The Function of Law in the International Community

Sir Hersch Lauterpacht

OXFORD

THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY

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To

ARNOLD DUNCAN M^{c}NAIR

FOREWORD BY SIR ELIHU LAUTERPACHT CBE, QC, LL.D

Amongst the many contributions of my father, the late Sir Hersch Lauterpacht, to the literature of international law, *The Function of Law in the International Community* may properly be regarded as the most important by reason of the rigour of its exposition of the judicial role in the settlement of international differences. To say this is not to detract from the originality and value of the other books that he published – *Private Law Sources and Analogies of International Law*, *International Law and Human Rights*, *Recognition in International Law*, and the *Development of International Law by the World Court*. However, there is about *Function of Law* an intensity of thought, comprehensiveness of vision and display of erudition which gives it a special quality that has been widely recognised.

The work was originally published in 1933 and the possibility of preparing a second edition certainly engaged my father's attention in the intervals of his work as a judge of the International Court of Justice between 1955 and 1960.[1] He left behind a partially edited text of the first sixty pages of the volume, for which no use could be found until the idea of this reprint emerged. It is, therefore, fortunate that it has been possible to incorporate in the present reprint the amendments that he contemplated.

The initiative of the Oxford University Press in producing this reprint, with the addition of a learned introduction by Professor Koskenniemi, which will be widely appreciated, is much to be valued.

[1] See *The Life of Hersch Lauterpacht*, by myself, published by the Cambridge University Press in 2010, pp. 399 and 414.

NOTE FROM THE PUBLISHER

This paperback edition of *The Function of Law in the International Community* features revisions and updates made by Sir Hersch Lauterpacht after the book first published in 1933, which have never before been implemented in the text. These revisions occur in the first three chapters of the book. As a result, eight pages have been added to the length of the work and the pagination may thus differ from that of the original edition of *The Function of Law*. A full overview of all the revisions made to this new paperback can be found on our website at http://ukcatalogue.oup.com/product/9780199608812.do.

PREFACE

THE plan of this book has undergone in the course of its preparation a series of substantial changes. It has grown out of an article, published in 1928 in *Economica* under the title 'The Doctrine of Non-Justiciable Disputes in International Law' and a course of lectures with a similar title given at the Academy of International Law at The Hague in 1930. Its original purpose was to examine the current doctrine—a doctrine accepted by most international lawyers and embodied in leading international conventions for pacific settlement—of the inherent limitations of the place of law and of the judicial process in the society of States. According to this doctrine, international disputes are, by virtue of the peculiar structure of international law and relations, necessarily divided into two categories variously described as 'legal' and 'political', as 'justiciable' and 'non-justiciable', or as disputes as to 'rights' and conflicts of 'interests'. In the opinion of the adherents of this doctrine, this distinction not only affords a satisfactory basis for scientific exposition, but also can, and ought to, be used in international treaties having for their object the creation of a legal duty of pacific settlement in all possible contingencies. This doctrine the writer believes to be juridically unsound, and the original object of the book was to substantiate this view.

As the work progressed, however, it became clear that a merely critical approach might fail to bring into relief the true implications of the scope of the judicial function in international society. As in any other system of law, so also in that which governs the relations of States *inter se*, the question of the limits of the rule of law is the central problem of jurisprudence. It may not be difficult to prove that there is no merit in a classification which is based on the opinion that certain categories of disputes are not amenable to judicial settlement on account of the absence of relevant rules of law. But even when this particular aspect of the doctrine has been disposed of, there still remain special problems confronting international tribunals on account of the shortcomings of the international legal system; for it is a system in which general principles have not always found specific expression in concrete rules, in which law frequently lags behind morals to an extent unknown to the law obtaining within the State, and in which

the process of adapting the law to changed conditions is still in a rudimentary stage. It may be easy to demonstrate that the absence from international society of law-making machinery which might effect a compromise between legal stability and social change is neither a sufficient basis for the classification of international disputes nor a reason for urging any limitation of the rule of law among States. But when this has been done there still remains the task of examining how the dangers arising from the absence of an international legislature may be overcome, and what is the solution, in the international sphere, of the perennial conflict between security and justice. To refute a doctrine and to avoid an issue of practical urgency and abiding legal interest would be too rigidly academic. Thus it happens that what was originally intended as a criticism of the orthodox doctrine of the inherent limitations of the international judicial function has been subordinated to an attempt to examine underlying legal problems of a more general nature. Subsequently, the extension of the original plan of the work made it necessary to consider the problem of the limitation of the place of law as a general problem of jurisprudence with special reference to the so-called 'specific' character of international law.

These are the reasons why what was originally intended as a monograph written *cum ira et studio* has developed into an examination, with reference to the relations of States, of some of the persistent problems of legal philosophy, such as the place of law in society, the nature of the judicial function, the problem of judicial discretion, and the antinomies of stability and change. This book is thus no longer a plea in support of a definite doctrine or an argument against a particular theory. It is an attempt at an exposition, by reference to the problem of the international judicial function, of what are believed to be the principal issues of the philosophy of international law.

I am deeply indebted to Professor Brierly for the care which he has bestowed upon the manuscript of this book. He has read it twice and made many suggestions, most of which I have adopted. My gratitude is the greater, because he is, as I know, not always in agreement with the views expressed in these pages. Mr. C. R. L. Fletcher, formerly one

of the Delegates of the Clarendon Press, has also read the manuscript. The usefulness of his suggestions is only surpassed by the modesty and courtesy with which he made them. Dr. McNair has read large portions of the manuscript in its earlier stage and parts of the proof. An international lawyer is fortunate to receive his advice.

My thanks are also due to the Editors of the *British Year Book of International Law and of Economica* for permission to make use of material published in these periodicals, and to the Curatorium of The Hague Academy of International Law for a similar permission in regard to my lectures given at The Hague in 1930 and published in the *Recueil des Cours*.

Miss G. Bloch, of the London School of Economics, has borne the brunt of copying the manuscript and the successive stages of the typescript, and I wish to express to her my warm thanks.

Both the Laura Spelman Foundation through its London Committee and the University of London through its Publications Fund have generously contributed towards the cost of publication.

To the Delegates and Staff of the Clarendon Press I wish to express my thanks for their patient and careful co-operation.

The manuscript of this book was concluded in June 1932. It has not been practicable to consider or cite the literature or decisions published after that date.

H. L.

LONDON SCHOOL OF ECONOMICS
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1 *February* 1933.

TABLE OF CASES CITED

LIST OF ABBREVIATIONS OF TITLES OF BOOKS AND PERIODICALS

Actes et Documents	Deuxième Conférence internationale de la Paix, Actes et Documents (1907).
A.J.	American Journal of International Law.
Lauterpacht, Analogies	Lauterpacht, Private Law Sources and Analogies of International Law (1927).
Annuaire	Annuaire de l'Institut de Droit international.
Annual Digest	Annual Digest of Public International Law Cases.
Arbitration and Security	Arbitration and Security: Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security deposited with the League of Nations (2nd ed., 1927), C. 653. M. 216. 1927. V.
A.S., Proceedings	Proceedings of the American Society of International Law.
B.Y.	British Year Book of International Law.
Fauchille	Fauchille, Traité de Droit international public (8th ed. of Bonfils' Manuel de Droit international public), 2 vols. (1921–6).
Fischer Williams, Chapters	Chapters on Current International Law and the League of Nations (1929).
Hague Reports	Reports to The Hague Conferences of 1899 and 1907 (ed. by J. B. Scott, 1917).
Hall	Hall, A Treatise on International Law (8th ed. by Pearce Higgins, 1925).
Hyde	Hyde, International Law chiefly as Interpreted and Applied by the United States, 2 vols. (1922).
J.C.L. and I.L.	Journal of Comparative Legislation and International Law
L.N.T.S.	League of Nations Treaty Series.
Lafontaine	Lafontaine, Pasicrisie internationale (1902).
Lammasch, Rechtskraft	Lammasch, Die Rechtskraft internationaler Schiedssprüche (1913).
Lammasch, Schiedsgerichtsbarkeit	Lammasch, Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange (1914).
Lapradelle and Politis	Lapradelle-Politis, Recueil des Arbitrages internationaux, vol. i (1905), vol. ii (1924).
Mérignhac, Conférence	Mérignhac, La Conférence internationale de la Paix (1900).
Moore	Moore, History and Digest of International Arbitrations to which the United States has been a Party, 6 vols. (1898).

Moore, Digest	Moore, A Digest of International Law, 8 vols. (1906).
Nielsen's Report	American and British Claims Arbitration (under the special agreement of 18 August 1910), Report by Nielsen (1926).
Nippold	Nippold, Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten (1907).
Official Journal	Official Journal of the League of Nations.
Oppenheim	Oppenheim, International Law (4th ed. by McNair), vol. ii (1926), vol. i (1928).
P.C.I.J.	Publications of the Permanent Court of International Justice. Series A—Judgements. B—Advisory Opinions. A/B—Cumulative Collection of Judgements and Advisory Opinions given since 1931. C—Acts and Documents relating to Judgements and Advisory Opinions given by the Court. D—Collection of Texts governing the Jurisdiction of the Court. E—Annual Reports.
Procès-Verbaux	Proceedings of the Committee of Jurists of 1920 appointed to draft the Statute of the Permanent Court of International Justice.
R.G.	Revue générale de Droit international public.
R.I.	Revue de Droit international et de la Législation comparée.
R.I. (Paris)	Revue de Droit international.
Recueil	Recueil des décisions des tribunaux arbitraux mixtes.
Recueil des Cours	Académie de Droit International, Recueil des Cours
Rivista	Rivista di diritto internazionale.
Schücking-Wehberg	Schücking und Wehberg, Die Satzung des Völkerbundes (2nd ed., 1924).
Verdross, Verfassung	Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926).
Westlake	Westlake, International Law, 2 vols. (2nd ed., 1910–13).
Z.f.a.ö.R. und V.	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.
Z.V.	Zeitschrift für Völkerrecht.

THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY: INTRODUCTION

Martti Koskenniemi[*]

I

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

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

[*] Professor of International Law, University of Helsinki. This text is based on my 'The Function of International Law in the International Community: 75 Years After' (2008) 79 BYIL 353–66.

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

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

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

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

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

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