

Sir Elihu Lauterpacht: a celebration of his life and work Cambridge: Friday, 13 October 2017

Some remarks on Eli's academic writings on international litigation

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It is a privilege to have been asked to contribute these few inadequate remarks in this celebration of Eli, and I thank the organisers for giving me the honour to take part. I think I said most of what I wanted to say about Eli—the-man in my tribute to him published by the [EJIL:talk! blog](#) in February, although I must reiterate that he was a wonderful and inspiring teacher and an assiduous PhD supervisor, despite some of the misgivings I am sure he had of the broadly theoretical nature of my research. I am convinced I worried him at times because he thought I was about to disappear up my own fundament, especially when I developed what he thought was an unhealthy interest in formal logic. (I have since recovered.)

What I would like to consider today is Eli's not inconsiderable contribution to the doctrinal study of international litigation. Of course his academic writings were informed by his practice, but I think that his achievement has been overshadowed, possibly for two reasons. One is the reputation of his father who is, after all, regarded as a significant figure in this field given his *Private law sources and analogies of international law* (1927), *The function of law in the international community* (1933), and *The development of international law by the International Court* (1958). The second is Eli's stellar reputation as an adviser, as an advocate, and as an arbitrator, as well as his work for so many years as editor of the International Law Reports. This might have led to the impression that Eli's contribution lay only in his practice and the substantive jurisprudence of courts and tribunals. I should like to bring Eli the academic out of these shadows by drawing on three principal doctrinal works—*Equity, evasion, equivocation and evolution in international law*, Proceedings of the American Branch of the ILA (1977-78); *Aspects of the administration of international justice* (Grotius:

Cambridge: 1991), which comprises lectures delivered in honour of his father on the thirtieth anniversary of his death; and his Hague Academy lectures on *Principles of procedure in international litigation* which were published in 2011, although they had originally been delivered in 1996. I must admit that I can only admire a publication deadline so gloriously missed.

A striking characteristic of these three works lies not only in the substantive knowledge and reflective insights they contain, but also something that was apparent in Eli's earlier series of lectures in 1977 at the Hague Academy on *The development of the law of international organization by the decisions of international tribunals*. They demonstrate a drive for systematisation, a search for common underlying principles which aim to unify specific areas of law. This was a clear intention of these earlier lectures which did not discuss individual organisations in isolation but tried to explore common ground to uncover where the practice of one organisation had influenced others. As far as I can recall, this integrative approach was fairly unusual in the late 1970s, there only being one or two other commentators who were similarly exceptional, such as Wilfred Jenks, but it was a far more interesting and rewarding method than the bare recitation of the organs and competences of particular organisations which was standard at that time and which, quite frankly, bored me rigid.

Eli's work on international litigation and in particular its procedural aspects also took a broad view which brought together the practice of diverse courts and tribunals which uncovered similarities but which also discussed differences in the way that international tribunals handle cases. Eli, rightly, saw an understanding of procedure as crucial, but he also conceded in his Hague Academy lectures that its study 'does not play a prominent part in the general syllabus of international dispute settlement'—which is still far too true today. But that concession only led up a classic Eli comment—'Procedure is to litigation what cooking is to food'.

In this brief comment, I cannot cover all of Eli's incisive observations. I shall pick out two, namely, his views on consent to international litigation, and those on the notion of equity.

In both *Aspects of the administration of international justice* and his Hague Academy lectures, Eli challenged the received wisdom that international litigation should be dependent on the consent of the parties. Partly he did this by burrowing below the formal surface of international law to uncover the wealth of arrangements which functionally contradict consensual jurisdiction, but also he challenged its very conception. His aim was to question whether there was any continuing justification for, to use his words, 'this so-called general principle'. He noted that its roots are historical: international arbitration preceded the emergence of international adjudication, but arbitration crucially relied on the parties' consent as this was needed to create a tribunal in the first place. With permanent courts, however, consent is only practically necessary for the establishment of the court, but once it exists then the need for consent in practical terms disappears—so, for Eli, the question was why is consensual jurisdiction still included as the keystone in the architecture of international courts?

On first glance, this might seem to be a reversion to some of his father's views, expressed principally in the *Function of law* on the need for compulsory jurisdiction, but Eli's approach and argument were different. Eli's father argued for compulsory jurisdiction essentially because of his [Kelsenite understanding of law](#) and the desire to demonstrate that things like vital interests clauses in arbitral agreements created a false dichotomy between legal and political disputes. While Eli freely accepted that all disputes have some legal element that can be processed and thus are amenable to judicial or arbitral decision, he saw the requirement of consensual jurisdiction as lying in late nineteenth century positivist concepts of the absolute sovereignty of the State. He argued that this mindset is outmoded, as absolute conceptions of sovereignty have been eroded by developments in the structure and content of international law—for instance, with the increasing importance and prevalence of international organisations, and the accumulation of treaties which include compromissory clauses which create compulsory mechanisms for the settlement of disputes.

Eli identified trends in international jurisprudence where the strict requirement of consent has been relaxed, but saw one contrary trend in the International Court, in its

dealing with disputes which implicate third party interests in matters of intervention and the indispensable third party doctrine. In his Hague Academy lectures, he was rather scathing about the [*Monetary gold*](#) doctrine and its significance in cases such as [*East Timor*](#) and [*Phosphate lands in Nauru*](#). 'Scathing' is really an understatement: he bluntly excoriated the Court's initial formulation of the doctrine and its relevance in subsequent cases.

Turning to the question of equity, I think that Eli was prescient in his analysis in the *Equity, evasion, equivocation and evolution* paper in the late 1970s which he subsequently developed at more length in *Aspects of the administration of international justice*. This interest in equity was obviously sparked by an increased reference to equity or equitable principles by international tribunals, principally the International Court, or in treaties. As Eli said, equity and equitable principles 'are intended to refer to elements in legal decision which have no objectively identifiable normative content'. Eli saw the use of equity as resulting in increased discretion on the part of decision-makers because it is an inherently subjective concept. Even if the application of equity is based on the enumeration of factors which should be taken into account, Eli did not see this as a shackle on discretion. He argued:

the mere listing of factors involves no predetermination of their respective roles and thus does not significantly limit the discretion which the basic provision vests in the adjudicator...unless an enumeration is made very specific and detailed, not only as to the factors to be considered but also as to the relative weight to be given to each of them, it will make little substantive difference.

Eli based a fair bit of his initial analysis on critical, incisive, and pertinent analysis of the *North Sea continental shelf* cases and the *UK-France Channel* arbitration. This elicited a letter from Gerald Fitzmaurice, which is quoted in *Aspects of the administration of international justice*. Fitzmaurice agreed with Eli's 'strictures' on the failure to identify the content and source of the equitable principles employed, but he continued:

where...the Tribunal is precluded by its Statute or terms of reference from

deciding *ex aequo et bono*, but is in fact doing just that, it cannot avow it, and has to take refuge in silence. [Emphasis in original.]

While Eli saw dangers in the use of equity, particularly the extent of discretion it confers on decision-makers, and consequently a lack of legal certainty, he thought that this was not necessarily a bad thing because it reflected an attempt to solve a problem, particularly in a treaty text—‘We must not be so idealistic as to deny that even a poor result in negotiation is better than none at all’. Shades of Brexit anyone?

But with equity, perhaps we tie back into his criticism of consensual jurisdiction, as Eli saw the use of equity as necessitating some form of third party settlement, whether judicial or conciliatory, because of its inherently subjective nature. But he wondered if international litigation was a suitable or appropriate mechanism. Because of its subjective and discretionary nature, he argued that in resorting to equity a tribunal is not applying the law, but is creating the law for the parties. A problem he perceived was that a tribunal might not have enough knowledge to do this adequately and so he argued that there should be an interchange between the bench and the parties on the standards and factors to be involved. He drew a parallel with legislation which, maybe a bit idealistically, he thought should not be adopted without an understanding of all the relevant elements, and wondered—‘Why should we be prepared to accept less when it comes to law-making in the international community through this process of third-party settlement?’.

But on equity, I think I should end with another characteristic Eli comment:

Attractive though the concept of equity may be in many situations, and perhaps as beyond criticism as is mother love, it is not a concept that can be sprinkled like salt on every part of the law.

Eli and cooking again.

Finally, despite Eli's manifest attachment to the complexities and niceties of international litigation, he was very clear on its limitations, exhorting the students attending his Hague Academy lectures, and those of us reading them, that 'The first rule of international litigation is to avoid it if at all possible'.