

## Democracies and International Law

Democracies and authoritarian regimes have different approaches to international law, grounded in their different forms of government. As the balance of power between democracies and non-democracies shifts, it will have consequences for international legal order. Human rights may face severe challenges in years ahead, but citizens of democratic countries may still benefit from international legal cooperation in other areas. Ranging across several continents, this volume surveys the state of democracy-enhancing international law, and provides ideas for a way forward in the face of rising authoritarianism.

TOM GINSBURG is the Leo Spitz Professor of International Law, University of Chicago Law School, and a research associate at the American Bar Foundation. He is the author, most recently, of *How to Save a Constitutional Democracy* (2018, with Aziz Huq). He is a member of the American Academy of Arts and Sciences. Before entering law teaching, he served as a legal advisor at the Iran – United States Claims Tribunal, The Hague, Netherlands, and he has consulted with numerous international development agencies and governments on legal and constitutional reform. He currently serves as a senior advisor on Constitution Building to International IDEA.

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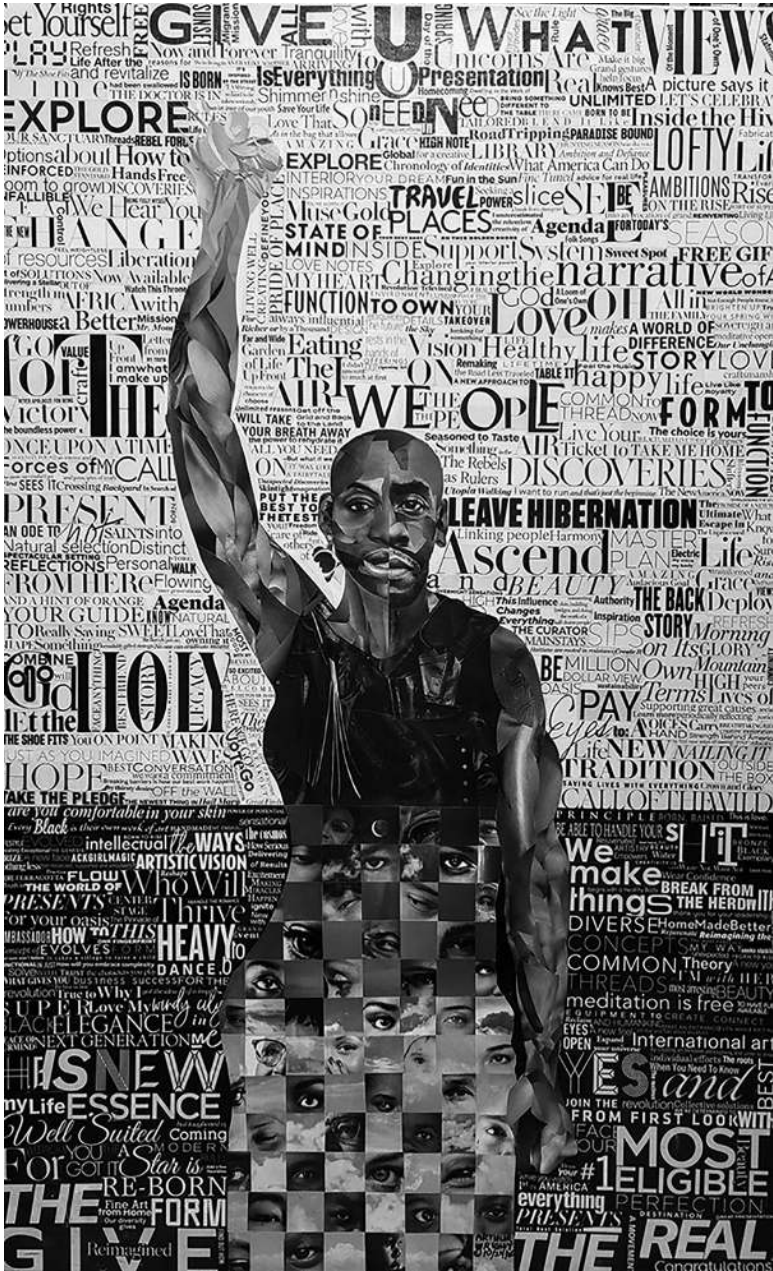
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To the memory of my father.

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## *Preface*

This book originated as the Hersch Lauterpacht Memorial Lectures, given at Cambridge in March 2019. Because Lauterpacht played such an important role in developing the basis for international legal liberalism, I think it appropriate to say a few words about him in this preface. I do so even though my primary concern in the book is with democracy rather than liberalism per se.

Sir Hersch Lauterpacht (1897–1960) was one of the leading figures in international law in the twentieth century: teacher, scholar and British judge of the International Court of Justice in the Hague. Born to a middle-class Jewish family in Austro-Hungarian Galicia, Lauterpacht's life covers a period in which Jews were transformed, and transformational, in international society. His is a quintessentially twentieth-century story: An *ostjude* going first to Vienna and then to London; retraining himself there, as did so many émigrés; and eventually rising, through sheer talent and energy, to the pinnacle of international legal society, even as his former world was being destroyed. Lauterpacht's career also spanned the transformation of international law, from a framework focused on interactions among sovereign states to one in which human rights were seen as being a legitimate subject of international concern; individuals not only had rights but also duties, and could bear international criminal responsibility; and intergovernmental organizations became important actors. Lauterpacht played a major role in providing an intellectual underpinning for all these developments, which can be broadly characterized as a liberal transformation.

Lauterpacht remains an object of fascination today. In recent years he has been the subject of a biography by his late son Elihu, himself a prominent international lawyer; he played a major role in Philippe Sands' bestselling *East–West Street*; and he was the topic of an incisive scholarly analysis by the eminent Finnish jurist Martti Koskenniemi, who called Lauterpacht's book *The Function of Law in the International Community*

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“the most important English-language book on international law in the 20th century.”<sup>1</sup>

Liberalism is often most attractive to minority groups, and it is perhaps not surprising that Lauterpacht, along with a number of other Jewish lawyers, played such a crucial role in its extension. Lauterpacht grew up in a corner of Galicia, where the aftermath of World War I brought violence and conflict as Poles and Ukrainians positioned for territory. The Jews of Galicia declared neutrality as between these groups and formed a volunteer militia to keep the peace – in which Lauterpacht served. It was a world of powerful nationalism and deep anti-Semitism; Lauterpacht was unable to take final examinations at the University of Lemberg because it had closed to Jews. He eventually completed his doctoral studies in Vienna, where he encountered the great jurist Hans Kelsen. Lauterpacht then sought a place where he could flourish, landing in the more tolerant environment of England. Enrolling at the London School of Economics, he soon met Arnold McNair, which his son notes was “probably the most important event in Lauterpacht’s career.”<sup>2</sup> McNair was one of the stars of English international law, eventually taking the Whewell Chair at Cambridge in 1935. Upon leaving in 1937, he arranged that Lauterpacht succeed him, a pattern again followed when Lauterpacht succeeded McNair as British judge on the International Court of Justice in 1955.

Under McNair’s guidance, Lauterpacht’s scholarship thrived, and he eventually assumed the editorship of the most important treatise on international law, *Oppenheim* (whose author had also held the Whewell Chair). Lauterpacht’s first book, *Private Law Sources of International Law* (1927), sought to elaborate the general principles of law, drawn from domestic legal systems, that were one of the formal sources of international jurisprudence. Emphasizing that international law drew on familiar domestic principles was crucial to making it palatable to the skeptical legal establishment in Britain. In his next book, *The Function of Law in the International Community* (1933), Lauterpacht argued that the international legal system, though lacking legislation and centralized enforcement machinery, was nevertheless conceptually complete and thus worthy of treatment as a true system. Lauterpacht’s view was that there was, in

<sup>1</sup> Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (New York: Cambridge University Press, 2010); Philippe Sands, *East–West Street* (New York: Alfred A. Knopf, 2016); Martti Koskeniemi, “Hersch Lauterpacht 1897–1960,” in J. Beatson and R. Zimmermann eds., *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth-Century Britain*, 601–62 (Oxford: Oxford University Press, 2004).

<sup>2</sup> Lauterpacht, *supra* note 1, at 41.

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principle, no nonjusticiable dispute and that judges could rely on general principles, analogy and other gap-filling techniques to articulate rules and resolve a wide array of interstate problems. This argument drew on practices quite comfortable to common law jurists and so also contributed to the mainstreaming of the subject in the United Kingdom.

Lauterpacht's optimism about the possibility of international adjudication to settle disputes was foundational for what might be called the legalist position in international relations, and helped to construct the dominant view of international lawyers to this day. In its naive version, international legalism assumes that with enough goodwill, states can resolve disputes through adjudication and law can thereby lead to a more peaceful world. Like its domestic variant identified by Judith Shklar, international legalism has been subjected to withering critique, which seems to arise in every generation.<sup>3</sup> The British realist E. H. Carr used Lauterpacht's book as a chief foil in his classic *The Twenty Years' Crisis* (1939); much more recently, my colleague Eric Posner renewed the attack in his *The Perils of Global Legalism* (2009). For legalists, however, Lauterpacht was a central figure in articulating the possibilities and promise of international law. He did not see its role as articulating a "philosophy of second best" but rather saw law as an autonomous moral enterprise. And it was this stance that helped him to imagine a future in which international law could be used to protect the individual, and in which states were seen as owing duties to the individual rather than the other way around. Legalism and liberalism went together.

World War II was a crucible for the debate between legalists and realists as well as for Lauterpacht, who lost nearly all of his extended family in Poland in 1942. Notwithstanding realist skepticism, the war brought with it a new set of legal problems and prompted new calls for a postwar international architecture that would facilitate greater protection of human rights. Lauterpacht was a contributor to these debates from his post in Cambridge and on his occasional visits to the United States. Before America's entry into the war, he advised Attorney General Robert Jackson on legal justifications for US assistance to the United Kingdom at a time when most American international lawyers remained critical of such proposals or were outright isolationist. Lauterpacht then drafted a volume, *The International Bill of Rights* (1945), which appeared just as the UN Charter was being signed, and foreshadowed the Universal Declaration of Human Rights of 1948. Lauterpacht was critical of the latter because it was issued as an unenforceable declaration of the General Assembly rather than a legally binding instrument. Lauterpacht's writing

<sup>3</sup> Judith Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964).

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emphasized the need for effective enforcement machinery, and in particular the role of international tribunals.

Along with his work on human rights, Lauterpacht also contributed to the notion that the individual was a bearer of duties in international law, a crucial intellectual underpinning of the Nuremberg and Tokyo war crimes trials. He played a central role in conceptualizing the scheme of charges against the major Nazi figures to include newer categories of waging aggressive war and crimes against humanity, along with the established set of war crimes. He also provided the intellectual justification for rejecting the defense of superior orders by military personnel and laid the basis for the development of international criminal law at Nuremberg and beyond.

In short, Lauterpacht contributed to the conceptual architecture of postwar international organization, which for the first time included machinery for the protection of human rights at the individual level and a doctrine of individual responsibility. Born into a doomed world, his young life was affected by the prewar minorities regimes, which had conceived of rights as belonging primarily to groups. These rights were guaranteed by a series of bilateral treaties in which external states ensured the enforcement of minority protections. Through these treaties, the rights of minority groups became a legitimate, if limited, object of international law, whose practical protection would depend on the benevolence of particular outside states. The United Nations Charter, in contrast, was a multilateral, indeed global enterprise. It enshrined *individual* human rights as a normative ideal and established a set of *international* mechanisms to protect them. To be sure, Lauterpacht rightly criticized the machinery of international enforcement under the charter for its weakness.<sup>4</sup> But the conceptual transformation was underway, even if it remained a work in progress as a practical matter.

Although he played a role in international courts and institutions, Lauterpacht's influence was not primarily as a lawyer or judge. He appeared as an advocate in only a handful of cases in his career and his influence on the jurisprudence of the International Court of Justice, on which he served for five years before his early death in 1960, was not great. Rather, his continued relevance testifies to the importance of books and ideas. Through his work as a scholar and editor, Lauterpacht played a central role in systematizing international law and shaping its operation and development. His commitment to the individual as the ultimate object of law, and to the legalist project of imagining that politics could be tamed,

<sup>4</sup> Indeed, he concluded after a brief tenure in the Legal Department of the UN that "the atmosphere of the UN is not conducive to concentrated work." Lauterpacht, *supra* note 1, at 304.

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serves as a good preface for lectures dealing with the question of whether these ideas can be sustained or whether they are doomed to be replaced by something new and darker. Lauterpacht's story is also a reminder of what is at stake. It was the liberal-democratic United Kingdom that allowed Lauterpacht the international lawyer to thrive. If liberal democracy's many critics have their way, we must ask ourselves how many future potential Lauterpachts will be lost to history and scholarship because they were judged not on their ideas but on their identities, or because their ideas threatened the holders of power.

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I expected that by this point in my life I would have returned to my native Northern California, but I find myself spending my career far from the land of my birth, further than even Lauterpacht himself. The sole reason for my continued self-exile is the University of Chicago Law School, where I have been fortunate to have extraordinary colleagues. My thanks to Dean Tom Miles for maintaining an unparalleled environment for scholarly inquiry, and to the Russell Baker Scholars Fund for financial support.

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My father, Sam Ginsburg z”l, was always my toughest reader and I’m grateful to have spent ten weeks with him while drafting the book during his final summer. I dedicate the work to his memory.