxima*, with the individual human being in the very centre of the constitution of the world'.<sup>127</sup>

It is in this 'Kantian' spirit that Lauterpacht vigorously assisted in the intellectual conception of the European Convention of Human Rights.<sup>128</sup> The subsequent 'practice' of the Council of Europe would, however, soon prove to be a disappointment to the idealistic Lauterpacht;<sup>129</sup> and a more promising regional route is thus quickly linked with a second organisation: the European Coal and Steel Community.<sup>130</sup> It is indeed in the context of European integration that Lauterpacht's hope for 'a more radical change in the political and moral conceptions' of

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<sup>125</sup> Ibid., 460-461.

<sup>126</sup> Ibid., 462.

<sup>127</sup> Ibid., 463.

<sup>128</sup> The final chapter of Lauterpacht's 1950 monograph was dedicated to an analysis of 'The Proposed European Court of Human Rights'. It is indeed on record, by none other than one of the fathers of the ECHR, that the first ECHR drafts had 'quite shamelessly borrow[ed] many ideas from Lauterpacht', see: Barrington in Lauterpacht *et al.*, 'The Proposed European Court of Human Rights', 35 Transactions of the Grotius Society (1949) 25 at 41. For a confirmation of this view, see also: Simpson, 'Hersch Lauterpacht and the genesis of the age of human rights', *supra* note 115), at 76 as well as E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010), 35.

<sup>129</sup> Lauterpacht, *Oppenheim: International Law*, *supra* note 25, at 186: '[T]he absence of any element of supranational authority and of a separate international personality of the Council of Europe, as well as the requirement of unanimity for the validity of the decisions of its principal executive organ, render its federal characteristics potential rather than actual.'

<sup>130</sup> Ibid.

sovereignty, federation and the rights of man would be fulfilled – a point to which Section 6 will briefly return.

## **5. From Utopia to Apologia: Koskenniemi's 'Lauterpacht' Revisited**

In light of the textual and doctrinal reconstruction of Lauterpacht's thinking as regards the judicial and the legislative functions in the international community in Sections 2 and 3, as well as my analysis of the role of natural law in Lauterpacht's project in Section 4, what are we to make of Koskenniemi's 'Lauterpacht'? We saw in Section 1 that Koskenniemi portrays the early Lauterpacht as a backward-looking 'Victorian' thinker – a traditionalist wishing to return to the developments and values associated with the nineteenth century. The latter Lauterpacht, by contrast, is cast as a modern (American) legal realist who embraces, by the end of his life, a depoliticised legal pragmatism devoid of theory and doctrine.

Four objections against this famous characterisation can be advanced. A first criticism concerns the very starting point and historical benchmark for Koskenniemi's 'Lauterpacht'. For Lauterpacht's thinking is not centred on '1873' but – always – on '1919'. A second unease relates to Koskenniemi's 'Lauterpacht' being classified a 'naturalist' and a 'realist' scholar; for, in essence, Lauterpacht is neither. A third criticism casts into doubt Koskenniemi's 'idealist-turn-pragmatist' thesis, which – in my opinion – finds little support in the academic evolution of Lauterpacht's work. Finally, it will be argued that 'legal imagination' – understood as academic imagination – plays only a subsidiary and minor role in Lauterpacht's work. For instead of a belief in the law-making power of the noble science of international law, the early and later Lauterpacht firmly believe that only international institutions can make positive international law.

Let us quickly look at each of these four objections in turn.

### ***A. Lauterpacht's Starting Point – '1919', not '1873'***

Let us start with Koskenniemi's belief that the early Lauterpacht wished to return to a traditional nineteenth-century sensibility, because he saw all that followed '1914-1918' as an intellectual retrogression. Yet Lauterpacht saw the period between 1870 and 1914 – at the very best – in a mixed light;<sup>131</sup> and the intellectual starting point for all his work was not '1873' but '1919'. For Lauterpacht considered the foundation of the League by its Covenant as a radical break that had decisively ended the 'Victorian' international law of the nineteenth century. Any talk of normative 'regression' – and there is indeed much of it in Lauterpacht's 1930s writings – is thus not in relation to a real 'Victorian' tradition but always in relation to the utopian benchmark of the 1919 Covenant.

Let me just give one example, taken from 'International Law after the Covenant' (1936), to explain Lauterpacht's general thinking here:

'What is the sum total of the contribution of the post-war period to the idea of world order? (...) Now the answer to the question thus interpreted must, it is submitted, be that international law, conceived as the expression of world order, has suffered a severe set-back in the period from 1920[!]-1934. (...) [T]he historian of the future will probably be right in saying that, not very long *after the setting up of the Covenant*, humanity recoiled ... before the magnitude of the new[!] departure, and was reverting to the essential characteristics of a system whose re-appearance many regarded in 1919 as inconceivable. (...)

This negative result, it must be pointed out at the outset, is [however] only a relative one. The history of these fifteen years is a history of relapse only when compared with the promise held out by the Covenant. But it might well be regarded as a history of rapid progress when contrasted with the state of international law in 1914. This divergence of assessment is due to the Covenant of the League ... [because] the Covenant as laid down in 1919 stands out for radical changes, express and implied, in the structure of international law. In comparison with these changes, the normal

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<sup>131</sup> For Lauterpacht's critical view of the period 1870-1914, see his 'International Law and Colonial Questions, 1870-1914', in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* – Volume 2 (1975), 95-144 at 95 (emphasis added): 'In the history of international law the period 1870-1914 is in some ways more significant than any other period of comparable length. During this period international society seemed to have a pronounced degree not only of well-being but also of stability. *Yet, in essence, the mutual relations of civilized States continued to be those of primitive communities. (...) It was [a period] directed towards mitigating the evils of war, not towards eliminating it or providing effective procedures for its avoidance.*'

development international law must appear to be trifling. If the Covenant and the question of its fulfilment are forgotten, then it is clear that this has been a period of unprecedented progress in the creation and clarification of international law.<sup>132</sup>

When asserting a *relative* retrogression of international law in the period between 1920-1934, Lauterpacht has here chosen the normative commitments made in ‘1919’ as his historical starting point,<sup>133</sup> and when measured against *that* benchmark, the *post*-1920 development of the Covenant’s promises were disappointing. Yet there had been significant progress when measured against the reality of the late-Victorian period, which Lauterpacht sees as a period of institutional anarchy to which the post-war international order was never to return.<sup>134</sup> When measured against this pre-1914 benchmark, the post-1919 period had indeed made ‘striking contributions to international law’.<sup>135</sup> Despite the overall failure of the utopian ‘1919’ promises, international law had thus shown *relative* progress when measured against the (late) nineteenth century.<sup>136</sup>

### **B. Lauterpacht – Neither Natural Lawyer, Nor Legal Realist**

It is against this intellectual background that we must place our second criticism of Koskenniemi’s ‘Lauterpacht’. For Lauterpacht simply cannot be assimilated to the Victorian

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<sup>132</sup> Lauterpacht, ‘International Law after the Covenant’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 2* (1975), 145-158 at 145-146 (emphasis added).

<sup>133</sup> *Ibid.*, 156: ‘political regression as compared with the law as shaped in 1919’. For Lauterpacht’s frequent and typical characterization of the Covenant constituting a revolutionary fresh start for modern international law, see: Sections 2 and 3 above.

<sup>134</sup> Lauterpacht, ‘Resurrection of the League’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 3* (1977), 592-601 at 592 (emphasis added): ‘When founded in 1919, the League was more than the sequel of the experience of the World War *and of the period of international anarchy which preceded it* – a no mean experience in itself. (...) That attitude suffered a setback in the decade preceding the Second World War.’

<sup>135</sup> Lauterpacht, ‘International Law after the Covenant’, *supra* note 132, at 147-149. The two examples Lauterpacht gives are the creation of the International Labour Organisation (1919) and the Kellogg-Briand-Pact (1928).

<sup>136</sup> Interestingly, a similar argument was made by him after the Second World War, too. See Lauterpacht, ‘International Law after the Second World War’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 2* (1975), 159.

‘men of 1873’ whose faith in ‘custom’ and ‘reason’ – to take Westlake as an illustration – he simply does not share.<sup>137</sup> Lauterpacht is, on the contrary, an international ‘institutionalist’, who considered natural law as a *source* of law but not as law properly-so-called. Indeed: what Lauterpacht’s work on the judicial function, discussed in Section 2 above, suggests is that only a *judicial* decision – a *formal* court judgment – will offer the objectivity and externality needed to transform an otherwise subjective and internal natural law principle into ‘law’.

This focus on the judicial function, however, does not make Lauterpacht an (American) ‘legal realist’ either. For while he admits, like Kelsen, that a judicial decision will never be totally determined by ‘the law’ and that a judge will, therefore, always enjoy judicial discretion, he nevertheless, and again with Kelsen, believes in the objectivity of legal norms.<sup>138</sup> Higher norms always offer a normative frame for lower norms with judicial norms being subject to, and limited by, the ‘legislative’ function – even if that function was, under the *de lege lata* Covenant, still predominantly exercised by States.

In that context, Koskenniemi’s presentation of Lauterpacht as a predominantly court-centric thinker must also be severely qualified. Throughout his life, Lauterpacht ardently encouraged the development of the legislative function within the international community.<sup>139</sup> Only through it, he believed, could the most important problem of international law be solved: the problem of *peaceful change*. To him, this was *the* problem of modern international law, because the latter had formally outlawed war as a ‘Hegelian’ instrument for such change. The problem of conflicting or evolving national interests could, henceforth, only be addressed, and potentially be resolved, though ‘organised’ change via international legislation.<sup>140</sup>

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<sup>137</sup> For Westlake, the two sources of international law were ‘custom’ and ‘reason’ (see: Schütze, ‘Victorian’ Traditions, *supra* note 15). Lauterpacht did undoubtedly admire Westlake and took certain elements from his thinking. However, Lauterpacht’s endorsement of Westlake was highly selective. Westlake, for example had argued in favour of the distinction between legal and political disputes with the latter not being justifiable, *supra* note 41, at 302.

<sup>138</sup> Anyone who has read Lauterpacht’s *Development of International Law*, *supra* note 68, will be struck by the sheer number of times of the phrase ‘*the law behind the cases*’ (e.g. *ibid.*, 1 – emphasis added); and there is even reason to believe that Lauterpacht thought there was only one ‘objective’ and ‘right’ solution for a judge in the interpretation of a legal rule, see *supra* note 73.

<sup>139</sup> See Section 3 above.

<sup>140</sup> In the absence of such a proper international legislature, Lauterpacht nevertheless encouraged the codification of international law by international conventions to advance the ‘progressive’ development of international law. See Lauterpacht, ‘Codification and Development of International Law’, 49 *AJIL* (1955) 16, at esp. 29: ‘[U]nlike codification in other fields, codification of international law must be substantially legislative in nature. It must

### ***C. Lauterpacht and the ‘Fall’ of International Law***

Let us now turn to a third criticism of Koskenniemi’s ‘Lauterpacht’. Is Lauterpacht really abandoning his early-day theoretical idealism for a later-day pragmatic managerialism that favours ‘the virtues of a legal pragmatism that is alien to theory and doctrine’?<sup>141</sup> Section 4 has pointed in the opposite direction: starting out closer to the empirical-positivist pole of the Grotian spectrum, Lauterpacht’s later work saw him move closer to the idealist-naturalist pole of that spectrum. And a similar move towards more – not less – (idealist) ‘naturalism’ can be detected in Lauterpacht’s evolving thoughts on the general principles of international law. For whereas they are still seen as a subsidiarity source in the 1920s, some of them gradually rise to a *jus cogens* limit on all international law – including treaty law – in the 1950s.<sup>142</sup>

Yet importantly: Lauterpacht’s idealism is always – always – embedded in an institutionalist ‘sensibility’ that demands the legal positivity and enforceability of law through international courts. This, however, hardly makes him an idealist-turned-pragmatist in thought or in practice. On the contrary, his scholarly convictions turned him into a harsh critic of the ‘pragmatic’ solution originally found for the UN human rights system;<sup>143</sup> and his subsequent judicial

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consist essentially in inducing governments (or some governments) to accept a new law.’ Yet, nota bene: the ‘International Law Commission’ forms part of a (public) international organization – unlike the private ‘Institute of International law’ or the equally private ‘International Law Association’!

<sup>141</sup> Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 7, at 411.

<sup>142</sup> In his early work, general principles are predominantly seen as a ‘supplementary’ and ‘subsidiary’ source of law, *supra* note 36, that will be trumped by the ‘primary’ sources of treaties and custom. However, in his 1953 ‘Report on the Law of Treaties’, in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 4* (1978), 295 at 297-8, we read: ‘It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessary have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Article 38(i)(c) of its Statute.’

<sup>143</sup> *Supra* note 118. Simpson, ‘Hersch Lauterpacht and the Genesis of the Age of Human Rights’, *supra* note 115, at 78 comments: ‘Lauterpacht was not a political animal, and his

convictions did immediately make him into ‘a sort of habitual dissentient’.<sup>144</sup> This is surely not the intellectual record of a legal pragmatist that succumbed to the lure of (technocratic) managerialism and (judicial) diplomacy.

#### **D. Lauterpacht and the ‘Science’ of International Law**

What – fourthly and finally – about Lauterpacht’s thoughts on the role played by the science of international law, and the academic profession in particular?

Koskenniemi here places ‘Lauterpacht’ into his ‘men of 1873’ master thesis. But Lauterpacht seems, on the contrary, and from the very beginning, to think that ‘well-meaning publicists’ have very little to bring to international law.<sup>145</sup> Already in his article on Westlake, Lauterpacht thus shows little esteem for the ‘impatient pacifists’ because he thinks ‘that imagining what ought to be, instead of what is, is likely to damage the not yet firmly established authority of international law’.<sup>146</sup> The article then continues with a beautiful passage that may well have inspired Koskenniemi’s ‘Gentle Civilizer’; yet that, when read closely, rather goes against the belief in the innate emancipatory power of the legal imagination:

‘Who will listen to international lawyers whose books are full of pious wishes unrelated to facts? Perhaps some day a historian of international law will arise who will write the history of this science in terms of a deep conflict in the hearts of many of its expounders. Men of broad internationalism and of best intentions striving against heavy odds to impress the character of law upon rules of conduct sometimes as different from the unstrained conception of law as a primitive society from a modern state. *Virtutem*

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revised book makes not the slightest attempt to adapt his proposals to the course of the United Nations negotiations so as to make them more palatable or influential. He simply set out the arguments and his own preferred view on a take it leave it basis.’

<sup>144</sup> Fitzmaurice noted, early on, that out of the ten ICJ decisions in which Lauterpacht fully participated, eight were separate or dissenting opinions – and while this does not automatically make Lauterpacht ‘a sort of habitual dissentient’, it is certainly not the record of a disillusioned or managerialist pragmatist. It is, rather, ‘the record of a man with a highly individual point of view, but not that of anyone with an ingrained love of non-conformity as such’ (Fitzmaurice, Hersch Lauterpacht – The Scholar as Judge: Part I, *supra* note 6, at 3-4.

<sup>145</sup> Lauterpacht, *Private Law Sources*, *supra* note 27, at x.

<sup>146</sup> Lauterpacht, ‘Westlake and Present Day International Law’, *supra* note 25, at 323.

*credant habere et habebunt*. Let only the international society believe that the actual rules are true law and the rest will come. (...) *But this method is fraught with danger.*'<sup>147</sup>

It is this danger that Lauterpacht explored in his critique of the 1934 'Budapest Articles of Interpretation' – a scientific proposal adopted by the International Law Association piously offering its academic interpretation of the Kellogg-Briand Pact.<sup>148</sup> And while not wishing to labour this point too much, let me nonetheless also refer to similarly sceptical assessments of '[t]he tasks and problems of publicists' in Lauterpacht's Hague Lectures (1937),<sup>149</sup> and the even harsher statements on '[t]he tasks of the science of international law' in 'The Reality of the Law of Nations' (1941).<sup>150</sup>

Importantly, however, Lauterpacht's radical rejection of any foundational role for the science of international law ought not to be read as a legal pragmatist's concession to unprincipled managerialism either. It simply confirms his normative belief, espoused ever since his article on Westlake, that it is ultimately States – in the collective plural as States acting within

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<sup>147</sup> Ibid.

<sup>148</sup> H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 Transactions of the Grotius Society (1934) 178, at esp. 190-2 (emphasis added): 'The inconsistencies and shortcomings of international law cannot be removed by juristic [that is: academic] effort, however well-meaning. (...) [The Budapest articles] seem to assume that it is the legitimate task of interpretation to effect the changes believed to have been necessitated by a treaty. (...) *But it is objectionable if the intention was to suggest that it is within the province or, indeed, the power of jurists to effect a change which governments failed or declined to make.* (...) It was a well-meant although scientifically faulty attempt to shift the burden from the competent shoulders of ascertainable governments to the generality of jurists.'

<sup>149</sup> Lauterpacht, 'General Rules of the Law of Peace', *supra* note 38, at 252-256 lists six tasks: (1) systematic account of the existing rules, (2) reveal inconsistencies, (3) examine critically the reality of international obligations, (4) adapt the traditional notions to changes in the positive law, (5) defend the normativity of international law against 'political reality', and finally (6) be lawyers and philosophers. The penultimate task is thereby defined as follows (ibid., 254): 'It is not the duty of the science of international law to translate political reality into terms of law; neither is it its duty to elevate breaches of the law, however frequent, into a law-creating factor. It is a false pursuit for the science of international law to try to be realistic in the sense of making the law fit the political realities; in effect this may result in generalising illegality. The law, so long as it is not changed, must be superior to political setbacks.'

<sup>150</sup> Lauterpacht, 'The Reality of the Law of Nations', in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 2* (1975), 22 at 43-44: 'In the first instance, it is clear that any startling developments in international law cannot be the work of international lawyers. They must be the result of the practice of States; they must be the outcome of a changed attitude of Governments prompted and supported in this matter by an enlightened public opinion.'

international institutions – and not well-meaning law professors that ‘make’ international law.<sup>151</sup>

The post-1919 task of the noble science of international law is, consequently, very different to the ‘law-making’ ambitions of the Victorian ‘men of 1873’. The academic ‘function’ – to add a fourth function to the three core functions discussed in Sections 2-4 above – is merely ‘to attempt to assess the merits of any given general international organisation of States by reference to the abiding purposes of humanity and to the ultimate goal of a supra-national legal ordering of mankind’.<sup>152</sup> This is a vital task; but it is a task that ought to always start from the ‘given’ – positive – structures of international organisation(s). It must start with ‘1919’ and the *text* and *telos* of the League Covenant (and, after 1945: UN Charter). Academic views can propose or interpret positive law; they are not, and ought not to be, constitutive of it.

## **6. Conclusion: Lauterpacht’s Supranational Legacy**

What legal philosophy should be associated with Lauterpacht’s oeuvre; was he, with Koskenniemi, a Victorian ‘traditionalist’ who subsequently turned into a ‘legal realist’? None of these labels, this article has argued, adequately captures the essence Lauterpacht’s normative project. For once his works on the judicial function (Section 2), the legislative function (Section 3), the ‘function’ of natural law (Section 4), and the academic ‘function’ (Section 5) are cautiously reconstructed, Lauterpacht is best characterised as an international positivist. This characterisation is, undoubtedly, counterintuitive considering Lauterpacht’s lifelong dismissal of the positivist doctrine. But what is meant by ‘positivism’ here is not the *state* positivism of Austin, Jellinek or Triepel; positivism, instead, refers to Lauterpacht’s international federalism,

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<sup>151</sup> Lauterpacht, ‘International Law after the Second World War’, *supra* note 136, at 167: ‘International law is not the product of writings of publicists. It exists effectively to the extent to which sovereign States submit to its rule.’ Lauterpacht thus comments in ‘Codification and Development of International Law’, in: E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht – Volume 2* (1975), 269 at 288: ‘[T]he codification of international law can have but little justification and but slender chances of success, in terms of eventual acceptance by States, if it is confined to purely private effort, however scholarly and thorough.’

<sup>152</sup> Lauterpacht, *Oppenheim: International Law*, *supra* note 25, at 375.

which actively insists that international law be externally ‘posited’ by international organisations.<sup>153</sup>

Lauterpacht’s positivism is, nonetheless, an inclusive positivism; for, unlike Kelsen’s pure theory of law, Lauterpacht aims to incorporate natural law, as a source of law, into his international legal order. Yet despite his express acknowledgement of the important secondary role played by natural law (and the academic profession), the latter is – always – embedded in an institutionalist project that prioritises the judicial and the legislative functions above or else. In Lauterpacht’s normative world, the two principal forms of law in the international community are therefore not nature/reason or morality/custom but the positive law adopted in ‘statute’ and ‘judgment’.<sup>154</sup>

We saw in Section 2 that the judiciary thereby operates, in the absence of a proper international legislature, as a normative backstop whose ultimate function it is to guarantee the legal ‘positivity’ of international law. For in the absence of an (Austinian) legislator, ‘courts’ exercise a vital normative-formal function that ensures that international law is external law properly-so-called. All international law must, consequently, be justiciable to be ‘real’ international law; and Lauterpacht’s lifelong battle against any ‘non-liquet’ should be seen in this light.

The absence of a ‘functioning’ international legislature is nevertheless seen as the key problem for the modern international community. For even if Lauterpacht accepts that, during its absence, courts will exercise a (limited) legislative function and will thereby enjoy discretion when deciding disputes,<sup>155</sup> he nonetheless does not believe, as Section 3 has shown, that they alone can solve the problem of peaceful change in international law. Courts can create norms based on higher norms, but judicial decisions cannot be the end point of modern international

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<sup>153</sup> For Lauterpacht, judicial and legislative determinations by international institutions seem enough to speak of ‘enforceable’ rights in international law. His conception of the executive function has therefore not been explored in this article.

<sup>154</sup> Lauterpacht’s tombstone thus reads (emphasis added): ‘He loved truth/Did justice and righteousness/*And taught the peoples statutes and judgment.*’ (For the full text in print, see: Lauterpacht, *The Life of Hersch Lauterpacht*, *supra* note 2, at 421.) Compare this to Kant’s ‘naturalist’ tombstone inscription (emphasis added): ‘Two things fill the mind with ever new and increasing admiration and awe, the more often and steadily we reflect upon them: the starry heavens above me *and the moral law within me.*’

<sup>155</sup> See especially: Lauterpacht, ‘The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals’, *supra* note 41.

law. Lauterpacht's positivism is therefore, ultimately, centred on the legislative function and the need to create a world legislature.

Lauterpacht nonetheless considered the foundation of the League in '1919' as a revolutionary break, which had opened a new era of international law. This modern 'organised' international law was radically different from the Victorian faith in the natural morality and reasonability of custom and the correlated idea that the juristic profession could represent the 'collective consciousness' of mankind. To Lauterpacht, on the contrary, an international law without international institutions – without courts (judgement) or legislators (statutes) – was anarchic; and in rejecting the gentle naivety of his Victorian predecessors, Lauterpacht was not among the 'men of 1873'. He belongs, instead, to the 'men of 1919' – a group of early twentieth-century jurists who, shocked by the collapse of the old international legal order during the Great War, were fighting for a new international law: the law of international organisations.

Importantly, Lauterpacht's international positivism is an institutional federalism. Lauterpacht accepts the US American idea of divided sovereignty in which a world government and state governments *share* governmental functions. Lauterpacht's utopian federalism can indeed even be seen in his conception of the international community itself. This is, in contrast to Westlake,<sup>156</sup> not an organic *pre-existing* moral community naturally subject to a (European) international law. On the contrary, the moral community needs to be positively constituted by law; and the creation of international institutions can thus, dialectically, *precede* the existence of the international community. To extensively quote Lauterpacht one last time:

'[I]s the decisive test a community of outlook – moral, political and humanitarian? The correct answer is probably that this is not an essential requirement for the existence of a community for the purposes of a legal order. It may be difficult to maintain that any such community, in the full sense of the word, exists within the State. It is possible to maintain without being misleading that it is the State or, what is the same, the law of the State which creates the community. *The effective establishment of international law with an international executive and legislature would in a true sense create an international community.* Form the point of view of pure legal analysis the community is not the condition but the effect of the law.'<sup>157</sup>

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<sup>156</sup> On Westlake, see *supra* note 137.

<sup>157</sup> Lauterpacht, 'General Rules of the Law of Peace', *supra* note 38, at 263 (emphasis added). See also: Lauterpacht's 'Sovereignty and Federation in International Law', *supra* note 78, at 24-25: '[I]t may be deceptive to succumb to the facile wisdom of the warning that we ought

Lauterpacht's institutional federalism here, once more, reveals its idealist-utopian orientation. For even if he decisively rejects the idea that a simple 'imagining' of international order by well-meaning publicists is enough, his positive international law has a constructivist and future-oriented aspect, because international legislation may not only effect peaceful change, it can – simultaneously – contribute to future moral and political world community.

This constructivist idealism in favour of a 'common law of mankind' will be further advanced by Lauterpacht's British intellectual heirs;<sup>158</sup> and it would also gain strong support from 'Third World Approaches' to international law in the 1960s and 1970s.<sup>159</sup> Yet despite some real successes during this time,<sup>160</sup> Lauterpacht's utopian federalism ultimately fails in the 1980s, especially when the hopes to transform the UN General Assembly into a proper world legislator flounder. Yet Lauterpacht's 'integration-through-law' thesis will celebrate a spectacular and lasting success in the context of European integration. Here, already in 1963, the European Court of Justice comes to interpret the 1957 EEC Treaty as a Lauterpacht-like 'new legal order of international law'.<sup>161</sup>

It is this regional route that will, in the second half of the twentieth century, successfully trigger a radical re-conceptualization of the three ideas of sovereignty, federation and the rights of

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not to create institutions unless they are deeply rooted in the spirit of peoples. For that spirit is the result of the protective and civilising influence of laws and institutions which intelligent courage and foresight have brought into being 'in advance of public opinion'. The lesson of history is that the idea of the *civitas maxima* of the federation of the world – of which a partial federation may be a necessary stage – is, in the terminology of Emmanuel Kant, the only means of attaining perfect internal government, which in turn is the condition of progress, namely, the realisation of the moral and intellectual capacities of mankind.'

<sup>158</sup> I am thinking here particularly of the works of Wilfred Jenks and Robert Jennings, and especially the former's 'The Common Law of Mankind' (1958). However, even in the discipline of international relations would Lauterpacht experience a posthumous afterlife when an 'English' countermovement to 'American' realism emerged around 1960. Through it, Lauterpacht's neo-Grotian ideas would rise – not fall – after 1960. See here, for example: H. Butterfield and M. Wright (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (Allen & Unwin, 1966).

<sup>159</sup> For a brief discussion of this conception of international law, see: R. Schütze and M. Siems (eds.), *Comparative International Law: Foundations and Critique* (2026), esp. Chapters 2 and 3.

<sup>160</sup> E.g. the idea of peremptory principles and rules of international law will enter positive law via the concept of 'jus cogens' in the 1969 Vienna Convention of the Law of Treaties.

<sup>161</sup> Case 26/62, *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR (English Special Edition) 1 at 12.

man. Based on the ‘higher law’ of its founding treaties,<sup>162</sup> the European Union indeed develops into ‘a community based on the rule of law’,<sup>163</sup> with a direct link between national courts and the European Court of Justice,<sup>164</sup> and in which European human rights are recognized as ‘general principles of law... inspired by the constitutional traditions common to the Member States’.<sup>165</sup> And the Union’s supranational judicial function was to be joined by a supranational legislative function. For with the establishment of (qualified) majority voting in the Council of the European Union and the rise of a directly-elected European Parliament after 1979, a majoritarian Union legislator has come to organise peaceful change within Europe.

Seen in this light, Lauterpacht is not the ‘end’ of modern international law – not Koskenniemi’s ‘last’ international lawyer. He rather stands for the beginning of a new *supranational* conception of international law – a conception that was totally alien to most ‘men of 1873’ to whom Lauterpacht’s idea of taking ‘the principle of supranational legislation as the starting point of inquiry’ would have sounded absurd.<sup>166</sup> Yet to Lauterpacht, all regional international solutions can only ever be partial and incomplete solutions in light of ‘the ultimate goal of a supranational ordering of mankind’.<sup>167</sup> The European Union may thus inspire the legal imagination,<sup>168</sup> but world peace and peaceful change can only be achieved by universal institutions that gradually posit a common law for mankind. Lauterpacht’s project here continues to point to the future; as it remains, one hundred years after he first conceived it, largely unredeemed.

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<sup>162</sup> Case 6/64, *Costa v. ENEL*, [1964] ECR (English Special Edition) 585.

<sup>163</sup> Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, (1986) ECR 1339, para.23.

<sup>164</sup> Article 267 TFEU. Writing in 1929, Lauterpacht had advocated a procedure of this kind for the international legal order. See: Lauterpacht, ‘Decisions of Municipal Courts as a Source of International Law’, 10 *BYIL* (1929) 65 at 95.

<sup>165</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1979] ECR 1125. On the emergence of ‘general principles’ in the EU legal order, see e.g.: M. Akehurst, ‘The Application of General principles of Law by the Court of Justice of the European Communities’, 52 *BYIL* (1981) 29.

<sup>166</sup> Lauterpacht, ‘Peaceful Change’, *supra* note 57, at 22.

<sup>167</sup> Lauterpacht, *Oppenheim: International Law*, *supra* note 25, at 375.

<sup>168</sup> R. Schütze (ed.), *Globalisation and Governance: International Problems, European Solutions* (2018).





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