

## Elihu Lauterpacht, LCIL and the Lauterpacht Tradition

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My focus here is Eli's relation to what is still thought of as the Lauterpacht tradition of thinking about and doing international law, a tradition largely identified with his father, Hersch Lauterpacht, scholar and judge – but which Eli contributed to perpetuating and consolidating.<sup>1</sup>

Precisely because Hersch's contribution is even now so well-known, nearly 60 years after his death, it seems appropriate to focus first on Eli's own, distinct, career. This one can in part recall by listing the various things he started or continued and which are in many cases now institutions, which embody new ideas or which at least evoke strong memories. This account is of course merely indicative.

First there was judging and arbitrating. He was once appointed an *ad hoc* judge in a case before the International Court, in the early stages of *Bosnian Genocide*. His separate opinion in that case (in some respects a dissenting opinion) is notable for its analysis of the role of the *ad hoc* judge. He said...

consistently with the duty of impartiality by which the *ad hoc* judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion...<sup>2</sup>

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<sup>1</sup> See the incomparable treatment of the Lauterpacht legacy by M Koskenniemi, 'Hersch Lauterpacht (1897-1960)', in J Beatson & R Zimmermann, 601. See also M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, CUP, 2001), 353-412.

<sup>2</sup> ICJ Reports 1993 p 409 (para 6).

In the substantial opinion that followed, he certainly performed the role in this way – some might say, to its limit.<sup>3</sup>

Outside the Court, he acted as arbitrator and judge in a number of important cases. He was a founding member of the World Bank Administrative Tribunal and for two years its president. He was arbitrator in a number of investment arbitrations,<sup>4</sup> and chaired a panel under Chapter 20 of NAFTA.<sup>5</sup> His most important arbitral appointment was as President of the Eritrea-Ethiopia Boundary Commission: its unanimous decisions on delimitation and virtual demarcation displayed a resolute independence of thought and action, faced with major difficulties of implementation.<sup>6</sup>

But it was as counsel and advisor that he spent most of his time. In this overview I should emphasise the sheer length of his career as an international advocate, unlikely ever to be equalled. According to Lesley Dingle's account on the Cambridge University website:

His first practical involvement with the ICJ was in the famous *Nottebohm* case in 1951, when he was drafted in to prepare the Memorial through his association with Mr Lowenfeld, a solicitor in Cambridge, and though he was not formally instructed to appear, he assisted in court when it sat... on 10th and 18th November 1953.<sup>7</sup>

But he did not speak at the *Preliminary Objections* phase<sup>8</sup> nor did he appear in the *Second Phase of Nottebohm*.

He also assisted in the *Anglo-Iranian Oil Company* case, although he was not formally retained.<sup>9</sup> The Court dismissed the UK's claims, holding that the 1933

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<sup>3</sup> He resigned as *ad hoc* judge once the Court adopted the policy of separation of the roles of *ad hoc* judge and counsel: see Practice Directions VII & VIII (2002). This, though entirely proper, was not formally necessary as those Directions were not retrospective.

<sup>4</sup> *Guadalupe Gas Products Corporation v Nigeria*, ICSID Case No. ARB/78/1; *Compañía del Desarrollo de Santa Elena AS v Republic of Costa Rica*, ICSID Case No. ARB/96/1; *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB(AF)/98/1; and *Azurix Corporation v Argentine Republic*, ICSID Case No. ARB/01/12.

<sup>5</sup> NAFTA Panel Established Pursuant to Article 2008 in the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (NAFTA Secretariat File No. CDA-95-2008-01) (Final Report of the Panel, 2 December 1996).

<sup>6</sup> The Commission was established in accordance with the Algiers Peace Agreement in 2001. The Decision on Delimitation of the Border between Eritrea and Ethiopia was handed down on 13 April 2002, 25 UNRIAA 83. The Commission issued several other related decisions, orders, and statements on 12 December 2000, 24 June 2002, 17 July 2002, 7 November 2002, 7 July 2003, and 27 November 2006.

<sup>7</sup> <https://www.squire.law.cam.ac.uk/eminent-scholars-archive/professor-sir-elihu-lauterpacht>

<sup>8</sup> ICJ Reports 1953 p 111. Sir Hersch recused himself.

concession agreement between Iran and the NIOC was ‘nothing more than a concessionary contract between a government and a foreign corporation’.<sup>10</sup> This dictum, accurate as a matter of law, had two sequels in both of which Eli Lauterpacht was heavily involved and which he continued to espouse through his professional life. The first was the idea, based on one reading of Lord Mansfield’s doctrine of the incorporation of international law in the common law,<sup>11</sup> that certain contracts between states or state entities and private parties are governed by international law as the proper law. This equation goes back to *Anglo-Iranian Oil Company v Jaffrate (The Rose Mary)*, a decision of the Supreme Court of Aden.<sup>12</sup> It reached its apotheosis – some might say nadir – in *Sandline v Independent State of Papua New Guinea*, where an ICC tribunal managed to hold valid a mercenary contract invalid or at least unenforceable under its chosen proper law, the law of Queensland, by appealing to Lord Mansfield’s doctrine.<sup>13</sup> Eli was counsel in both *The Rose Mary* and the *Sandline* arbitration.

A second sequel was the umbrella clause, now well-known and a central aspect of the debate over investment arbitration. Its origins can be traced to advice he provided in 1953-54 to the Anglo-Iranian Oil Company (as it was then called) in connection with the Iranian oil nationalisation dispute. According to Anthony Sinclair,<sup>14</sup> he proposed the inclusion of a clause in a treaty between the UK and Iran whereby any breach of a contractual settlement reached between the Company and Iran would be *ipso facto* deemed to be a breach of the treaty between Iran and the UK.

In the event, no such treaty was concluded, but he made similar proposals in 1956-57 to a group of oil companies engaged in promoting a trunk pipeline from Iraq to the Eastern Mediterranean. Eli’s contribution appears also to have flowed through his working relationship with Sir Hartley Shawcross, former British Attorney General and

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<sup>9</sup> His father’s involvement in *Anglo-Iranian* is noted by in E Lauterpacht, *The Life of Hersch Lauterpacht* (CUP, 2010) 353; Eli’s own behind-the-scenes involvement is not referred to.

<sup>10</sup> ICJ Rep 1952 p 93, 112.

<sup>11</sup> *Triquet v Bath* (1764) 3 Burr 1471, approved and applied in a different context in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529.

<sup>12</sup> (1953) 20 ILR 316.

<sup>13</sup> Award of 9 October 1998, 117 ILR 552, 560-1 (paras 10.1-10.2), discussed in D Sturzaker & C Cawood, ‘The Sandline Affair: Illegality and International Law’ [1999] *Australian ILJ* 214. The award survived scrutiny in the Queensland Supreme Court on jurisdictional grounds: (1999) 117 ILR 565.

<sup>14</sup> The Origins of the Umbrella Clause in the International Law of Investment Protection’, (2004) 20 *Arb Int* 411. For a more detailed account see Y Chernykh, in ‘The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention’ in R Hofmann, S Schill, C Tams (eds), *International Investment Law and History* (Baden-Baden, Nomos 2018, in press). For Eli’s role in the gestation of the ICSID Convention, see T St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (Oxford, OUP, 2018) ch 2.

British Prosecutor at Nuremburg.<sup>15</sup> Shawcross was now director of Shell Petroleum Company, and an early variant of an umbrella clause was included in the Abs-Shawcross draft Convention on Foreign Investment of 1959.<sup>16</sup> It was also included in the very first BIT, between Germany and Pakistan, in the same year.<sup>17</sup>

Eli was involved in 16 further cases before the Court,<sup>18</sup> a remarkable number given the paucity of cases in the 20 years after 1966. The first in which he actually addressed the Court was in the Preliminary Objections phase of *Barcelona Traction* in 1964, where he began with a personal remark, referring to his father's death in 1961:

May I first express my distinct and deep sense of privilege upon being permitted to address you. If, in my own case, this feeling is mingled with another, of a different nature, I am sure that the Court will understand why.<sup>19</sup>

And the last time he spoke before the Court was in *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* in 2014. He was unsparing in his criticism of the Australian measures, concluding with the following words:

I thank you very much for allowing me to speak and I need hardly say that it is with the greatest displeasure that I leave you now.<sup>20</sup>

At the time it seemed a touch histrionic, but in retrospect it was effective,<sup>21</sup> indeed memorable. It may have had a hidden meaning, since Eli had derived such evident pleasure from his work before the Court, over no less than 62 years, that he quitted its stage with reluctance.

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<sup>15</sup> Shawcross' close working relationship with Hersch during the Nuremberg trials is documented in Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge, CUP, 2010), 272-283, 292-298. Eli regarded Shawcross as the best advocate he ever heard.

<sup>16</sup> The Abs-Shawcross Draft is in UNCTAD, *International Investment Instruments: A Compendium* (United Nations, New York, 2000), vol V, 395; Sinclair, 421.

<sup>17</sup> Federal Republic of Germany-Pakistan, Treaty for the Promotion and Protection of Investments, 25 November 1959, 457 UNTS 23, Art 7. See Sinclair, 423-4.

<sup>18</sup> See the list at <https://www.squire.law.cam.ac.uk/eminent-scholars-archiveprofessor-sir-elihu-lauterpacht/international-litigation>.

<sup>19</sup> *Pleadings... Case concerning Barcelona Traction, Light and Power Company, Limited*, vol 2, p 506 (15 April 1964) (Lauterpacht).

<sup>20</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, CR 2014/3, p 12 (22 January 2014) (Lauterpacht).

<sup>21</sup> Notwithstanding extensive undertakings offered by Australia, the Court granted provisional measures: *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Provisional Measures, ICJ Reports 2014 p 147, 161; cf 207 (para 31) (Judge Greenwood).

Secondly, he was a great editor, of International Law Reports (where he edited or co-edited 145 volumes covering 60 years),<sup>22</sup> of his father's papers, in itself a major achievement in five volumes,<sup>23</sup> of the Hersch Lauterpacht Memorial Lectures,<sup>24</sup> and of other spin-off publications under his own Grotius imprint. Most of these were continued under his tutelage since the acquisition of Grotius by Cambridge University Press in 1995, a move which marked the resurgence of international law publishing by the Press.<sup>25</sup>

Thirdly, he was a teacher and mentor of distinction, inspiring devotion from many, including judges of the International Court, foreign office legal advisers, and professors in many countries.

Fourthly, he was the creator of the Lauterpacht Centre of International Law. Established as an entity in 1983, through private benefactions (including his own) it acquired splendid premises at 5 Cranmer Road in 1986. He directed the Centre until his (compulsory) retirement from the University in September 1995. During that whole period, it had no funding whatsoever from the University, a situation which changed to a degree thereafter when the University acknowledged the treasure it had been gifted, renaming it the Lauterpacht Centre in honour of father and son, and providing a modicum of funding. After his retirement he remained actively involved as Honorary Director, notably in attracting funding from the Kingdom of Bahrain and the Government of Malaysia for the acquisition of the next-door house, 7 Cranmer Road, from Trinity College, thereby doubling the size of the Centre. The word 'unique' is overused but it is appropriate here. University centres of international law are common, but the Lauterpacht Centre has a distinct *persona*, its own identity, while being fully part of the Law Faculty.<sup>26</sup> As a centre for study, research and publication in

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<sup>22</sup> From vol 24 (1957) through vol 168 (2017).

<sup>23</sup> *International Law: Being the Collected Papers of Hersch Lauterpacht, Q.C., LL.D., F.B.A.*, Systematically arranged and edited by Elihu Lauterpacht, Q.C., Cambridge, CUP (vol I: The General Works, 1970; vol II: The Law of Peace, International law in general, part I, 1975; vol III: The law of peace, parts II-VI, 1977; vol IV: The law of peace, parts VII-VIII, 1978; vol V: Disputes, war and neutrality, parts IX-XIV, 2004).

<sup>24</sup> This series started in 1983 and publishes the series of lectures given annually in the Michaelmas term at the University of Cambridge. The first book of the series was *Breach of Treaty* by Shabtai Rosenne, (Cambridge, Grotius, 1985). To date, more than 20 books have been published.

<sup>25</sup> These include the *Iran-U.S. Claims Tribunal Reports*; *ICSID Reports*; *International Environmental Law Reports* and the *Cambridge International Document Series*.

<sup>26</sup> It has for example hosted more than 700 academic visitors over the years.

international law and as a drawcard for visiting scholars, it is unique at least in the English-speaking world.

In reviewing his career, it is worth stressing, first of all, how different he was from his father, despite the filial piety evident from his editing of the *Collected Papers* and from his biography of Hersch. Eli was and sounded English, a tribute to the (I hope not disappearing) capacity of the United Kingdom to thoroughly anglicise in a single generation. Hersch by contrast – to judge from his work and from those who knew him – was and remained central European, polyglot and polymath. Hersch was a European civil lawyer by formation, despite later influences and a strong sense of case law method; Eli was a thorough-going common lawyer with no special European affinity. Hersch is remembered above all for his monographs – *Private Law Sources and Analogies*, *Development of International Law*, *An International Bill of the Rights of Man*, *Recognition*, and above all *The Function of Law*. Uniquely among international lawyers of his generation, most of these are still in print, three having been recently reissued with substantial introductions.<sup>27</sup> Eli was not an enthusiast for monographs: he never wrote one,<sup>28</sup> nor did he take up the monograph series started by Hersch in 1946, Cambridge Studies in International and Comparative Law – one of the few aspects of his father's heritage he neglected.<sup>29</sup> Despite his father's urgings, Eli did not undertake doctoral studies,<sup>30</sup> while Hersch did so twice, in the German tradition, supervised respectively by Hans Kelsen at Vienna and Arnold McNair at the LSE. Eli was above

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<sup>27</sup> See: *The Development of International Law by the International Court* (1958, reprinted CUP, 2011); *The Function of Law in the International Community* (1934; revised edn with introduction by M Koskenniemi, OUP, 2011); *Private Law Sources and Analogies of International Law* (1927, reprinted Lawbook Exchange, 2012); *An International Bill of the Rights of Man* (1945, reprinted with introduction by P Sands, OUP, 2013); *Recognition in International Law* (1947, reprinted with introduction by J Crawford, CUP, 2013). See also: *The Development of International Law by the Permanent Court of International Justice* (1934); *International Law and Human Rights* (1950, reprinted Archon Books, 1968, and Garland Publishing, 1973).

<sup>28</sup> *Jerusalem and the Holy Places* (London, The Anglo-Israel Association, 1968) was justly described as a pamphlet rather than a monograph. His own Lauterpacht lectures were published: *Aspects of the Administration of International Justice* (Grotius, 1991). He published two Hague special courses (1976, 2009); Hersch gave three, plus a General Course in French ('*Règles générales du droit de la paix*', (1937) 62 *Receuil des cours* 95), published in English in *International Law: Being the Collected Papers of Hersch Lauterpacht, Q.C., LL.D., F.B.A.*, vol I: *The General Works* (Cambridge, CUP, 1970), 179-445.

<sup>29</sup> One reason may have been Cambridge University Press's then aversion to law publishing – but Eli's own publishing house, Grotius, did not go in for monographs either.

<sup>30</sup> In 2011, Eli obtained a Cambridge PhD 'under the special regulations'. This is a doctorate available only to Cambridge graduates based on the evaluation of published works, without supervision or residence requirements. The works submitted included his complete *oeuvre* of writings including edited volumes.

all a practitioner, whereas Hersch's career as practitioner was fairly brief and (by his standards) unspectacular, leaving Nuremberg to one side.<sup>31</sup> Hersch was plurilingual; Eli effectively monolingual.

It is true of course that they had certain things in common. One was a devotion to international law and a sense of its importance, including the value of judicial settlement of international disputes (although among professional international lawyers these are hardly unusual). Another shared trait was an understated adherence to the Jewish tradition. Hersch saw the creation of Israel as a post-war necessity, but his draft declaration of independence of Israel was apparently rejected as too international in tone.<sup>32</sup> Eli for his part advised Israel, e.g. on the Peace Treaty with Jordan in 1994, but was unhappy with recent developments in Israeli policy, especially as concerns the settlements and the apparent rejection of a two-state solution.

Turning to the substance of international law and its application, there were as many differences as there were similarities. Hersch was more interested in ideas than institutions: he wrote comparatively little about the institutional law of either the Covenant or the Charter. Characteristic ideas revolve around a distrust, amounting at times to a devaluation, of the state. Sovereignty is seen not as a value but as a diminishing quantity, identified with the relative notion of domestic jurisdiction. International law is, and should be, seen as in a state of progress towards domestic or at least federal law – and private law to boot, hence the value of private law analogies. The 'real' subjects of international law, correlatively, are individual human beings, in whose disaggregated interests all law, international law included, exists and should exist. The real enemy of law is self-judgement, allied to which is non-justiciability: this is the leitmotif of *The Function of Law*, and from it flowed also his thesis of the invalidity of the 'automatic' reservation to the Optional Clause. In short, a stern reaction against Hegel in light of Hitler – the latter of whom, however, he seems never to have referred to in writing.<sup>33</sup>

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<sup>31</sup> On Hersch as practitioner, see *The Life of Hersch Lauterpacht*, chs 9 & 10. Nuremberg is dealt with separately within ch 9: *ibid*, 268-300. See also P Sands, *East West Street* (2017).

<sup>32</sup> See E Lieblich & Y Shachar, 'Cosmopolitanism at the Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence' (2013) 84 *BYIL* 1.

<sup>33</sup> There were few enough references to Hegel: *Private Law Sources and Analogies* (1927) 44-5; 'Spinoza and International Law' (1927), in 2 *Collected Papers*, 381-2; 'On Realism, Especially in International Relations' (1953), *ibid*, 53. Singled out for criticism was Hegel's dictum that 'The relation of States is one of independent units which make stipulations, but at the same time stand above their stipulations':

Little or nothing of this is to be found in Eli's work. He accepted the value of human rights but placed limited emphasis on them in practice. The father thought recognition constitutive, not because individual state judgments of legal status should be definitive but because someone has to perform the certification function and it cannot be the putative state itself. The son – *qua* Australian legal adviser – suggested that recognition be abolished because it made no legal difference.

If an intellectual tradition associated with the Lauterpacht name survives – as it does, and not only at Cambridge – it is no doubt attributable to Hersch rather than Eli. Eli was creative in his own way, but more as a builder of institutions than ideas – including the institution of his father, a datum of the biography. But international law is a continuing enterprise, a continuing struggle against certain basic facts of international life. It cannot rest on laurels however distinguished their provenance: it needs institutions, places if not palaces. And it must be stressed of Eli that in his creativity he was not self-centred. For example, the Lauterpacht Centre was so-named after Eli's retirement as Director, but this was rather against his inclinations, which were to sell the naming rights! The naming when it happened was deliberately equivocal, neither Eli nor Hersch, therefore both. It seemed then, as it seems now, appropriate.

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*Grundlinien der Philosophie des Rechts* (1821) §330. Hersch's view was that treaty commitments could lead to a real qualification of sovereignty