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## International Law: The Collected Papers of Hersch Lauterpacht By E. Lauterpacht, ed.

Edward Gordon

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## BOOK REVIEWS

### INTERNATIONAL LAW IN THE TWENTIETH CENTURY

EDWARD GORDON\*

INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, Volume 4. ("The Law of Peace — Parts VII-VIII"). E. Lauterpacht, ed. (Cambridge: Cambridge University Press, 1978). xxvii & 571 pp. \$75.00, cloth.

Few men in the modern history of international law acquired in their own lifetimes such stature as attended Sir Hersch Lauterpacht in his. To understand why is to understand, too, why the publication recently of the fourth volume of his collected papers enriches and ennobles the literature and the jurisprudence of international law no less than did that of the first, and far more than seems decent for a fourth volume of any mortal's collected works.

To be sure, his were extraordinary times. Lauterpacht was born in Lvov on August 16, 1897 and died, less than sixty-three years later, in London on May 8, 1960. The whole structure of international society was refashioned during those years and with it, not coincidentally, the conceptual framework which theretofore had guided international lawyers for generations. Had he not been deeply philosophical, had he been caught up solely in matters of the moment, had he, indeed, been educated in a single legal system or been subject to a single dominating intellectual influence, Lauterpacht would probably still have made a major contribution to the development of international law by virtue of his intellect, his inquiring mind and what his successor as Whewell Professor of International Law at Cambridge University, R. Y. Jennings, not long ago described as "many years of persistent, close and strenuous labour and thought."<sup>1</sup>

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\*Edward Gordon, Associate Professor of Law at Union University, Albany Law School, is editor of *Practitioner's Notebook*, a quarterly digest of international law cases and developments published by the American Branch, International Law Association.

1. Jennings, Book Review, 13 *CAMBRIDGE L. J.* 165 (1976) (review of *INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT*, Vols. I and II (E. Lauterpacht, ed. 1970 & 1975).

As it happened, however, Lauterpacht was deeply philosophical, a disposition no doubt fostered by his years of study in Vienna with, among others, Hans Kelsen. Moreover, he was always opposed to writing about merely "topical" subjects, concerning himself both early and late in his career with what his son Elihu later characterized as "fundamental abiding issues."<sup>2</sup> And, of course, he had the advantage of having roots both in Continental legal philosophy and in the English common law, being a student not only of Kelsen but, for a longer time, of his own Cambridge colleague, Lord McNair.

In fact, when Lauterpacht died, no less an observer than C. Wilfred Jenks wrote that "the most unique of Lauterpacht's many services to the progress of international law was to maintain for a generation a broad and firm bridge between British and Continental legal thinking."<sup>3</sup> An American writing some years later may be forgiven for wondering whether this assessment is fully justified. Early in his career Lauterpacht questioned the idea, popular at the time, that there existed two distinct "schools" of international law, the Continental and the Anglo-American. Given his multicultural background — he was raised in the Austrian Empire and migrated to England only after taking his first two degrees abroad — he was able to, and did, attack the idea on empirical grounds.<sup>4</sup> But for most of his career he seemed disposed as well to challenge Continental (though for that matter Austinian) positivism on more fundamental terms than seems appropriate to someone who might later be characterized as "bridging" the two legal cultures. Perhaps a more fitting allusion would be that of an elevated highway, since with the aid of his heightened observational vantage point one could see clearly the received illusions of both cultures.

Metaphors aside, Lauterpacht belongs in a category by himself, one which approaches but never extends as far as legal realism. In their tribute to him, Philip C. Jessup and Richard R. Baxter put it this way:

The salient feature characteristic of his legal thought is his sense of the completeness and the movement of international law. If Kelsen . . . can be said to be concerned with the morphology of international law, Lauterpacht was a physiologist of the law. His concern was very heavily with the development and function of the law of nations,

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2. *Id.* at 167. Philip C. Jessup and Richard R. Baxter have also noted this feature of Lauterpacht's work, observing: "He avoided matters of transient interest and had as one of the criteria for the selection of articles [for the British Year Book of International Law when he was its editor] whether the particular paper would in future years continue to be a useful contribution to the science of international law." Jessup & Baxter, *The Contribution of Sir Hersch Lauterpacht to the Development of International Law*, 55 AMER. J. INT'L L. 97, 102 (1961) [hereinafter cited as Jessup & Baxter].

3. Jenks, *Hersch Lauterpacht — The Scholar as Prophet*, 36 BRIT. Y. B. INT'L L. 1 (1960).

4. *The So-Called Anglo-American and Continental Schools of International Law*, 12 BRIT. Y. B. INT'L L. 31 (1931).

rather than with the exposition of a static positive law resting solely upon state practice, adjudicated cases and treaties.<sup>5</sup>

His sense both of the completeness and the dynamism of international law led Lauterpacht in a celebrated article to take issue with the doctrine of *non-liquet*,<sup>6</sup> not surprisingly, one would say, since that doctrine rests ultimately upon a perception of law as a static body of rules.<sup>7</sup> But it probably offended his sense of practicality, too, since Lauterpacht was keenly aware that, given the absence in international law of a strong central law-making institution, the failure of such authoritative decision-makers as do exist to resolve contentious issues submitted to them on the grounds of a "gap" in the law has serious implications for the legal system as such. As he wrote in *The Function of Law in the International Community*:

Shall international law, by refusing to admit its present imperfections and by elevating them to the authority of legitimate and permanent manifestations of a "specific" law, abdicate the task of raising itself above the level of a primitive law of a primitive community?<sup>8</sup>

In the final analysis, it may well have been Lauterpacht's attention to the human dimensions of law that caused him, from time to time, to draw heavily on the insights of legal realism. Thus, for example, in a major article on treaty interpretation, he observed in the manner of Justice Holmes that rules of construction are

not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means. . . . [T]he very choice of any single rule or of a combination . . . of them is the result of a judgment arrived at independently of rules of construction, by reference to considerations of good faith, of justice and of public policy.<sup>9</sup>

And in a seminal work on the international protection of human rights, he pierced the veil of nation-state identity with the argument that

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5. Jessup & Baxter, *supra* note 2, at 97.

6. See *Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law*, in SYMBOLAE VERZIJL 196 (1958).

7. See in this regard THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 51-135 (1933) and THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 158-172 (1958).

8. *Supra* note 7, at 431.

9. *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y. B. INT'L L. 48, 53 (1949). Compare Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897): "You can always imply a condition in a contract, but why do you imply it? It is because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of founding exact conclusions."

to assert that duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose them and who act on their behalf is to open the door wide for the acceptance, in relation to States, of standards of morality different from those applying among individuals. Experience has shown that 'different' standards mean, in this connexion, standards which are lower and less exacting.<sup>10</sup>

Indeed, almost a quarter of a century earlier, in 1927, Lauterpacht had seemed to be completely at home among the legal realists when he wrote:

An ever-growing body of international legal opinion . . . has been engaged during the past half-century in impressing upon the mind of the student and the statesman what the author believes to be a true and beneficent notion, namely, that behind the personified institutions called States there are in every case individual human beings to whom the precepts of international law are addressed.<sup>11</sup>

But that in his own mind his affinity was not to legal realism as such but rather to Grotius and natural law is clear from the next sentence, in which Lauterpacht said:

Thus interpreted, the exalted conception of the father of international law and of other publicists of the classical period which regarded nations as moral individuals *respectu totius generis humani*, is still an ideal worthy of pursuance.<sup>12</sup>

Disguised legal realist or neo-Grotian naturalist, Lauterpacht's scholarly contributions were prodigious. These included five major monographs, four courses of lectures at the Hague Academy of International Law, over sixty articles, two reports on the law of treaties as *rapporteur* for the International Law Commission, four editions of Volume I ("Peace") and three editions of Volume II ("Disputes, War and Neutrality") of Oppenheim's *International Law*, and countless book reviews and notes — all this, it might be noted, before he was elected to the International Court of Justice in the autumn of 1954 at the age of 57.<sup>13</sup>

He was to serve little more than five years of his term on the World Court,

10. INTERNATIONAL LAW AND HUMAN RIGHTS 5 (1950).

11. PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 305 (1927), as quoted and cited in Rosenne, *Sir Hersch Lauterpacht's Concept of the Task of the International Judge*, 55 AM. J. INT'L L. 825, 828 (1961).

12. *Id.* See generally his article, *The Grotian Tradition in International Law*, 23 BRIT. Y. B. INT'L L. 1 (1946).

13. The present writer would be remiss in not also mentioning that Lauterpacht, with Lord McNair, founded the ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES (known since 1950 as INTERNATIONAL LAW DIGEST) and was its sole editor from 1935 until the time of his death — some twenty-three volumes in all; and that from 1944 to 1954 he edited the *British Year Book of International Law*.

the last year in failing health. So he participated fully in only ten cases, in eight of which, however, he wrote either a separate or dissenting opinion.

Volume I ("The General Works") of Lauterpacht's collected papers, published by his son in 1970, presented three general works, the most notable of them being the transcript of the Ninth Edition of Oppenheim which Lauterpacht did not live to complete. His intention had been to make that edition very much his own treatise, rather than a continuation of Oppenheim's. Historically, that manuscript probably ranks as the most important of his collected papers yet published. The second work in Volume I consists of a theretofore unpublished English translation of Lauterpacht's 1937 Hague Academy lectures. The third is a memorandum, prepared in 1948 and first published anonymously as a U.N. document, *inter alia* surveying international law with a view to selecting topics suitable for codification by the ILC.

Volume II ("The Law of Peace — Part I, The General"), published in 1975, reflects an attempt at the systematic assembling of papers, many of them previously published, according to a textbook plan. Eli Lauterpacht says that his father himself regarded one of the papers, on the Grotian tradition in international law, as "probably the most important he ever wrote."<sup>14</sup>

Volume III ("The Law of Peace — Parts II-VI"), published in 1977, continues the systematic assembly with papers on states as the subjects of international law, state territory and territorial jurisdiction, the individual in international law, diplomatic intercourse, and international organizational and administrative law.

The fourth volume ("The Law of Peace — Parts VII-VIII"), published in 1978, concludes the presentation of Lauterpacht's writings on the Law of Peace, leaving for the fifth and final volume "only his significant contribution to the law governing disputes, including the jurisdiction of the International Court, and to the law of war and neutrality."<sup>15</sup> It opens with two of Lauterpacht's previously unpublished professional opinions, the first prepared early in 1950 for the Principality of Liechtenstein in the *Nottebohm* case, the other a draft of the legal argument he proposed be used by the British Government in the *Anglo-Iranian Oil Company* case. In them we see Lauterpacht the advocate somewhat at odds with what we know of Lauterpacht the scholar.

The rest of the papers concern the law of treaties, presented in this instance not chronologically but as with the rest of the collected papers on the Law of Peace, systematically. The materials here, in fact, have been placed under headings Lauterpacht contemplated for the series of reports on the Law of Treaties which he began to prepare for the ILC in 1953 but which, owing to his election to the Court the following year, he did not complete. Students of

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14. Quoted by Jennings, *supra* note 1, at 167; *see also* note 6 *supra*.

15. 4 INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, *The Law of Peace — Parts VII-VIII*, at xi (E. Lauterpacht, ed. 1978).

treaty law may wish to contrast Lauterpacht's approach with that which ultimately found expression in the Vienna Convention on Treaties of 1969 and will be aided in doing so by the editor's inclusion, at appropriate points, of the text of the relevant Article of that Convention.

In their tribute to Sir Hersch, Jessup and Baxter — each of whom was later elected to the World Court — wrote:

The measure of the regard in which he is held is the great deference which is accorded to his views throughout a major proportion of the world.<sup>16</sup>

The deference remains and, if anything, the proportion grows with the publication of each succeeding volume of his collected papers. Together the four volumes are no less than indispensable reading for international lawyers who are serious about their identification with international law.

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16. Jessup & Baxter, *supra* note 2, at 97.

### DANIEL G. PARTAN\*

CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA. EDITED BY BARBARA JOHNSON AND MARK W. ZACHER. (Vancouver, British Columbia: University of British Columbia Press, 1977), xx and 407 pages, indexed. \$19.00, cloth; \$6.50, paper.

Although not uniquely so among major industrialized states, Canada's ocean policy concerns are impressive. First, Canada has one of the world's longest coastlines, touching Atlantic, Pacific and Arctic waters. That coastline is shared by all but two of Canada's provinces, making ocean policy a matter of importance for nearly all Canadians. Second, Canada also has one of the world's largest continental margins, embracing about two million square miles and, in the North Atlantic, extending about 650 miles from the coast. Canada has been actively engaged in searching for and producing off-shore oil both from its continental shelf and from its continental slope and continental rise areas several hundred miles from shore. Third, Canada is a major fishing state in areas both off its Atlantic and off its Pacific coasts; in recent years Canada has been one of the top three exporters of fish and fishery products.

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\*Daniel G. Partan, is a Professor of Law at Boston University School of Law.