



Sir Elihu Lauterpacht QC
(1928 - 2017)
Board Member in Memoriam

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Introduction

*Professor Maurice Mendelson QC**

ELIHU LAUTERPACHT was a valued member of the Editorial Board of TDM¹, and we decided that it would be appropriate to mark his passing in 2017 with a few reminiscences by some of those who knew and admired him. I would like to express my sincere thanks to those who took the time out of their busy schedules to write the tributes that follow.

Elihu (known to all as Eli) was born in London in 1928, the only child of Rachel (née Steinberg) and Hersch Lauterpacht, Jewish immigrants from central and Eastern Europe. Despite his foreign origins, Hersch was to become, not only Whewell Professor of International Law at Cambridge University and a knight of the realm, but one of the leading international lawyers of his generation, and certainly one of the most imaginative and most admired.

In due course, Eli followed in his father's footsteps by becoming an academic at the same university. A generation younger than him, and the scion of a rival ancient university 67 miles away, it took me some years to get to meet him personally. But even before I did so, initially - I must confess - I felt rather sorry for him, pursuing his career in the shadow of so illustrious a father. But I could have spared Eli my silent sympathy; for in time he became highly distinguished in his own right. He achieved this by steering a course somewhat different from his father's.

He, too, became an academic, a Fellow of the illustrious Trinity College, Cambridge, which had been the home of so many great men, including Francis Bacon, Edward Coke Isaac Newton, Bertrand Russell and Ludwig Wittgenstein. And by all accounts he was an inspiring teacher, especially at the postgraduate level. His written output was substantial, both quantitatively and qualitatively, though it is fair to say that there was little that was strikingly original. He edited his father's various writings and drafts into multi-volume *Collected Works*, and another act of filial piety was his writing *The Life of Hersch Lauterpacht*.²

He played an important part in making state practice and the decisions of international and national courts and arbitral tribunals widely available. As Sir Michael Wood notes in his contribution, in 1956 to 1961 Eli (as he was universally known) was responsible for the publication, in the *International and Comparative Law Quarterly*, of "Contemporary Practice of the United Kingdom in the Field of International Law", the baton being later picked up in the *British Year Book of International Law* and emulated in a number of other countries. And in 1960 he took over from his father the editing of *International Law Reports*, a task which he later shared with a number of younger colleagues. Along the same lines, through Grotius Publications, which he founded, he was responsible for the *Iran-US Claims Tribunal Reports*, and the *ICSID Reports*, both of which are now published by Cambridge University Press.

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¹ Alongside Judges Schwebel and Brower.

² Cambridge University Press 2012.

A further important academic contribution was the establishment in Cambridge of what was to become one of the most important international law research centres in the world; the University marked the contribution Eli had made to its creation, and the eminence of his and his father's standing in the field, by attaching to it their family name. There is more about this below, in the paper by Professor Benvenisti and Drs Nouwen and Waibel.

But it was as a practitioner of international law that he really made his name. He was called to the Bar by Gray's Inn in 1950, took silk in 1970, and became a Master of the Bench of his Inn in 1983. After call, he continued in practice for virtually the whole of the rest of his life. For some six decades he appeared in many cases in the ICJ in particular. He was highly esteemed, both for his advice and his advocacy, and was regularly placed in the top tier of international law practitioners by the legal directories. He once joked to me that he had lost more cases in the ICJ than any other counsel, which he considered an accolade: the reason, he said, was that if a case was hopeless, the cry went up "Send for Eli!"

So highly esteemed was he as a practitioner, that in 1974 he was appointed Legal Adviser on International Law to the Australian Government – a post he held from 1975 to 1977. It is extremely rare for a person without ties of nationality or residence in a country to be appointed to such a post, and it is a great tribute to his ability and his reputation that he was asked and that he filled the post with distinction. The essay by Judge Anderson below recounts one aspect of Eli's contribution in that post at the Third UN Law of the Sea Conference; but there were many others.

Unlike his father, Eli did not pursue a career on the international bench. But he was a founder-member, and eventually president, of the UN Administrative Tribunal. He also sat as an arbitrator in several investment arbitrations chaired a NAFTA panel. He also presided over the important Eritrea-Ethiopia Boundary Commission. He only sat once in the ICJ, as a Judge *ad hoc*; but his separate opinion in the provisional measures phase of *Bosnia Genocide case*³, part of which is quoted in Judge Crawford's paper below, is widely regarded, and often cited, as epitomising the proper function of a party-appointed member of an international court or tribunal.⁴

His contribution was recognised in numerous ways, including a knighthood in 1998, an LLD and a professorship from his University, membership of the Institut de Droit International, the Manley O. Hudson Award from the American Society of International Law, and the Hague Prize for International Law.

He was twice married: first, to Judith Hettinger, with whom he had three children before her untimely death in 1970; and then to Catherine Daly, with whom he had one son and who was his mainstay until the end.

As a man, he was full of fun. He liked to tell funny stories against himself, and we loved swapping jokes. I think I had the bigger store, but he was a worthy counterpart and competitor. And I have a very fond memory of one occasion when we found ourselves on the same transport to The Hague and, as soon as we arrived, with one mind made a bee-line to the nearest Dutch-herring stall. He was certainly not one to let infirmity stand in his way.

³ ICJ Rep. 1993, p. 409 (para. 6).

⁴ See also the contribution by Prof. McCorquodale below.

For his wisdom, his contribution to international law and his *joie de vivre*, he will be greatly missed.

Sir Elihu Lauterpacht QC and the Settlement of Maritime Disputes

D H Anderson

During a long and varied professional life, Eli Lauterpacht was involved with remarkably many different aspects of public international law. The matters that he dealt with included both inter-State relations and relations between States and non-State actors of many kinds. In particular, he was much involved with the settlement of disputes of all kinds, turning on questions of public international law or transnational law. He was not only a teacher at Cambridge,¹ but also an author,² a publisher,³ an editor,⁴ a legal adviser to the Australian Government 1995-1977, counsel representing at different times many Governments and corporations,⁵ an arbitrator,⁶ and a judge, including a judge *ad hoc* of the International Court of Justice.⁷ To all these endeavours, he used his deep knowledge of the law in order to make positive contributions, almost invariably delivered with good humour.

This tribute will concentrate first on his involvement with maritime disputes during the Third United Nations Conference on the Law of the Sea (where for three years he served as Deputy Leader of the Australian Delegation), and then with a particular maritime dispute that arose many years later between Malaysia (for whom he was leading counsel) and Singapore brought under the United Nations Convention on the Law of the Sea (LOS Convention).

Lauterpacht as negotiator

In 1975, the Third United Nations Conference on the Law of the Sea (Conference), meeting in Geneva, was attempting to reform, re-state and develop the traditional law of the sea, based on the Geneva Conventions of 1958 and customary law. One of the notable weaknesses of the Geneva Conventions was that the arrangements for dispute settlement were in the form of a separate Optional Protocol that, in the event, most States opted not to accept. A key figure in earlier efforts to improve upon those arrangements was the Leader of the Australian Delegation, Ambassador Ralph Harry, who was joined in 1975 by Eli Lauterpacht as deputy leader.⁸ The two supported efforts to ensure that the dispute settlement arrangements in a future Convention were both integral parts of the total package and compulsory. In early discussions in the working group of which Ambassador Harry was a co-chairman it became clear that, while some compulsory jurisdiction (subject to defined qualifications and exceptions for particular topics) could perhaps be attainable as part of the future Convention, there were wide differences over the question of the appropriate forum. Some States favoured recourse to the International Court of Justice, but many newly-independent States were opposed to the Court's

¹ Fellow of Trinity College; Professor of International Law; founder of the Lauterpacht Centre for International Law.

² Including in the present context *Aspects of the Administration of International Justice* (1991).

³ Founder of the Grotius Press.

⁴ Principal Editor of *International Law Reports* (CUP).

⁵ In the present context, Counsel for Denmark in the *North Sea Continental Shelf* cases (ICJ 1969)

⁶ Including NAFTA and ICSID disputes.

⁷ Judge *ad hoc* Lauterpacht's Separate Opinion explaining the position of the judge *ad hoc* is a classic (ICJ Reports 1993, at 407).

⁸ During his three years as legal adviser to the Ministry of Foreign Affairs and Trade in Canberra, Lauterpacht attended many bilateral and multilateral negotiations, as well as the Sixth (Legal) Committee of the UN General Assembly.

involvement. Many of these States favoured instead recourse to a new Tribunal to be constituted under the Convention, but other States feared this would lead to a proliferation of courts and inconsistent decisions. A third group of States supported recourse to arbitration on the grounds that, whenever a dispute arose, suitably experienced arbitrators could be selected by the States concerned. Given these divisions of opinion, there seemed to be slight hope of securing consensus on any single forum.

At this point, the Conference received an invitation from the Rockefeller Foundation to attend an informal meeting of legal experts during a weekend in Montreux, away from the corridors of Geneva. Many leading figures, including President Amerasinghe (Sri Lanka), Ambassador Koh (Singapore),⁹ Ambassador Harry and Eli Lauterpacht attended the weekend retreat, together with Ambassador Rosenne (Israel) and Ambassador Riphagen (Netherlands).¹⁰ As recounted by Rosenne, it was Riphagen who best articulated the proposal that there should be included in a future Convention a system of choices from among a list of alternative fora.¹¹ In other words, there should in principle be some measure of compulsory jurisdiction but the forum could vary from case to case. This solution was finally accepted as article 287 of the LOS Convention.¹² This was one of the key decisions taken during the Conference. Riphagen originally proposed that, if different choices of forum had been made by two States in dispute, the default rule should be that the forum chosen by the respondent should have jurisdiction. This was later changed, so as first to give the jurisdiction to the new International Tribunal on the Law of the Sea (ITLOS) and finally to provide for arbitration under Annex VII.¹³

The LOS Convention entered into force in November 1994 and over the next 20 or so years several of the different arrangements for the settlement of disputes have been used. The ITLOS was established in Hamburg in 1996 and received its first case in the following year. Several cases have been submitted to arbitration under Annex VII to the Convention. So far, the cases on law of the sea that have been decided by the Court have been based on jurisdictional provisions outside the Convention. A leading commentator noted in 2012 that litigation on the law of the sea was running at an all-time high.

Lauterpacht as Counsel

Turning to the particular dispute, in July 2003, Malaysia instituted proceedings against its neighbour Singapore in respect of the latest stages of the latter's on-going land reclamation programme. Malaysia had raised questions concerning some newly-undertaken reclamation works to the southwest and northeast of Singapore which Malaysia feared would damage its

⁹ Following the passing of Ambassador Amerasinghe, Ambassador Koh succeeded him as President of the Conference.

¹⁰ The present writer was the UK representative at the meeting.

¹¹ S Rosenne, *UNCLOS III-The Montreux (Riphagen) Compromise*, in Bos and Siblesz (Eds), *Realism in Law-Making* (1986) 169.

¹² Article 287(1) reads:

'When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.'

¹³ Article 287(5) reads:

'If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.'

interests and infringe its maritime rights. Malaysia, advised by Eli Lauterpacht, James Crawford and others, instituted arbitration proceedings under Annex VII of the LOS Convention and then in September 2003 invoked article 290(5) of the LOS Convention according to which the ITLOS has the power to prescribe interim measures in appropriate circumstances pending the constitution of the arbitral tribunal. Singapore appointed Ambassador Koh as its Agent. A hearing on the Malaysian request was held later that month at the outset of which Eli Lauterpacht as Counsel for Malaysia stated the following:

‘[O]n this, the first occasion in which I have the honour to address this Tribunal, I must confess to a special pleasure in doing so. Twenty-eight years ago, in the company of a number of the distinguished members of this Tribunal, as well as of the eminent leader of the Singapore delegation, I was able to participate in the meetings both within the Law of the Sea Conference in Geneva and at its margins in the Montreux gathering, when the fundamental elements of the novel dispute settlement system were hammered out and so I have observed the subsequent work of the Tribunal with special interest and admiration.’¹⁴

On 8 October the ITLOS prescribed provisional measures, calling for fresh consultations between the Parties and the undertaking by independent experts of a joint study of the hydrological and environmental effects of the proposed reclamation works.¹⁵ On the basis of the recommendations of experts (including modifications to the proposed works), the parties reached an amicable settlement of their differences and the Annex VII arbitration was withdrawn by agreement of the parties on 1 September 2005,¹⁶

The case represents a good example of the operation of the system of dispute settlement in the Convention. Having helped to set up the system as a participant in the key meeting in Montreux, Eli Lauterpacht played an important role in the operation of that system when he represented Malaysia in both the Annex VII proceedings and the request for provisional measures made to the ITLOS. His personal support for ITLOS was much appreciated at the time.

D H Anderson

¹⁴ ITLOS Pleadings, etc., 2003, at p. 701.

¹⁵ ITLOS Reports 2003, p.4.

¹⁶ The Order of the Annex VII Tribunal is available on the website of the Permanent Court of Arbitration.

Sir Elihu Lauterpacht and the Lauterpacht Centre for International Law at the University of Cambridge

*Eyal Benvenisti, Sarah Nouwen and Michael Waibel**

The Lauterpacht Centre is one of Sir Eli Lauterpacht's principal legacies. As the current Director and Deputy Directors, we have had the privilege of working closely with Sir Eli, our Founding Director and Honorary Fellow, over the last few years. Eli's erudition, warmth and generosity have made us feel immediately welcome in Cambridge's international law community of which Eli was a central pillar for over six decades. His death in February 2017 marks the end of an era for international law in Cambridge and for the research centre named after Sir Eli and his father Sir Hersch Lauterpacht.

We first met Eli in different capacities and at different times. Eyal as he joined the Cambridge Community as the Whewell Chair and the Director of the Centre, Sarah as an MPhil student, then PhD student and later Junior Research Fellow at the Lauterpacht Centre, and Michael as a postdoc at the Centre. Irrespective of the circumstances, and for two of us, in spite of, or probably because of our early-career status, Eli took a close interest in our academic work and, just as characteristically, in our well-being. One of us was prodded on by Eli, three months after the publication of a monograph, about the next book – Eli expected the same prodigious work ethic in others that he himself maintained over his long and distinguished career of teaching, practice and writing.

Born in Cricklewood, North London, Elihu Lauterpacht moved to Cambridge in 1938 on his father's appointment as Whewell Professor of International Law at the University of Cambridge. The only child of Rachel (a pianist) and Hersch, he occupied 6 Cranmer Road, opposite the two buildings that today house the Lauterpacht Centre for International Law. In 1945, Eli followed his father to Trinity College, to read for a degree in first history and then law. He was awarded a Whewell Scholarship in 1950, and became a fellow of Trinity College in 1953.

In 1983, Sir Eli founded the Research Centre for International Law, as it was called at its inception. A towering figure in the international legal community in Cambridge and the world, Sir Eli understood that, although the University of Cambridge had long been among the world's leading universities for international law, it lacked an institution that could provide a home for international legal teaching and scholarship at the University.

Under his leadership as its inaugural Director, the Centre pioneered several major research projects, held the annual Lauterpacht Lectures and a series of weekly talks at which students rubbed shoulders with judges, leading members of the Bar, academics and people from a wide variety of walks of life who had an interest in international law. The Centre provided a home for the International Law Reports (ILR) which Sir Eli edited for almost sixty years. He inaugurated the Iran-United States Claims Tribunal Reports in 1983 and the ICSID Reports in 1993. Sir Eli also set up a publishing house, Grotius Press (which Cambridge University Press

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later acquired) which published the ILR, the Lauterpacht Lectures and a major series of monographs on international law.

In 1985, the Centre moved to its current premises at 5 Cranmer Road, a fine Victorian family house with a large garden. The house was purchased with the generous financial support of the Lauterpacht family, and others. A new wing was added to no. 5 in 1996 which houses the Finley Library and the Snyder Study Room above. In 1996, the University of Cambridge renamed the Centre the Lauterpacht Research Centre for International Law in honour of both Sir Hersch and Sir Elihu Lauterpacht to mark their distinguished contribution to international law at Cambridge.

In June 2002 the Centre acquired the adjoining premises, no. 7 Cranmer Rd. When Trinity College put the house on the market, Sir Eli – with his customary vision and energy – arranged for its purchase for the purposes of the Centre. The King of Bahrain, the Malaysian government, and Trinity College made substantial donations for this purpose.

Following his retirement from teaching, Sir Eli continued to be a familiar face around the Centre, as founder, Emeritus Director, member of the Committee of Management and Honorary Fellow. He regularly attended lectures and events, including the annual Christmas Dinner which made him famous for his jokes, and spoke to fellows and visiting fellows about their research.

Thanks to Eli's leadership and personal generosity, and his ability to persuade many other generous benefactors of his vision, the Centre has developed from its relatively humble beginnings in Sir Eli's private study into one of the world's principal centres for the study of international law. Today the Centre has more than 30 permanent fellows working on all areas of international law. It also welcomes more than 50 visiting fellows a year from around the world, drawn from academic, government and private practice. Together, these people make the Centre one of the liveliest places for research in international law anywhere.

To be invited for tea in his and Cathy's home at Herschel Road was always a special treat – and offered temporary refuge from the busy life of a Cambridge academic and to step into the world that represents the ideal-type of a Cambridge don: surrounded by books in his expansive study, Eli as a host was a true gentleman full of wisdom and wit, who was never hurried, despite his multiple roles as a scholar, barrister and adjudicator at the highest levels. To our minds, Eli was quintessentially Cambridge, in its finest, and undiluted form.

As the current custodians of the Centre to which Sir Eli gave so much, our aim is to preserve his legacy of creating one of the world's leading research centre's in international law almost single-handedly. One of our first activities to that effect was the organisation of a symposium celebrating Sir Eli's life on 13 October 2017. The Symposium brought together Sir Eli's former colleagues, students and friends to remember his influence on the law and their lives, and Fellows from the Lauterpacht Centre to discuss how his vision for a thriving research centre for international law in Cambridge is still very much alive. Audio and video recordings of the events are available on our website at www.lcil.cam.ac.uk.

The Lauterpacht Centre aims to honour Sir Eli's life and work through the establishment of the LCIL – Cambridge International Lawyers Archives; an Eli Lauterpacht Visiting Fellowship to continue Eli's tradition of welcoming scholars from around the world at the Lauterpacht Centre; and an Eli Lauterpacht Events Fund.

Sir Eli will be missed deeply by everyone at the Centre, not only as a giant of international legal scholarship and practice, but also as a mentor and friend.

Elihu Lauterpacht, LCIL and the Lauterpacht Tradition

James Crawford AC*

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.¹

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...²

* © James Crawford, 2017. This is an extract of a longer paper entitled 'International Law and the Public Service', given in Canberra on 27 September 2017, forthcoming in 35 *Australian YB Int L* (2018). This extract was delivered at a conference 'Sir Elihu Lauterpacht. A Celebration of his life and work' held at the Faculty of Law, University of Cambridge, 13 October 2017.

¹ 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.

² 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.³

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,⁴ and chaired a panel under Chapter 20 of NAFTA.⁵ 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.⁶

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 1953.⁷

But he did not speak at the *Preliminary Objections* phase⁸ 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.⁹ The Court dismissed the UK's claims, holding that the 1933

³ 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.

⁴ *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.

⁵ 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).

⁶ 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.

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

⁸ 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’.¹⁰ 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,¹¹ 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.¹² 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.¹³ 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,¹⁴ 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

⁹ 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.

¹⁰ ICJ Rep 1952 p 93, 112.

¹¹ *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.

¹² (1953) 20 ILR 316.

¹³ 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.

¹⁴ 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.¹⁵ 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 1959.¹⁶ It was also included in the very first BIT, between Germany and Pakistan, in the same year.¹⁷

Eli was involved in 16 further cases before the Court,¹⁸ 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.¹⁹

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.²⁰

At the time it seemed a touch histrionic, but in retrospect it was effective,²¹ 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.

¹⁵ 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.

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

¹⁷ 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.

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

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

²⁰ *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).

²¹ 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),²² of his father's papers, in itself a major achievement in five volumes,²³ of the Hersch Lauterpacht Memorial Lectures,²⁴ 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.²⁵

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.²⁶ As a centre for study, research and publication in

²² From vol 24 (1957) through vol 168 (2017).

²³ *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).

²⁴ 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.

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

²⁶ 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.²⁷ Eli was not an enthusiast for monographs: he never wrote one,²⁸ 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.²⁹ Despite his father's urgings, Eli did not undertake doctoral studies,³⁰ 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

²⁷ 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).

²⁸ *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.

²⁹ 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.

³⁰ 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.³¹ 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.³² 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.³³

³¹ 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).

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

³³ 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.

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

Influencing International Law without Dispute

*Robert McCorquodale*¹

I first met Eli Lauterpacht when he was teaching a Masters of Law course with the title of 'Pacific Settlement of Disputes'. He made very clear that this was real law for real international lawyers. He emphasised international arbitration was the future, even though, in the late 1980s, there were not many cases and most of those were not publicly accessible. Fortunately, he was involved in many of them, and brought his immense knowledge, careful analysis and very amusing anecdotes, to make the whole subject both accessible and stimulating. It confirmed in me that I would return to being a full-time practitioner (which I had been for number of years), with an increased awareness of public international law.

The fact that I did not return to full-time legal practice is due to Eli. He had asked me to assist him with research for some of his cases, which I was pleased to do whilst studying. When I had finished and was about to graduate, I received a letter from St. John's College, Cambridge, asking if I was interested in applying for a lectureship in international law. I was very surprised by this but I did decide to apply and - astonishingly - was appointed to the role. This changed my life completely. I suddenly became an academic, albeit one always interested in the applied aspects of international law. It was only many years later I found out - and not from Eli - that he had suggested my name to the selection committee to approach for the appointment of the international law lecturer. He had seen something in me that I had not seen in myself. He had acted in my best interests without me even knowing it. For that I am eternally grateful to Eli.

Over the subsequent decades, Eli and I have met often. He talked of his latest cases and we exchanged views on a range of international legal matters. Always amongst this was discussion of the developments of international law in investment treaties, international arbitration, and international courts and tribunals. He had a wonderful sense of humour, as well as a warmth of feeling about Australia, where I was born and where he had spent several happy years. At the same time, his family was very important to him, and we often discussed our families. The importance of the role of the international legal academic as a practitioner was one of Eli's themes, and he often sent me his and others' articles on these areas. After many years, he persuaded me to return to practice, which I did with pleasure, though, to his disappointment, not at his own Chambers.

Eli had an ability to see beyond the present and to create a future for others. His creation of what is now the Lauterpacht Centre for International Law is one example of this, as was his support for the British Institute of International and Comparative Law (BIICL), including for me to take the role of its Director in 2008.

Above, all he has made a significant impact on public international law more generally. This has come in many forms: from his many publications; from his teaching; from his talks around the world; as judge and arbitrator; and as a result of his advocacy in many cases. For example, his consideration of the interaction between the Security Council and the International Court of Justice in his Separate Opinion in the *Genocide Case (Bosnia-*

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Herzegovina v. Serbia) is superbly analysed.² It is a thoughtful, insightful and powerful statement of the importance of international law and the rule of law within the international order. It deserves to be part of the lexicon for all international law students, academics and practitioners.

Indeed, his dedication to the field of public international law is part of the reason for the now general acceptance that public international law is real law and that it matters to all – governments, organisations, companies, groups and individuals – every day. Many international lawyers around the world are influenced by how Eli has made a practice of it for 60 years. Real cases, real clients, real law, and all based on deep knowledge.

In his wonderful book about his father,³ Eli speaks highly of many of his father's qualities. In particular, he wrote: 'Hersch was a man of remarkable insight, balance, sensitivity and foresight, capable of great understanding and affection and of expressing himself delicately, directly and clearly'.⁴ I think that Eli also had these qualities. In addition, he was able to change lives in international law, including mine, without seeking thanks or praise. A remarkable man.

² *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia (Serbia and Montenegro))* (1993) ICJ Reports.

³ Eli Lauterpacht, *The Life of Hersch Lauterpacht* (CUP, 2012).

⁴ *Ibid*, p.7.

Sir Elihu Lauterpacht: a Celebration of his Life and Work¹

Some Remarks on Eli's Academic Writings on International Litigation

Iain Scobbie*

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 2017², 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

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¹ This is the text of a commemorative talk given in Cambridge on 13 October 2017. A video of the presentation is available at <https://sms.cam.ac.uk/media/2621145>

² <https://www.ejiltalk.org/celebrating-professor-sir-elihu-lauterpacht-cbe-qc-11d-13-july1928-8-february-2017-when-death-becomes-really-personal/>

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'.

Sir Elihu Lauterpacht QC: the Practitioner as Publicist

Michael Wood*

It may well have been Eli Lauterpacht's work as a practitioner before international and domestic courts and tribunals, which began early in his academic career, that led him to devote much energy to practical ways of making international law, and the raw materials of international law, more widely known. Among his many important legacies in the field are the establishment in 1978 of his own publishing house, the aptly named 'Grotius Publications' (later - perhaps a victim of its own success - acquired by Cambridge University Press) and the creation in 1985 of the Research Centre for International Law (since renamed Lauterpacht Centre for International Law, in honour of Eli's father). The present note highlights how his interest and pen turned to publicizing the practice of States (and international courts and tribunals) as the raw material and evidence of international law, an endeavour that remains both important and inspiring.

As a scholar and certainly as a practitioner, Eli devoted much attention to what he referred to as "the problems of international law which arise in the day-to-day activities of the State", believing that such knowledge was instrumental in "keeping international lawyers in touch with new developments".¹ His interest may well have been grounded in his practical approach to the discipline as well as his awareness of what he termed "the inevitability of change in international law".²

Early in his career Eli attended to surveying, in a series of articles published in the *International and Comparative Law Quarterly* during the years 1956-1961, the 'Contemporary Practice of the United Kingdom in the Field of International Law'. In these he skillfully reported and often analysed British practice in relation to such topics as international personality, independence and intervention, jurisdiction and territory, State responsibility and succession as well as disputes and international organizations. The purpose, he explained, was "to make more readily available materials and comment which may assist in ascertaining, by reference to current practice, both the views of the British Government on the content of the rules of international law and the manner in which the United Kingdom discharges her international obligations".³ In 1960 he replaced his father as editor of the *International Law Reports*, a role he was to carry out so ably (alone or jointly with others) for almost six decades. This systematic reporting of decisions of international courts and arbitral tribunals as well as judgments of national courts, now in the hands of Sir Christopher Greenwood and Ms Karen Lee, remains of much practical value. Similar enthusiasm for making international legal materials more readily available must have guided Eli in editing such works as the collections of documents concerning the Suez Canal dispute of 1956-1959 and the Kuwait crisis of the early 1990s.⁴

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¹ E. Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment', 5 *International & Comparative Law Quarterly* (1956) 405.

² E. Lauterpacht, 'The Inevitability of Change in International Law and the Need for Adjustment of Interests', 51 *Australian Law Journal* (1977) 83-88.

³ *Supra* note 1.

⁴ E. Lauterpacht (ed.), *The Suez Canal settlement: a selection of documents relating to the settlement of the Suez Canal dispute, the clearance of the Suez Canal and the settlement of disputes between the United Kingdom, France and the United Arab Republic, October 1956-March 1959* (Stevens, 1960); E. Lauterpacht, C.J. Greenwood, M. Weller and D. Bethlehem (eds.), *The Kuwait Crisis: Basic Documents* (Grotius Publications, 1991).

Access to State practice is, indeed, critical for the application and development of international law, in particular customary international law. But in a world of some 200 States and a plethora of international fora and means for communication, ascertaining such practice (and that of other subjects of international law) is not free from difficulty. The sheer quantity of available material is daunting, and the challenge is compounded by the absence of a common classification system to compare and contrast all available records.⁵ In addition, despite the great mass of materials that is now at hand and the powerful new means to collect, preserve and disseminate data, coverage of practice remains limited given that many official documents and other indications of governmental action are still unpublished and thus unavailable. This may sometimes reflect a political choice, but more often derives from the simple fact that publishing State practice systematically requires considerable resources, which only relatively few States have been able to commit over an extended period.

Aware of the need for making State practice more widely available in a legal system in which customary international law continues to play a vital role, the United Nations International Law Commission has recently placed the issue on its agenda. As part of its current work on the topic 'Identification of customary international law', the Commission intends to examine the present situation and recommendations for its improvement, an undertaking for which various UN members have already expressed support. This will not be the Commission's first consideration of this matter: an earlier foray into exploring 'ways and means for making the evidence of customary international law more readily available' was mandated by Article 24 of the Commission's Statute of 1947, and led to specific recommendations being issued by the Commission in 1950. Most of these have been acted upon, giving rise to some important documentation frequently consulted by international lawyers (and perhaps serving to inspire the young Eli as well). Publication of State practice (and of other evidence of such practice, as may be found in scholarly writings, documents stemming from international organizations, and decisions of international courts and tribunals) has greatly expanded, in part also thanks to fruitful activities of private national or international institutes. It is hoped that a renewed examination of the issue, taking account of modern circumstances and the developments of the digital era, would make the evidence of customary international law even more readily available. It may be thought that Eli, too, would have considered such an effort worthwhile.

⁵ The exception of the model plan for the classification of documents concerning State practice in the field of public international law, adopted by the Committee of Ministers of the Council of Europe in 1968 (Resolution (68) 17) and amended in 1997 (Recommendation No. R (97) 11), bears mention.