

## Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law

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## Abstract

This article seeks to contextualize the international legal contributions of Hersch (Zvi) Lauterpacht (1897-1960) against his specific historical conditions. It therefore begins with an overview of his biography. The intention is to emphasize his Jewish background in the context of the overlapping cultural and social influences of his time. The article then moves to deal with the three main pillars of Lauterpacht's theoretical approach to international law – his 'Kelsenian twist', the individual and nation State sovereignty. The purpose here is review them in light of his Jewish affinity and German-speaking legal education. The article is concluded with the argument that our understanding of Lauterpacht's international legal contributions could be infinitely richer when and if they are reread against a Babylonian Talmudic text, which is used below in an analogical fashion.

## A. Introduction

Hersch Lauterpacht (1897-1960) identified himself as "Jewish". According to his son Eli Lauterpacht, his "determination not to be less Jewish" was part and parcel to his proud and strong character.<sup>1</sup> The following article approaches this predicament by asking *if*, and more importantly, *how* Lauterpacht's Jewish identity might be relevant to international law. While there are no scientific answers to questions of identity, considering the statistical representation of Jewish lawyers in German speaking universities during the interwar time,<sup>2</sup> there are enough significant identity-based conjectures that need to be raised, especially because international law as a profession is to have always been a *project*

<sup>1</sup> E. Lauterpacht, *Note after his Father's Death*. Unpublished Manuscript, copy on file with author.

<sup>2</sup> If only to mention some numbers: German legal scholars with Jewish backgrounds made up almost twenty per-cent of the field in the beginning of the 1930's. Keeping in mind that the Jewish minority in German speaking countries represented less than one per-cent of the whole population; these statistics mirror an interesting phenomenon that influenced the discipline of international law as well. See R. Y. Paz, *Between a Distant God & a Cruel World: The Contribution of 20th Century Jewish German Scholars Hans Kelsen, Hans J. Morgenthau, Hersch Lauterpacht and Erich Kaufmann to International Law and International Relations* (forthcoming 2012).

carried out by international lawyers and their universal *consciousness*.<sup>3</sup> Although any reference to consciousness remains rather difficult and ambiguous, international law has always a deep structure that refers to assumptions which when explicated, most international lawyers would probably recognize as very basic to the identity of their profession.<sup>4</sup> In brief, without international lawyers, and their identity, that includes their vision of the universal consciousness, there is no international law.

To do justice to the complexities of any questions dealing with identity, I begin with a brief overview of Hersch Lauterpacht's biography. The intention here is to emphasize his Jewish background in the context of the overlapping cultural and social influences mirrored in his *Zeitgeist*. The next section of the paper deals with Lauterpacht's conceptualization of international law. It picks up the three central topoi of Lauterpacht's theoretical approach – sovereignty, Lauterpacht's Kelsenian twist, and his understanding of the individual in international law – to reread them in light of his Jewish affiliation. In particular, this paper argues that our understanding of Lauterpacht's legal style might be richer when read through a Babylonian Talmudic anecdote, which is mostly helpful to explain what I have in mind with Lauterpacht's "rabbinical approach to international law".

## B. Broken Genealogy: From Jewish Particularity to Universalism

Hersch Lauterpacht was born into a middle-class Jewish family in a small town called Zolkiev, located in Galicia, fifteen miles from Lwów (Lemberg), then still part of the Austro-Hungarian Empire. Historically, Zolkiev was notorious for its lively Jewish community and for its publications of Hassidic, Mishnaic and Talmudic discussions of religious laws.<sup>5</sup> Lauterpacht's childhood atmosphere appears to have been one of deep

<sup>3</sup> See D. Kennedy, 'Two Globalizations of Law and Legal Thought: 1850-1968', 36 *Suffolk University Law Review* (2003) 3, 631.

<sup>4</sup> For more on international law's deep structure, see M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 10 (fn. 8).

<sup>5</sup> According to Gershon David Hundert, the Jewish publishing industry in Zolkiev goes back to 1692, and although it was rather small in size, this industry was crucial to the cultural life of Polish-Lithuanian Jewry. By mid 18<sup>th</sup> century, nine presses were in

Jewish nationalism and love of classical literature. His parents were orthodox, and he too knew the Torah and was fluent in Yiddish and Hebrew.<sup>6</sup>

As a teenager, he was a member of an organized group of young Jews, whose goal was self-education in numerous themes, such as Zionist history and the geography of Palestine. This membership caused his expulsion from the Austrian army in 1917. In Vienna, where he went to study law, he became a representative of Jewish high school and university students in dealing with the educational authorities. He was also busy in setting up the World Federation of Jewish Students (where Einstein served as honorary president). These undertakings were carried out alongside his legal studies as a student of Hans Kelsen (1881-1973).

Lauterpacht received doctorates in law (1921) and political science (1922). In 1923, he married a Palestinian Jewish woman, Rachel Steinberg, and moved to London in autumn 1923 where Hersch became a research student at the London School of Economics and Political Science and a candidate for the LL.D. in the University of London. Thus, Lauterpacht was in no sense a refugee.

In 1925, when attending the opening ceremony of the Hebrew University in Palestine, Lauterpacht had expressed his wish to settle in Palestine, but as the young university could only offer a part time lectureship, he remained permanently in England. This must have been positively received by the Lauterpachts, given that among the Jews, England was typically perceived as the personification of independence, freedom, dignity and style. In England, his academic career excelled without apparent interruption. After the publication of his London dissertation, Lauterpacht was appointed as an assistant lecturer in public international law at the London School of Economics, where he established very important professional relations with the most prominent figures of that time. His family was not so lucky, after years of “standardized” persecution in

operation. Expectedly, this highly profitable enterprise began to be taxed after an “ordinance” was issued in 1750. See more in G. D. Hundert, *Jews in Poland-Lithuania in the Eighteenth Century: A Genealogy of Modernity* (2006), 55-56.

<sup>6</sup> Although there is little evidence confirming to this, it is most probable that Lauterpacht received his early education in the Cheder. (Yiddish: kheyder, Hebrew: cheder-tora, literally meaning room of learning). The Cheder is a full-time elementary religious school that boys began when turning three years old. For more on the Cheder and Jewish education in general see B. Binder Kadden & B. Kadden, *Teaching Jewish Life Cycle: Traditions and Activities* (1997), 27-28.

Galicia,<sup>7</sup> Lauterpacht's parents, his brother and his family, his sister and her children, all (except for one who was saved by nuns) perished in the *Shoah* during the autumn of 1940.

Judaism as an academic pursuit naturally penetrated into Lauterpacht's thinking, even if not to a considerable degree. Lauterpacht dedicated his Viennese dissertation to *The International Mandate in the Covenant of the League of Nations*, where he expressly supported the wish to develop Palestine into a Jewish homeland.<sup>8</sup> In 1932, Lauterpacht also conducted his study on *Some Biblical Problems of the Law of War*.<sup>9</sup> In 1933, he wrote an article on the *Persecution of Jews in Germany*.<sup>10</sup> What is striking in this study, also including a proposal of legal possibilities for international action, is the highly diplomatic use of language in the paper's disposition. The resulting superficiality, retrospectively speaking, is definitely confusing. Yet, considering the rise of anti-Semitism that England experienced at the time, this must be seen as a prudent move by Lauterpacht.<sup>11</sup>

<sup>7</sup> For more on the context of a specific political, social, and economic situation that was conducive to rising anti-Jewish violence in Galicia, especially after the breakdown of the "Old Order" in the former Austro-Hungarian province and the Russification and Polonization of these areas see A. V. Prusin, *Nationalizing a Borderland: War, Ethnicity, and Anti-Jewish Violence in East Galicia, 1914-1920* (2005), 114-115.

<sup>8</sup> M. Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', 8 *European Journal of International Law* (1997) 2, 215, 230.

<sup>9</sup> The paper tackles the tense relationship between the Ten Commandments (law) and the war waging by Hebrews on Canaan's conquest (politics). Likewise it deals with the affiliation between just and unjust wars from the Hebrew Bible to international law. Lauterpacht attempted to bring the reader closer to the truth by annulling previous connotations of Jewish contribution to the development of law which were presented either by embarrassing silence or whole hearted condemning. One such example reads "[T]he suggestion will be put forward that in the process of interpretations of the Bible conceptions have evolved [...] constitute a significant contribution to international law". See H. Lauterpacht, *Some Biblical Problems of the Law of War* (1932). Unpublished manuscript, copy on file with author.

<sup>10</sup> Lauterpacht's claim was very "gracious" considering the topic. For instance, he relied on the "public law of Europe" and not on universal import to validate his request for preventing Jewish persecutions. Moreover, it is unclear where and if his request had ever been published. See H. Lauterpacht, *Persecution of Jews in Germany* (1933). Unpublished manuscript, copy on file with author.

<sup>11</sup> Allegedly even the Prince of Wales supported The British Union of Fascists, led by Mosley and in 1936 was renamed The British Union of Fascists and National

Lauterpacht had legally advised the Jewish Agency in Palestine and the Agency's permanent UN mission in New York from the 1930's until Israel's independence. It has also been found that Lauterpacht had advised the Jewish Agency on questions relating to the powers of the General Assembly before the Partition Resolution of November 1947. He did this only after ensuring that his advice and guidance would be rendered anonymously.

It is known that during the London conference on military trials (26 July - 2 August 1945) that initiated the agreement between the Allied Powers on the military tribunal at Nuremberg, Robert H. Jackson (the American representative to the conference) was in direct contact with Hersch Lauterpacht.<sup>12</sup> Moreover, Lauterpacht became a member of the British War Crimes Executive. His duty was to compose drafts for Britain's chief prosecutor, Hartley Shawcross.<sup>13</sup> It has been confirmed that the definitions that later came to be enshrined in Article 6 of the Nuremberg charter (crimes against peace, war crimes, and crimes against humanity) were in fact formulated by Lauterpacht, although Jackson did not directly refer to him by name.<sup>14</sup> This article became the cornerstone of international criminal law.<sup>15</sup> In 1948, Lauterpacht also participated in drafting a proposal for the Declaration of Independence for the State of Israel. This is significant for understanding his Zionist endowment as well as his approach to state sovereignty under international law, an aspect dealt with in more detail below.

Lauterpacht's private as well as academic life reflects the 20<sup>th</sup> century changes in Europe: his multilingual and multicultural background in Galicia; his Jewish upbringing; Zionism; studying law and politics in Vienna with Hans Kelsen, who once even mentioned how Lauterpacht's heavy *Ostjuden* (Jewish East European) accent stood out in the Viennese

Socialists. See G. G. Betts, *The Twilight of Britain: Cultural Nationalism, Multiculturalism and the Politics of Toleration* (2002), 123.

<sup>12</sup> See M. Koskenniemi, 'Hersch Lauterpacht and the Development of the International Criminal Court', 2 *Journal of International Criminal Justice* (2004) 3, 810.

<sup>13</sup> *Id.*; N. Feinberg, *Massot Besheelot Hazman* (1973), 244.

<sup>14</sup> William Jackson, Robert Jackson's son who assisted his father during the Nuremberg trials, confirmed this to Robinson. (J. Robinson, 'The Contribution of Hersch Lauterpacht to the Theory of War', in N. Feinberg (ed.), *Studies in Public International Law in Memory of Sir Hersch Lauterpacht* (1961), 68.

<sup>15</sup> According to Martti Koskenniemi, the strengths and weaknesses of Lauterpacht's writing on the topic of criminal law continues to account for contemporary debate over the politics of war crime trials. See Koskenniemi, *supra* note 12.

circles; marrying a Palestinian Jewish woman; opting to teach in Jerusalem and yet ending up in England; advising the Jews in establishing the Israeli State and becoming one of the most famous international lawyers worldwide. These biographical themes should be kept in mind when the attempt is to decipher the paradoxes that Lauterpacht's approach to international law entails.

### C. Lauterpacht's Conceptualization of International Law

Lauterpacht was a proponent of the natural tradition in international law who never was tired of believing in human goodness and the ability of reason to find this goodness, even in the darkest moments of European history.<sup>16</sup> Although he opted for more "tradition" and naturalism in international law, his version of what this meant relied on the cosmopolitan tradition of Western liberalism.<sup>17</sup> Moreover, given that international law applies "the general principles of law recognized by civilized nations" (Article 38 (1) c, Statute of the International Court of Justice, acquired from Article 38 of the Statute of the Permanent Court of International Justice, 1920), it contains natural law which is vital to the very essence and legitimacy of international law. Unlike other natural legal scholars, Lauterpacht uses natural law to mainly protect the individual, and not the sovereign.<sup>18</sup>

<sup>16</sup> Lauterpacht specified what natural law means to him in his article on 'Spinoza and International Law' (1927) and in his 1946 article, 'The Grotian Tradition in International Law', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 2 (1975), 307-365 [Lauterpacht, Grotian Tradition]. 'The Grotian Tradition in International Law' was the article "that he on several occasions referred to as the most important essay he had ever written." (M. Koskeniemi, 'Hersch Lauterpacht (1897-1960)', in J. Beatson & R. Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004), 601, 656).

<sup>17</sup> *Id.*, 657.

<sup>18</sup> Erich Kaufmann (1880-1972), a contemporary of Lauterpacht, also relied heavily on principles of natural law in his approach. In contrast to Lauterpacht however, Kaufmann understood the principles of natural law to primarily protect the sovereignty of the State. For more on their opposite understanding of natural law see Paz, *supra* note 2.

Lauterpacht contributed to establishing principles of natural law in international law in England, an aspect of much significance considering the rather homogenous composition of English society during the first three decades of the 20<sup>th</sup> century.<sup>19</sup> For Lauterpacht, international law was a translation of natural decency, rationality and universal values into its professional language. Because goodness was one single unit, also the legal translation of what that meant had to be “one”. Ergo, Lauterpacht’s legal approach was one based on principles of legal normativism, legal completeness, and absolute justice. He understood the law as a comprehensive whole.<sup>20</sup> In fact, as he saw it, if justice is not universal and complete, it is denied.<sup>21</sup> The following three sections, three topoi of Lauterpacht’s “complete” pluralistic and liberal cosmopolitan approach to international law will be explicated in further detail. A Talmudic analogy is then introduced linking his biography to his legal approach with more precision.

<sup>19</sup> England did see some social strife during this time. After all, the first Communist Party of Great Britain (CPGB) was established in 1920 and David Lloyd George laid the foundation for the welfare state (for instance, the Education Act, 1918 and the Housing and Town Planning Act, 1919). This however can only be relativized in comparison to the rest of Europe. Despite Harold Laski, the father of pluralism and the London School of Economics’ notorious sociological club, Franz Neumann (1900-1954) – a member of the Frankfurt School who later came to the London School of Economics – was probably right to have described English society as one that “was too homogeneous and too solid, her opportunities (particularly under conditions of unemployment) too narrow, her politics not too agreeable. One could, so I felt, never quite become an Englishman.” (Quoted by M. Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research (1923-1950)* (1973), 144).

<sup>20</sup> Without the “principles of universal jurisprudence’ so frequently resorted to by international publicists [that] prove ultimately identical with general principles of private law, there is no justice”. (H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (1927, 1970), 67-71).

<sup>21</sup> Here one could argue that Lauterpacht’s insistence on the “all or nothing” understanding of universal justice represents a gentle version of the phallic logic (i.e. a logic based on either *having* or *not having the phallus*.) For more on the phallic logic see J. Dor, ‘Hysterical Structure and Phallic Logic’, in J. Feher-Gurevich (ed.), *Clinical Lacan* (1999), 71, 71-75.



## D. Lauterpacht's Approach through a Three-Dimensional Construction

### I. Topos 1: Lauterpacht's Sovereignty (from Youthful "Realism" to its Rejection)

Lauterpacht sought a victory of universal values over State particularism. This was his way to secure State sovereignty against the extreme "Hegelianism" that he associated with the anti-liberal, irrational, egoistic, short-sighted, and "unscientific" philosophy reflected in the politics of Hobbes and Machiavelli.<sup>22</sup> Lauterpacht held nothing but contempt for such "realist" philosophers and/or politicians: it is they who uphold politics to direct international law. Mainly, he is annoyed by the convenience of their position. Realism comes into view as the best of all worlds.<sup>23</sup> On the one hand it is easy to defend, or rather there is no need to defend it, since it is endorsed by the "realistic" national politics/interests. On the other hand, it is easy to cloak opportunism under the assertion of realism – opportunism that results in short sighted solutions rather than realizing future contingencies. Moreover, Lauterpacht resents such realists for their understanding of the foundations of human nature.<sup>24</sup> By relativizing

<sup>22</sup> See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2004), 359.

<sup>23</sup> This notion is reminiscent of Baruch Spinoza's ethical relativism, which Lauterpacht did criticize. According to Lauterpacht, Spinoza's doctrine of reason of State, when dealing with international relations, is "a fatalistic determinism [that] took the place of reliance upon the power of reason [...]. The master's hand lost its cunning". (H. Lauterpacht, 'Spinoza and International Law', in E. Lauterpacht, *supra* note 16, 366, 374-375.) It should here be noted that it was typical among 19<sup>th</sup> century legal theorists to attack Spinoza on this point, which was really attacking him on the idea of no natural sociability of humanity. That Lauterpacht repeats such attacks in the 20<sup>th</sup> century links well with his Victorian approach to international law. See more on his Victorian approach in Koskenniemi, *supra* note 8, 215-263.

<sup>24</sup> As Lauterpacht writes, a main characteristic against the realists is that "[h]e has no faith in the human capacity of human beings when acting collectively, especially in relation to other collectivities, to act intelligibly and to learn from experience. He denies, in fact, the sovereignty of the human will, both in general and in the field of international relations. In this sphere he questions the power of man to learn from experience and to advance to progress." (H. Lauterpacht, 'On Realism, Especially in International Relations', in E. Lauterpacht, *supra* note 16, 52, 61).

principles of universal morality, the realist denies the idea of a peaceful society, international solidarity, and human reason altogether.<sup>25</sup>

According to Lauterpacht, the construction of the modern State needs to be understood differently:

“The modern state is not a disorderly crowd given to uncontrollable eruptions of passion oblivious of moral scruples. It is, as a rule, governed by individuals of experience and ability who reach decisions after full deliberation and who are capable of forming a judgment on the ethical merits of the issues confronting them.”<sup>26</sup>

Clearly, Lauterpacht does not ignore the existence of sovereignty and understood well that, regardless of how it is resolved, it is the basic structure of modern political life. It is just a legally based sovereignty that he has in mind. It might be argued that Lauterpacht developed a “relational” concept of sovereignty, based on recognition (and profoundly different from any “realist” understanding of sovereignty),<sup>27</sup> especially because to him, the modern State is an entity that is to be governed by shrewd judges who avoid the irrationality that stems from self-interest. Lauterpacht – somewhat similarly to Kelsen – used the normative basis of the law to question but also “fix” or rather “replace” altogether the very structure of sovereignty, or rather as this sovereignty is imagined by the “realists”, to be based on the national interest and political State of exception.<sup>28</sup>

<sup>25</sup> See Koskeniemi, *supra* note 22, 60-64.

<sup>26</sup> H. Lauterpacht, *Grotian Tradition*, *supra* note 16, 307, 338.

<sup>27</sup> This can be linked to his rather unique approach to the recognition of States in international law as outlined in his 1947 article and later famously included in the editions of Oppenheim/Lauterpacht that were published under his editorial responsibility. For more see L. Oppenheim & H. Lauterpacht, *International Law* (1947).

<sup>28</sup> Here it is noteworthy to mention William Rasch’s distinction between Carl Schmitt on the one hand and Walter Benjamin/Giorgio Agamben on the other. This is telling because Lauterpacht’s approach is both reminiscent but also significantly different of the approach held by the latter two. According to Rasch, while “calling sovereignty into question is not what Schmitt is after [...] [it is] not totalitarianism vs democratic rule of law, but the metaphysics of the West, which is characterized by the ontology of sovereignty, vs a post metaphysical ontology of the political yet to be realized. Whereas Schmitt locates himself firmly within the political as defined by the sovereign exception, both Benjamin and Agamben imagine the possibility of a politics that exceeds the political. Yet neither Agamben nor Benjamin can say what the grand

Lauterpacht relies on the normative law for the here and now. Firstly, State sovereignty is ascertained and delegated by international law: law tames politics and not the other way around. Secondly, the task of mitigating international law to the individual is important. By establishing his “methodological individualism” as the centre of international law, Lauterpacht gives primacy to the citizen on the one hand,<sup>29</sup> and to the legal interpretation of the international practitioner, on the other hand.<sup>30</sup> Whereas the importance of the individual in international law is explicated further below, for Lauterpacht, international law supersedes international politics mainly because the international legal actors act “in good faith and in pursuance of legal principle”.<sup>31</sup> Not to mention that sovereignty is nothing but “an artificial personification of the metaphysical State.”<sup>32</sup>

Lauterpacht however, began his academic endeavors with a closer association to political realism than one might anticipate. In his Viennese dissertation (1922), he had gone so far as to “reject private law analogy in any form” as these analogies guised as general law concepts “endanger the independence of international law and fail to recognize its particularity.”<sup>33</sup> After his arrival in England, his approach became more progressive and ethical, and from rejecting legal analogies completely he devoted his first book to *Private Law Sources and Analogies of Public International Law*

Other of the structure of sovereignty may be [...]” (W. Rasch, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political* (2004), 94). While Lauterpacht rejects the Schmittian notion of the state of exception, he uses the law to question the political sovereignty and yet clearly avoids any grand Other hypothesis that relies on any other mystical or “post” political visions. As he saw it, political sovereignty needs to be replaced by a legal one. How such a legal based approach sustains its difference from the political alternative remains, in the final analysis, rather weak. See more on this in Paz, *supra* note 2.

<sup>29</sup> “The ordinary citizen is no longer in the mood to look at the matter as an [international legal] object of doctrinal dispute.” (H. Lauterpacht, ‘The Reality of the Law of Nations’ (1947), in E. Lauterpacht, *supra* note 16, 22, 24 [Lauterpacht, Reality]).

<sup>30</sup> The principles of interpretations the judges follow “are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means”. (H. Lauterpacht, ‘Restrictive Interpretations and the Principle of Effectiveness in the Interpretations of Treaties’, in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 4 (1978), 404, 410).

<sup>31</sup> H. Lauterpacht, *Recognition in International Law* (1947), 48-51.

<sup>32</sup> Lauterpacht, *supra* note 20, 299.

<sup>33</sup> H. Lauterpacht, ‘The Mandate under International Law in the Covenant of the League of Nations’ (1922), in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 3 (1977), 57.

(1927). But Lauterpacht's early Viennese flirtation with political realism was important for him to develop an individually based "legal scientism" (i.e. legal realism), which reflected a better awareness of the values and weaknesses of the ethical position as such.

Phrased differently, from his Viennese experience, he knew that repeating, interpreting, and invoking the ethical way cannot be enough. Instead of reiterating the centrality of the individual for a morals-based community, he chose to "fight" sovereignty by promoting a number of basic rights on which international justice could be based on; he subsequently turned to legal scientism for the necessary formal requirements.<sup>34</sup> This turn that I call the "flirt with realism" was also essential for Lauterpacht to develop his close acquaintance with political sovereignty, which he renounces entirely later on in his new home. In England too, Lauterpacht's overall understanding of legal sovereignty becomes more consistent, especially because he frames it together with the needs of the individual on the one hand and by international requirements on the other.

It was the German/Austrian perception of State sovereignty, as Anthony Carty argues, that Lauterpacht made "a scapegoat" responsible for the crisis of the over-powerful State.<sup>35</sup> Lauterpacht equated with Germany alone features of the legal philosophy of the political realism and hence also of political sovereignty which were part of a common European heritage, but from which he purported to separate and single out Germany. Likewise, Carty claims that Lauterpacht treated German legal culture as monolithic and could not recognize the diversity and complexity of opinion within Germany.<sup>36</sup> I believe, however, that Lauterpacht's accusation of Germany for such homogeneity is not a result of his inability to distinguish between German legal varieties. Having had his education in Vienna, under Kelsen, he could not possibly be oblivious to divergences in appreciation of the law in German-speaking areas. Lauterpacht conceives the German tradition of political realism to be the source of "all-evil" because not only did Nazi Germany use the (political) state of exception to an unprecedented manner, it was the ramifications of its irrational passions that he experienced firsthand. 20th century Germany forced Lauterpacht to face the dangerous

<sup>34</sup> As Lauterpacht briefly sums it up: "The disunity of the international world is a fact; but so in the truer sense is its unity." (Lauterpacht, *Reality*, *supra* note 29, 26). It is in the eye of the beholder. See more on his legal realistic approach in Paz, *supra* note 2.

<sup>35</sup> A. Carty, 'Hersch Lauterpacht in International Law', 7 *Baltic Yearbook of International Law* (2007), 83, 84.

<sup>36</sup> *Id.*, 84-86.

possibility of a condition of a continuous political state of exception on a professional level but more importantly on an individual level.

A true victory of universal values needs to be won over State particularism. But how does Lauterpacht's insistence on international legal protection of human rights resonate with his promotion of Jewish self-determination? Lauterpacht seems to have turned his approach upside-down in the case of the Jewish people. It appears he uses the principle of sovereignty to promote the nationalistic "collective passions" that normally personified everything he fought against.<sup>37</sup> Arguably, Lauterpacht's reliance on sovereignty becomes the "exceptional circumstance" that is usually used by his opponents – the legal skeptics and political realists – to protect the individual person from the national interest, when and if that has gone astray.

Lauterpacht's promotion of principle of State creation with respect to the Jewish State on the one hand and his insistence on the protection of international human rights against the power politics of the sovereign reflects a particular trend of the interwar era. As Nathaniel Berman argues in several works dedicated to the international law of this time, minorities' regime was considered a ground to which an opposition to the dictates of statist positivism can be laid on.<sup>38</sup> Such (legal) regimes were seen to enable a certain limitation on the political interests of powerful sovereigns. This ability stems from a double move: first the creative force of liberal nationalism and self-determination were a bypass alternative regulating international relations. This went together with the second tendency: entrusting supra-state entities such as the League of Nations and later the United Nations with a significant role and competence to deal with such matters that were traditionally regarded as exclusively domestic, falling into the *domaine réservé* of the nation State, particularly the State's treatment of its national minorities. While Lauterpacht's way to incorporate both these early 20<sup>th</sup> century "zeitgeist inclinations" into his contribution to both the

<sup>37</sup> Already in 1927 Lauterpacht argued that the professional task of the international lawyer is to protect the power of universal reason against the "collective passions" determined by national interests. (Lauterpacht, *supra* note 23, 374).

<sup>38</sup> See N. Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Inter-War Framework', 33 *Harvard International Law Journal* (1992) 2, 353; *id.*, 'Modernism, Nationalism and the Rhetoric of Reconstruction', 4 *Yale Journal of Law & the Humanities* (1992) 2, 351; *id.*, 'But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law', 106 *Harvard Law Review* (1993) 8, 1792.

Israeli Declaration of Independence and his approach to sovereignty cannot be described here in much more detail,<sup>39</sup> it is hardly surprising that he used Jewish (legal) self-determination in order to challenge the orthodoxy of 19<sup>th</sup> century statist-positivism that viewed the political interests of the sovereign State as international law's foundational unit.

## II. Topos 2: Lauterpachts' Kelsenian Twist

Lauterpacht's modern natural law approach to natural international law owes much to Kelsen's influence as his *Doktorvater*. Ironically, it was Lauterpacht's Jewishness that availed him better social and academic conditions: it was the *numerus clausus* of the University of Lwów which limited the acceptance of Jewish students and which compelled Lauterpacht to study in the cosmopolitan capital of Vienna. But, while the multi-ethnic Vienna eased the burden of his Galician origins, it was neither forgotten nor forgiven.<sup>40</sup> This Jewish experience was bound to influence his approach to international law.

For my purpose here only a brief mention of Kelsen's constructivist and normative jurisprudence is necessary.<sup>41</sup> Kelsen constructs a legal paradigm where all legal statements are hypothetical and tied together in the form of a basic norm. This *Grundnorm* is value-neutral and free from any moral presupposition.<sup>42</sup> The successful act of tracing norms all the way to a

<sup>39</sup> For a more comprehensive picture of Lauterpacht's involvement in the writing of the Israeli Declaration of Independence see Y. Shachar, 'Early Drafts of the Declaration of Independence' 26 *Lyunei Mishpat (Tel Aviv University Law Review)* (2002) 2, 523 and Paz, *supra* note 2.

<sup>40</sup> For example, irrespective of the quality of his dissertation, it received a barely passing grade due to his racial background. The dissertation (entitled *Das völkerrechtliche Mandat in der Satzung des Völkerbundes: Zugleich ein Beitrag zur Frage der Anwendung von privatrechtlichen Begriffen im Völkerrechte.*) could not even be found in the archives of the University, as it disappeared in the aftermath of the *Anschluss* of Austria to the Third Reich. For Kelsen's narration of the incident see H. Kelsen, 'Tributes to Sir Hersch Lauterpacht', 8 *European Journal of International Law* (1997) 2, 309 and E. Lauterpacht, 'Editors Note', in E. Lauterpacht, *supra* note 33, 29, 29.

<sup>41</sup> For more on Kelsen's theoretical approach see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010).

<sup>42</sup> "The Pure Theory describes the positive law as an objectively valid normative order and states that this interpretation is possible only under the condition that a basic norm is presupposed according to which the subjective meaning of the law-creating acts is also their objective meaning. The Pure Theory thereby characterizes this interpretation

basic norm indicates that they are created accurately, and thus Kelsen's question shifts the importance from the essence of the legal system to its "pure" form. Lauterpacht was dissatisfied with Kelsen's lack of morality and viewed his construction of purity in terms of positive normativity as a "theory superadded to the main structure of his doctrine – principally for the sake of argumentative advantage, but ultimately to the disadvantage of the whole system".<sup>43</sup> Kelsen's theory, according to Lauterpacht, would gain more had it embraced natural law to be its basis instead.

Moreover, given that Kelsen's construction of the *Grundnorm* (or rather his *Urgrundnorm*) is based on the customary notion of *pacta sunt servanda*, Lauterpacht does not accept the *Grundnorm* of *pacta sunt servanda* as a plausible fundamental hypothesis.<sup>44</sup> It is insufficient for Lauterpacht because it includes only States and as such cannot explain the binding force of custom or general principles of law.<sup>45</sup> "[T]he initial hypothesis ought not to be a maxim with a purely formal content, but an approximation to a social value, then indeed the first postulated legal cause can fittingly be formulated by reference to the international community as such and not to the will of States."<sup>46</sup> Thus, Lauterpacht puts up against Kelsen's formal and more philosophical perception of the law the material completeness of the law, which follows from the faith in single moral

as possible, not necessary and presents the objective validity of positive law only as conditional – namely conditioned by the presupposed basic norm." (H. Kelsen, *Pure Theory of Law* (1967), 217-218).

<sup>43</sup> H. Lauterpacht, 'Kelsen's Pure Science of Law' (1933), in E. Lauterpacht, *supra* note 16, 404, 424.

<sup>44</sup> More precisely, and as François Rigaux argues, while Kelsen advanced the rule *pacta sunt servanda* as *Ursprungsnorm* for international law in 1920, in his later works, he excluded the possibility that the *pacta sunt servanda* rule *alone* be the basic norm of international law. By 1932 it is only the most important norm of international customary law. See F. Rigaux, 'Hans Kelsen on International Law', 9 *European Journal of International Law* (1998) 2, 325. Later Kelsen clearly argues that "the basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The States ought to behave as they have customarily behaved." (H. Kelsen, *Principles of International Law* (1952), 417-418).

<sup>45</sup> I. G. M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', 8 *European Journal of International Law* (1997) 2, 264, 267.

<sup>46</sup> H. Lauterpacht, *The Function of Law in the International Community* (1966), 423.

goodness. By so doing, he reinforced his association to what elsewhere he terms “the tradition of idealism and progress”.<sup>47</sup>

This progressive tradition becomes more elusive through Lauterpacht’s stance on *non liquet* in international law.<sup>48</sup> Keeping in mind that Lauterpacht struggled with Julius Stone (1907-1985) over this issue more profoundly,<sup>49</sup> the focus here is on Lauterpacht’s divergence from Kelsen’s approach to *non liquet*.<sup>50</sup> In general terms, both scholars deny the possibility of *non liquet* situations. Their reasoning, however, follows different grounds. Kelsen relies on a single, unitary, catch-all system that follows his structural Pure Theory of Law to argue against the possibility of *non liquet*.<sup>51</sup> For Lauterpacht, a *non liquet* is objectionable because there is no *evidence* of the presence of any systematic *non liquet*. The legal *practice*, as he sees it, reveals that the international judicial and arbitral is a complete and gap-free system.<sup>52</sup>

Furthermore, Lauterpacht draws from the “general principles of law”, as specified by Article 38 (1) c of the Statute of the International Court of Justice (that, as mentioned, goes back to Article 38 of the Statute of the Permanent Court of International Justice, 1920), a blank check and even

<sup>47</sup> Lauterpacht, *Grotian Tradition*, *supra* note 16, 359-365.

<sup>48</sup> *Non liquet* means “it is not clear” in Latin. Here I follow Steffen C. Neff definition that: “[m]ore precisely, it is a pronouncement by a court to the effect that it is unable to render a decision in a particular manner because of the existence of a gap in the law, or the lack of a sufficient basis in law for reaching a decision one way or another. [...] A true *non liquet* is a pronouncement by a tribunal not simply that such a provisional gap exists but also, and far more crucially, that no means are available for dealing with it, i.e. that it is not possible to devise any means of repairing the defect.” (S. C. Neff, ‘In Search of Clarity: Non Liquet and International Law’, in K. H. Kaikpbad & M. Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), 63, 63-64).

<sup>49</sup> See more in Paz, *supra* note 2; M. Koskenniemi, *supra* note 22, 361.

<sup>50</sup> See more on the difference between the two approaches in J. Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice’, 80 *British Yearbook of International Law* (2009), 333.

<sup>51</sup> As Steffen C. Neff argues it, Kelsen’s answer is to the idea of legal gaps and it strictly follows the legal procedure: “In international (or, for that matter, domestic) litigation, a claimant is attempting to obtain something from a respondent on the basis of some proffered rule of law. In this process the burden of proof lies on the claimant to establish the existence of the rule of law entitling it to a relief. Either the claimant succeeds in discharging this duty of proof, or it does not.” (See Neff, *supra* note 48, 63-64, 69).

<sup>52</sup> *Id.*, 70.



duty for the legal actor to rely on his/her “natural built-in ethical ability” to solve any possible gaps in the law before they become *non liquets*. Kelsen's argument, in contrast, does not exclude social gaps as such, but such gaps are simultaneously beyond the law as well as secured by the legal system. As Kelsen phrases it, “By obligating humans to behave in a certain way, the legal order ensures freedom beyond legal obligation”.<sup>53</sup> Thus, while Kelsen's view follows a clear distinction between gaps in the law and the very concept of “gaps” in social behavior,<sup>54</sup> Lauterpacht's view is based on the creative ability of the legal actor to use the juridical tool kit to solve and/or repair any provisional gap in the law that would ever appear.

From this point, Lauterpacht goes further to deduce that “the principle of the completeness of the legal order is in itself a general principle of the law [...]”. Likewise, the unacceptability of a structural *non liquet* is “perhaps the most general of the general principles of the law”, or even “[i]t is not easy to conceive of a rule or principle of international law to which the designation ‘positive’ could be applied with greater justification than the prohibition of *non liquet*”.<sup>55</sup>

As long as law's completeness is not jeopardized, the law, in a circular manner, has a practical necessity and vice versa. His understanding of the *non liquet* to be unfeasible as well as an overriding principle of international law induces the very tool kit of international law to be adequate to begin with. The focus on the practical essence of the law is what makes Lauterpacht's concept of natural law tangible, modern, pluralistic and liberal in character. More specifically, his instruction to the judge to be creative is more open-ended and flexible than that of Kelsen's. Although the price of

<sup>53</sup> “Denn indem [die Rechtsordnung] die Menschen zu einem ganz bestimmten Verhalten verpflichtet, gewährleistet sie jenseits dieser Rechtspflichten die Freiheit.” (H. Kelsen, ‘Zur Theorie der Interpretation’, 8 *Revue internationale de la théorie de droit* (1934) 1, 9, 14, reprinted in: H. R. Klecatsky, R. Maric & H. Schambeck (eds), *Die Wiener rechtstheoretische Schule: Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1969), 1363, 1369).

<sup>54</sup> As Christoph Kletzer argues, for Kelsen “not the gaps are the problem of legal scholarship, but rather the concept of gaps is”. (C. Kletzer, ‘Das Goldene Zeitalter der Sicherheit: Hersch Lauterpacht und der Modernismus’, in R. Walter, C. Jabloner & K. Zeleny (eds), *Hans Kelsen und das Völkerrecht: Ergebnisse eines internationalen Symposiums in Wien (1.-2. April 2004)* (2004), 223, 228).

<sup>55</sup> H. Lauterpacht, ‘Some Observations on the Prohibition of “Non Liqueet” and the Completeness of the Law’, in F. M. van Asbeck *et al.*, *Symbole Verzijl: Présentées au Professeur J. H. W. Verzijl à l'occasion de son LXX-ième anniversaire* (1958), 196, 206. Note that, with “positive”, Lauterpacht most probably means “unquestionable” and/or logical rather than positive (i.e. man-made) law.

turning away from the possibility of systemic *non liquet* (and perhaps even its desirability) can be, as Julius Stone argues, very dangerous,<sup>56</sup> the strengths of Lauterpacht's alternative stems from his legal realism and its more policy oriented starting point: there is a range of solutions to be molded and adapted according to the provisional gap at hand. This is the duty of the international legal actor: his approach attributes almost endless attention to the individual and to the supremacy of legal interpretation over substance, and process over rules. This brings us right into the third topos of Lauterpacht's conceptualization of the individual in international law.

### III. Topos 3: The Role of the Individual in International Law

Lauterpacht's 20<sup>th</sup> century circumstances are also reflected in his views on individual human rights. This can clearly be seen when taking a closer look on his shift from being an active Zionist in his place of origin, Lwów in Galicia and later Vienna, to a more passive form of Zionism in his newly adopted country, England. Likewise, most of Lauterpacht's works in the 1940's were dedicated to the development of human rights. As Martti Koskenniemi describes, Lauterpacht "reacted to the Second World War by an express invocation of the liberal-humanist tradition that had been the target of defeated dictatorship".<sup>57</sup> Up until the Universal Declaration on Human Rights (1948), Lauterpacht's work showed great optimism with respect to the future of human rights. In 1945, his successful contribution to the Nuremberg Court must have encouraged him. Using the arguments he developed in *The Grotian Tradition in International Law* (1946), Lauterpacht went to a great extent to establish "the majestic stream of law of nature," in his major work in this time, *International Law and Human Rights* (1950).<sup>58</sup>

In this book, Lauterpacht roots the principles of natural law and international law in the Western tradition and modern Western constitutions.<sup>59</sup> In his view, these could be traced as a set of traditions and principles from the Greek philosophers, through Grotius and Vattel, to "the

<sup>56</sup> For more on the debate between Stone and Lauterpacht see Neff, *supra* note 48, 73-75 and see Paz, *supra* note 2.

<sup>57</sup> Koskenniemi, *supra* note 16, 648.

<sup>58</sup> H. Lauterpacht, *International Law and Human Rights* (1950), 79.

<sup>59</sup> *Id.*, 73-93.

most powerful tradition of freedom conceived, in the words of the Act of Settlement, as the 'birthright of the English people'".<sup>60</sup> Clearly, such consideration of England happened to coincide with his assimilation needs. While his *International Law and Human Rights* "was the first full-scale treatment of the topic [i.e. human rights] by an international lawyer and effectively established human rights as a sub-discipline in the field as it continues to be today"<sup>61</sup>, it also reflects Lauterpacht's great disappointment of the "deceptive" and "concealing" character of the 1948 Universal Declaration on Human Rights.<sup>62</sup> Lauterpacht was deeply frustrated with the fact that States unanimously denied the legally binding force of the declaration, so that the will of States still reigned in a supreme way.<sup>63</sup>

Lauterpacht therefore laid great weight on the ability of the jurists to carry out the "translation" of the moral good into legally valid norms, of ethical into legal norms. The core and essence of the law were neither rules nor institutions but the lawyer himself. In fact, according to Lauterpacht, for the translation of such goodness into valid law to be done aptly, the jurist had to also be a diplomat and vice versa.<sup>64</sup> Moreover, such jurists/diplomats should work in international judiciaries, not political bodies per se, to determine what can be adjudicated by "existing law".<sup>65</sup> Thus, Lauterpacht's oeuvres concentrate on the acidity of courts and other judicial institutions, which are not technical rule-apppliers, but rather act as executors of just solutions. Although Lauterpacht accepts that often there is no one single right answer to legal conflicts, he nevertheless expresses faith in the ability of the jurist to find the equitable or the just interpretation of the law. The

<sup>60</sup> *Id.*, 145, 139.

<sup>61</sup> Koskenniemi, *supra* note 16, 644.

<sup>62</sup> Lauterpacht, *supra* note 58, 421.

<sup>63</sup> *Id.*, 397-408.

<sup>64</sup> As Martti Koskenniemi explains Lauterpacht's work "offered a redescription of diplomacy as the administration of the law". (Koskenniemi, *supra* note 16, 638).

<sup>65</sup> Though Lauterpacht acknowledges the "traditional distinction between so-called legal and so-called political disputes [that] has acquired the character of a sound and obvious limitation of the jurisdiction of international tribunals", he nonetheless argues that "the only proper limitation upon the jurisdiction of international tribunals – as, indeed of all judicial tribunals – consists in the fact that they administer law and must not administer anything else [...]. Undoubtedly, a tribunal cannot *settle* a dispute arising out of a claim, which is unsupported by law [...]. What a tribunal can do is formally to dismiss such a claim and to divest it of any pretence of legality". He generously then adds that "[s]uch adjudication by a tribunal need not preclude the subsequent examination of the dispute by a political organ". (Lauterpacht, 'The Principles of International Organizations', in E. Lauterpacht; *supra* note 33, 461, 478).

fact that this requires legal “improvisations” by jurists is not an issue for Lauterpacht, because all law is based on certain fictions, and so is international law.<sup>66</sup> His legal system therefore is normative in composition and it necessarily relies on fundamental values termed as “general principles of law as recognized by civilized nations” (Art. 83 1. c) Statute of the International Court of Justice), i.e. universal justice, integrity, ethics etc., to solve political inconsistencies.<sup>67</sup> This, as already discussed, makes him a modern promoter of natural law.<sup>68</sup>

Lauterpacht does not only perceive protection of human personality to be one of the fundamental principles of international legal moral duties.<sup>69</sup> He takes it as a truly self-evident fact. After all, for him, international law is nothing but a trifling without the enthronement of the rights of persons. In his terms:

“[W]hat is required at this juncture of history is not the recognition and not even the formulation of inalienable human rights but their effective protection, by an instrumentality higher than the state itself, against the arbitrariness of wilful men and against the complacent or selfish indolence of entrenched interests.”<sup>70</sup>

This has profound consequences. Not only do individuals have rights and responsibilities, in times of need all individuals deserve to be judged by international legal standards, i.e. by international justice, and not by the “subjective” sovereign procedures. Lauterpacht’s promotion of individual-universalized justice together with his arguments in favor of legal *Analogies* extended the tradition of “rule of law” (preferably as practiced in Britain) to

<sup>66</sup> “For although every classification must needs be an artificial one and contain some element of fiction, in the classification based on the law-making character of treaties the element of fiction is represented in a marked degree.” (Lauterpacht, *supra* note 20, 157).

<sup>67</sup> See *id.*, 63.

<sup>68</sup> Martti Koskenniemi calls it a Victorian morality, where Lauterpacht’s tradition refers to “a double program – scientism and individualism – [that] was as central to inter-war cosmopolitanism as it had been to Victorian morality.” (Koskenniemi, *supra* note 8, 218).

<sup>69</sup> Lauterpacht, *Reality*, *supra* note 29, 27.

<sup>70</sup> H. Lauterpacht, ‘Towards an International Bill of Rights’ (1949), in E. Lauterpacht, *supra* note 33, 410, 412.

the international level.<sup>71</sup> Ergo, the international lawyer is appreciated as a detached individual who is a scientific and objective professional in contrast to State representative actors. According to Lauterpacht, professional guilds, especially the cosmopolitan ones, are more trustworthy than the State. For him, decency and morality prevail when the sensibility of objective professional cosmopolitans reigns.

\* \* \*

Linking Lauterpacht's biography to his intellectual oeuvres demonstrates how every barrier he experienced, on a personal and/or professional level, only reinforced his primary intention: to turn the search for the moral goodness into an achievable goal. Goodness is attainable without relying on States' ad-hoc desires. Neither can it be based on anyone's subjective self-interests. Lauterpacht, moreover, avoided fantasy based on the world to come, a vision of what a "God-like" figure might desire. For Lauterpacht, it is about sustaining the normative good, as interpreted by legal scholars, for the here and now. With his legal realism, his scientific tool kit, he sought to avoid the politics of the State of exception.

As he indicated in *The Grotian Tradition* article, the ultimate good is to realize "the craving, in the jurist and layman alike, for a moral content of the law".<sup>72</sup> This can be done from within a legal, liberal and naturalistic approach where the law serves the individual without State interference, at least to a certain extent. This "made" him promote principles of natural law in the international legal framework in a normative way. Like Emmanuel Levinas' and Martin Buber's, Lauterpacht's *Weltanschauung* goes back to East European Jewish *Shtetl* and commences with an intuition about law as a framework that, allegorically speaking, constructs God through morality and goodness.<sup>73</sup> Arguably, his international legal approach "tuned itself" to

<sup>71</sup> As Koskenniemi phrased it, for Lauterpacht "the challenge to the international order was a challenge to Britain's dominant position in it, Lauterpacht's clear preference for British international law against German ("Hegelian") jurisprudence aligned his assimilative strategy with the on-going cultural battle of tradition against revolution". (Koskenniemi, *supra* note 16, 619).

<sup>72</sup> Lauterpacht, *Grotian Tradition*, *supra* note 16, 364.

<sup>73</sup> For more on the allegorical role of God in Lauterpacht's approach see Paz, *supra* note 2.

rabbinical litigation based on the a priori instinct that law is a modern and normative tool to secure human morality and decency.

## E. An Interlude: A Talmudic Turn

At this point, where we see how Lauterpacht sought after the widest freedom to be left open for scholarly reasoning, which can be argued to resemble the “rabbinical” exegetes, it is high time to make a brief interlude and bring to the forefront the Talmudic analogy mentioned above. Although the section to discuss here (Bavli Baba Metzia ch. IV<sup>74</sup>) is one of the few familiar Talmudic texts,<sup>75</sup> it is nevertheless helpful in illuminating, by way of analogy what I have in mind with Lauterpacht’s “rabbinical” approach to international law. The halachic question reads as follows:

“There is a Mishna (Keilim, V., 10) which treats of an oven which R. Eliezer makes clean and the sages unclean, and it is the oven of a snake. What does this mean? Said R. Jehudah in the name of Samuel: It intimates that they encircled it with their evidences as a snake winds itself around an object. And a Boraitha states that R. Eliezer related all answers of the world and they were not accepted. Then he said: Let this carob-tree prove that the Halakha prevails as I state, and the carob was (miraculously) thrown off to a distance of one hundred ells, and according to others four hundred ells. But they said: The carob proves nothing. He again said: ‘Let, then, the spring of water prove that so the Halakha prevails.’” The water then began to run backwards. But again the sages said that this proved nothing. He again said: ‘Then, let the walls of the college prove

<sup>74</sup> Whereas the Hebrew Bible (Tanakh) is the primary source of Jewish law, the Talmud, which is composed of the Mishna (or “Mishnah”, which also means “Secondary” derived from the adj. שני, and the Greek name Deuterosis means “repetition”, thus named for being both the one written authority [codex] secondary [only] to the Tanakh as a basis for the passing of judgment, a source and a tool for creating laws, and the first of many books to complement the Bible in a certain aspect) as well as the Gemara that is more of an analysis and commentary of the Mishna and other Tannaic texts.

<sup>75</sup> See for instance, G. Teubner, *Law as an Autopoietic System* (1993), 12. See also N. Luhmann, *Law as a Social System* (2004), 429.

that I am right.' The walls were about to fall. R. Joshua, however, rebuked them, saying: 'If the scholars of this college are discussing upon a Halakha, wherefore should ye interfere!' They did not fall, for the honor of R. Joshua, but they did not become again straight, for the honor of R. Eliezer [and they are still in the same condition]. He said again: Let it be announced by the heavens that the Halakha prevails according to my statement, and a heavenly voice was heard, saying: Why do you quarrel with R. Eliezer, who is always right in his decisions! R. Joshua then arose and proclaimed [Deut. xxx. 12]: 'The Law is not in the heavens.' How is this to be understood? said R. Jeremiah: It means, the Torah was given already to us on the mountain of Sinai, and we do not care for a heavenly voice, as it reads [Exod. xxiii. 2]: 'To incline after the majority.' R. Nathan met Elijah (the Prophet) and questioned him: 'What did the Holy One, blessed be He, at that time?' (when R. Joshua proclaimed the above answer to the heavenly voice), and he rejoined: 'He laughed and said, My children have overruled me, my children have overruled me.'<sup>76</sup>

The issue at hand is a Halakhic dispute about the (im)purity of an oven owned by a person that may have been called "achnai".<sup>77</sup> This discussion, that starts with the question about the (im)purification of an oven, turns into one of the most constitutive texts found in Jewish sources. There are two "camps" here to this debate. On the one hand, we read of the protagonist who argues in favor of the purity of the oven Rabi Eliezer, the son of Horkanos and a colleague of Rabi Gamliel DiYavne (and his sister's husband). Rabi Eliezer was one of the most important students of Rabi Yuhanan ben Zachai, the greatest of all the Tannaic Rabbis. His adversaries,

<sup>76</sup> The following text is taken from Bavli Baba Metzia Chapter IV (p. 119) and it illustrates a Tannaic text found in the Babylonian Talmud that is written in Babylonian, Aramaic and Hebrew. The Babylonian Talmud is a massive compilation collected in Babylon of various disputations. It incorporates traditions of 400 years from both the Land of Palestine and Babylon. It later became the most authoritative and learned text in Jewish tradition that generated a massive corpus of commentaries. This particular text was discussed in Hebrew by the Tannaim, who were Rabbinic sages from the end of the 2<sup>nd</sup> century Christian Era.

<sup>77</sup> "Achna" or "Achnai" in Aramaic could also mean a snake. A snake can easily create a circle with its body and this could symbolize the opening of an oven.

those who claimed the oven to be impure, are the students of Beit HaMidrash, the school of the Halakha led by Rabi Jeushua Ben Hanania.

Although much of the beauty of this text is lost with its translation,<sup>78</sup> this text that covers an almost normative dispute over the purity of an oven remains significant in numerous ways. It starts with R. Eliezer who argues in favor of the oven's purity and attempts to prove his righteousness through the use of external sources, "evidence" external to the legal corpus. R. Joshua and the rest of the students retaliated against R. Eliezer's "legal proof", namely against the power of prophecies and overtly magical forces that literally threatened the physical and thus also the spiritual existence of the temple by and large. Their collective insistence against R. Eliezer prevailed.

The climax (and irony) is that R. Eliezer really did speak for God, as the heavenly voice tells (i.e. "*why do you quarrel with R. Eliezer, who is always right in his decisions!*"). Moreover, godly interferences were rather common at the time. And yet, the rabbis failed to be impressed with R. Eliezer, who was one of the most respected authorities at the time and who brought proof from the Heavens in support of his stance. Traditionally, this narrative is explained rather straightforwardly; although R. Eliezer may have been right in his assessment of the purity of the oven, it still does not permit him to bring proofs that are external to the law. No one should be allowed to rely on magic, prophecies, and voices from the Heavens in support of a legal claim. The students, Rabbis, scholars, jurists and judges cannot accept such argumentation because it does not come not from within the legal texts: *it is not what the law directs the logic of mankind to do.*

R. Joshua and his students represent in this Talmudic piece a certain fear. Namely, the reliance on heavenly guidance could not suffice for eternity. Heavenly voices might not always be within reach. The primary obligation is therefore to keep the covenant with God, i.e. to follow the law, as it has already been given. Moreover, if the divine logic is open to us, it is to be unraveled in God's words, God's laws. In other words, *if law exists it must be possible, the question remains how.* This *how* question, after the divine law has been given, remains up to us to answer. Notably, this text illustrates how the self-identity of these rabbinical sages is constituted in contrast and in opposition to that of God, the powerful sovereign lawgiver. Once God has given the Jews the law on Mount Sinai, how this law is (the *Sein*) and how it should be (the *Sollen*) is no longer in God's hands.

<sup>78</sup> See the Hebrew and English versions in their "original forms" below in the appendix.



The turn that this text bears witness to is of an historical, social, political and religious nature. It is a shift in the collective understanding of the Jewish people who should no longer follow heavenly voices. Ethical questions are for scholars to interpret through legal texts, but this does not suffice as such. Another demand is for conclusive answers to be made by the *majority* participants of the Beit HaMidrash: after a plurality of opinions have been expressed and discussed, the decision has to be made by a majority rule. The law is in the hands of the Jewish people and their rabbinical leaders who are required to settle disputes with a majority vote. Unlike a joint decision and/or interpretation of the law made by the community's rabbis, an individual (with or without God on his/her side) can and should be driven out of the equation.

Significantly, this is how it should work. God does not retaliate against the decision of the rabbis; he is not even angry for his support of R. Eliezer to be neglected and ignored. On the contrary, he is clearly satisfied. God fondly laughs and says, "My children have overruled me". In other words, God is "happily defeated" by his children because they relied on the very law, a complete law, that he has given to them to do so. This is how it is and how it should be.

To sum up, this text establishes the interpretative role of Halakhic scholars to be more relevant than that of God, the sovereign and the lawgiver. God, the law-giver, is himself bound by law. As such, it is clear that answers to ethical questions must come from within a legal framework. Legal interpretations by the sages, who are responsible to reach decisions by a majority vote, become more important than assuming and/or even knowing what God desires the outcome to be. Such an understanding of the law is extraordinary for that time but also for a religious basis by and large. As a motif, this approach to the law is found in other Jewish religious texts and sources. There is no ability to turn to God or make Godly claims but only to undertake decisions through and by the law that is interpreted by the majority of shrewd rabbis – the law interpreters.

After the loss of the Temple, the kingdoms, land and the Sanhedrin (which was a sort of "supreme court" assembly of twenty-three judges appointed in every city in the Land of Israel), the law that God gave to the Jews, as a chosen people, was the only thing that was left. It is this legal corpus that God had granted the Jews that needs to guide the Jewish people as a united whole. It is a law that serves the community, and not the subjective desires of a sovereign individual. The bottom line is that "the law is not in the Heavens". It is, for better or worse, in our hands instead.

## F. Lauterpacht's "Rabbinical Approach"

Lauterpacht had a clear Jewish awareness and consciousness. He was certainly familiar with this text and similar texts that emphasized the legal understanding as exemplified by the rabbis in this Talmudic episode. Such Jewish legal thinking, that elsewhere I call Jewish legal *Denkkollektiv*,<sup>79</sup> might have influenced Lauterpacht's approach to international law. Be that as it may, it is hard to ignore the similarities between his understanding of the law and that of the rabbis: God and/or the desires of a political sovereign cannot be above the law, which can only be determined by shrewd jurists and scholars. Conflicts must be solved legally and not politically. The meaning of justice, of what is right and what is wrong, is not and should not be in heavenly hands, but in the hands of a group of contemporary learned jurists. This is the only way to avoid the dangers and random arbitrariness, subjective desires and interests driven by power politics. The search here is for legally based stability that is beyond political constructions that are more difficult to control. This is not to say that the sovereign is not important. After all, it is God and/or the sovereign who gives the law in the first place. But, once the sovereign has created the law, however universal and/or particular this law might be, it is to be left in the hands of the jurists. Ergo, such legal scholars, who are aware of the importance of their function, are not only the right persons to determine what is right and what is wrong because of their knowledge, education and personal commitment, they are the people to do so because they were trusted and intended to do so in the first place.

Arguing for similarities between Lauterpacht's legal approach and that of the Tannaic rabbis remains nevertheless problematic. While the extent to which Lauterpacht's familiarity with the sages remains questionable, it is also problematic to assume a certain "Jewish condition" that binds the needs and desires of the rabbis from the end of the 2<sup>nd</sup> century to that of a 20<sup>th</sup> century Jew from Galicia who received his legal education from a modern and secular Jewish international lawyer in Vienna. Instead, the assumption here is based on a broader and more analogous approach. Without presupposing a particular a priori "Jewish condition", there is no need to shy away from comparing the living conditions and circumstances of the Jews living in the time of the destruction of the Second Temple and that of the

<sup>79</sup> More on *Denkkollektiv* see R. S. Cohen & T. Schnelle (eds), *Cognition and Fact: Materials on Ludwik Fleck* (1986), xi; and in Paz, *supra* note 2.

Jews living in 20<sup>th</sup> century Europe. Indeed, these conditions that may have instigated similar desires, wishes and imaginations, just as they may have influenced a particular legal approach from scholars of the time.

Linking Lauterpacht to the Talmudic thinking demonstrates this. Whereas Lauterpacht lost his family and the world he knew with the destruction of European Jewry, the Tannaic rabbis lost their *Heimat* after the destruction of the Second Temple. They too lost their historical foundation, especially with the disintegration of the Sanhedrin. Lauterpacht might have feared God's detachment – or, rather the instability of the politics around him – at a rather early stage of his career just as the rabbis did after their world began to crumble. After all, by annulling R. Eliezer's claim to heavenly voices they tried to replace their daily instabilities with a more normative and trustworthy social framework. Both the rabbis and Lauterpacht seem to have made a similar turn into the world of the legal text, its significance, interpretations and possibilities, arguably as the result of being greatly disappointed by the loss of “a powerful sovereign” to begin with. It is possible that Lauterpacht's endeavors, just like the rabbinical attempts centuries before his time, were simply to create a space apart from the arbitrariness of power politics, a room that allows for the creation of an extra-territorial, ahistorical space that is over and above the turmoil of the present and where law rules in a supreme way.



## II. The English Version quoted above (Babylonian Talmud, Baba Metzia 59b)

59b

B A B A M E Z I A

clared it unclean; [59b] and this was the oven of 'Aknai.<sup>5</sup> Why [the oven of] 'Aknai?—Said Rab Judah in Samuel's name: [It means] that they encompassed it with arguments<sup>6</sup> as a snake, and proved it unclean. It has been taught: On that day R. Eliezer brought forward every imaginable argument,<sup>7</sup> but they did not accept them. Said he to them: 'If the *halachah* agrees with me, let this carob-tree prove it!' Thereupon the carob-tree was torn a hundred cubits out of its place—others affirm, four hundred cubits. 'No proof can be brought from a carob-tree,' they retorted. Again he said to them: 'If the *halachah* agrees with me, let the stream of water prove it!' Whereupon the stream of water flowed backwards. 'No proof can be brought from a stream of water,' they rejoined. Again he urged: 'If the *halachah* agrees with me, let the walls of the schoolhouse prove it.' whereupon the walls inclined to fall. But R. Joshua rebuked them, saying: 'When scholars are engaged in a *halachic* dispute, what have ye to interfere?' Hence they did not fall, in honour of R. Joshua, nor did they resume the upright, in honour of R. Eliezer; and they are still standing thus inclined. Again he said to them: 'If the *halachah* agrees with me, let it be proved from Heaven!' Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the *halachah* agrees with

a him!' But R. Joshua arose and exclaimed: '*It is not in heaven.*'<sup>1</sup> What did he mean by this?—Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, *After the majority must one incline.*<sup>2</sup>

R. Nathan met Elijah<sup>3</sup> and asked him: What did the Holy One, Blessed be He, do in that hour?—He laughed [with joy], he replied, saying, 'My sons have defeated Me. My sons have defeated Me.' It was said: On that day all objects which R. Eliezer had declared clean were brought and burnt in fire.<sup>4</sup> Then they took a vote and excommunicated him.<sup>5</sup> Said they, 'Who shall go and inform him?' 'I will go,' answered R. Akiba, 'lest an unsuitable person go and inform him, and thus destroy the whole world.'<sup>6</sup> What did R. Akiba do? He donned black garments and wrapped himself in black,<sup>7</sup> and sat at a distance of four cubits from him. 'Akiba,' said R. Eliezer to him, 'what has particularly happened to-day?' 'Master,' he replied, 'it appears to me that thy companions hold aloof from thee.' Thereupon he too rent his garments, put off his shoes, removed [his seat] and sat on the earth, whilst tears streamed from his eyes.<sup>8</sup> The world was then smitten: a third

(5) This refers to an oven, which, instead of being made in one piece, was made in a series of separate portions with a layer of sand between each. R. Eliezer maintains that since each portion in itself is not a utensil, the sand between prevents the whole structure from being regarded as a single utensil, and therefore it is not liable to uncleanness. The Sages however hold that the outer coating of mortar or cement unifies the whole, and it is therefore liable to uncleanness. (This is the explanation given by Maimonides on the Mishnah, Kel. V, 10. Rashi a.l. adopts a different reasoning). 'Aknai is a proper noun, probably the name of a master, but it also means 'snake'. (Gr. *ἄκναι*) which meaning the Talmud proceeds to discuss. (6) Lit., 'words'. (7) Lit., 'all the arguments in the world'.

a (1) Deut. XXX, 12. (2) Ex. XXIII, 2; though the story is told in a legendary form, this is a remarkable assertion of the independence of human reasoning. (3) It was believed that Elijah, who had never died, often appeared to the Rab- bis. (4) As unclean. (5) Lit., 'blessed him,' a euphemism for excommunication.

(6) I.e., commit a great wrong by informing him tactlessly and brutally. (7) As a sign of mourning, which a person under the ban had to observe.

b (1) Lit., 'what is this day (different) from yesterday (or to-morrow)?' (2) Renting the garments etc. were all mourning observances. (In ancient times mourners sat actually upon the earth, not, as nowadays, upon low stools).—The character of R. Eliezer is hotly contested by Weiss and Halevi. The former, mainly on the basis of this story (though adducing some other proof too), severely castigates him as a man of extreme stubbornness and conceit, who would brook no disagreement, a bitter controversialist from his youth until death, and ever seeking quarrels (*Dor. II*, 81). Halevy (*Doroth I*, 5, pp. 374 et seqq.) energetically defends him, pointing out that this is the only instance recorded in the whole Talmud of R. Eliezer's maintaining his view against the majority. He further contends that the meekness with which he accepted his sentence, though he was sufficiently great to have disputed and fought it, is a powerful testimony to his humility and peace-loving nature.