Hersch Lauterpacht as a Positivist

— Understood in the Context of the Methodological Argument (*Methodenstreit*) —

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"International law is not a highly technical subject, and it would be a mistake to aim at giving it more technicality by the mode of treating it". —— John Westlake

Hersch Lauterpacht has been regarded as one of the great opponents of positivism. He severely criticized the State Will doctrine which holds that the will of the state is the ultimate and exclusive source of law. Paradoxically however, his methodology, namely the construction of a complete and self-contained system of legal norms through which a lawyer could settle every dispute, owed much to German legal positivism. He defended the positivist methodology against anti-positivists, such as Hans Morgenthau. Twentieth century scholars of international law, such as J.L.Brierly and J.Stone, criticized his methodology for its positivist heritage. Only by examining the positivist elements of Lauterpacht's methodology can we fully appreciate the significance of the arguments it has engendered.

1. Lauterpacht and Positivism

To the extent that the history of international law can be understood as a dichotomy between "positivist" and "natural law" doctrines, international legal theories in the first half of the twentieth century are often characterized as a "criticism of positivism" or as a "renaissance of natural law". Similarly Hersch Lauterpacht, one of the dominant international law scholars of that period, could also be described as an opponent of positivism, or as a proponent of "natural law" First, Lauterpacht criticized "the doctrine of rigid positivism according to which only rules expressly recognized by international custom and treaties are the exclusive sources of international law," regarding "positivism" as an aspect of the "doctrine of sovereignty".[1] Second, he maintained that not only the rules to which the State gives its consent, but also the principles which have been established in jurisprudence — "general principles of law", "principles of justice" and "principles of equity"—are applicable in international judicial settlement[2]. He further believed that the analogy of "general

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1) Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, Longmans, Green and Co.,1927, p.43.

2) Lauterpacht regarded those principles as legal ones and clearly distinguished the application of them from non-judicial settlements *ex aequo et bono*. See *Private Law Sources and Analogies*, pp.63-67.

principles of private law recognized by the main systems of jurisprudence" was useful and necessary in international law in order to constitute a gapless system of law in this field[3]. For those who adhere to the dichotomy of "positivist" and "natural law" doctrines, such beliefs may appear to fall under the latter's umbrella. After all, Lauterpacht expressly avoided basing international law on the will of the State, seeking instead to establish it on another, "higher" basis[4]

This understanding, however, is too narrow. It overlooks, for example, the fact that Lauterpacht was criticized in E.H.Carr's, *The Twenty Years Crisis 1919-1939* (1939), as a utopian. Moreover, it ignores that one of the chief purposes of Lauterpacht's masterpiece, *The Function of Law in the International Community* (1933), was to refute the theory of Hans Morgenthau who was then an international law scholar in Europe. The dichotomy of "positivist" and "natural law" doctrines is of little use to understand these arguments. Neither Carr nor Morgenthau can be counted as a "positivist" who only recognizes as law those positive laws founded on the will of State.

In particular, Morgenthau, a lawyer from Germany, clearly grasped the significance of the "methodological argument (*Methodenstreit*)"[5] in German pubic law and general State doctrine (*allgemeine Staatslehre*) between positivism and anti-positivism in the inter-war period, and expressed sympathy with the latter's view[6]. In his inaugural academic lecture before the law faculty of the University of Geneva (1932), Morgenthau tried "to fit the history of the German idea of State in the last thirty years into the context of general spiritual and political development in this period"[7]. He highlighted the historically conditioned character of Paul Laband's "seemingly nonpolitical" formalism and of the "logical-formal" tendency of his followers, who dedicated themselves to the task of constructing a logically consistent system of positive legal norms and gave up grasping the total reality of State in their time.[8]

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3) *Private Law Sources and Analogies*, p.85.

4) Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschihte*, Nomos Verlagsgesellschaft, 2. Aufl., 1988, p.712. Iain G.M.Scobbie, "The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function,"*European Journal of International Law*, vol.8, 1997, pp.266-269. Lauterpacht himself called the general principles of law "a modern version of the law of nature" (Lauterpacht, *International Law and Human Rights*, Stevens & Sons, 1950, p.115).

5) On the argument and its political context, see: Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 3.Bd., C.H.beck, 1999, pp.153-186.

6) Christoph Frei, *Hans J. Morgenthau, An Intellectual Biography*, Luisiana State University Press, 2001, pp.114-120.

7) "die Geschichte des deutschen Staatsdenkens der letzten dressig Jahre in den Zusammenhang der allgemeinen geistigen und politischen Entwicklung dieses Zeitraums einzufügen" ("Der Kampf der deutschen Staatslehre um die Wirklichkeit", manuscript, box53 in the collection of Morgenthau's literary estate on the deposit at the Library of Congress in Washington, D.C.).

8) "Laband überliess die politischen Probleme, die das öffentliche recht jener Zeit aufgab, den Politikern und zog sich in den scheinbar unpolitischen Formalismus seines Staatsrechts zurück" (*Ibid.*, p.6). In Jellinek's system "die für die staatlichen Zustände der Zeit charakteristischen Teile der staatlichen Wirklichkeit... [blieben]

According to Morgenthau, the positivist retreat from non-juridical, and especially political, elements of the State had corresponded with the political context and the spirit of the time during Bismarck's reign when the German bourgeois (*das deutsche Bürgertum*) and their academic activities had to withdraw from the political sphere. Such a situation, he believed, could only be temporary[9].

> "In aller Regel aber verlangt ein elementares Bedürfnis der Menschen nach sinngebender Erklärung und wertender Rechtfertigung der Ordnung, die wir Staat nennen, und zwar nicht einer abstrakten Sollordnung, deren einzelne Teile sich nach formal-logischen Gesichtspunkten systematisieren lassen, sondern der konkreten,wirkenden Lebensordnung, als welche jene abstrakte Ordnung in unser Leben bestimmend eingreift."[10]

It was no wonder then that young scholars after the First World War, such as Erich Kaufmann, Rudolf Smend and Carl Schmitt, criticized the positivist method, arguing that it could not capture the reality of the State. Morgenthau interpreted Schmitt's introduction of the concept of the *political* into legal thought as an unsuccessful effort "to theoretically comprehend the reality of State",[11] which had been excluded by positivists from the sphere of legal theory.

Such an anti-positivist concern was shared by Morgenthau himself. In his first book published in 1929[12], he attempted to establish a theoretical basis for the concept of the political dispute, which had been often invoked by international law theorists in order to limit the scope of international judicial function[13]. He denied "the dominant theory imprisoned by the positivist prejudice, according to which juridical problems could be resolved only by the interpretation of positive law."[14] For Morgenthau, only the reality of

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unverarbeitet" (p.8). "[Kelsen] beschränkt sich...darauf, die Fülle des geltenden positiven öffentlichen Rechts in ein nach bestimmten formalen Gesichtspunkten logisch geordnetes System zu bringen." "die Staatslehre Kelsens [ist]...ausschliesslich an eine logisch-normative Methode gebunden" (p.14).

9) *Ibid.*, pp.5-6, 15-16.

10) *Ibid.*, p.16

11) *Ibid.*, p.20

12) *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, Universitätsverlag von Robert Noske. The revised French version of this book is: *La notion du "politique" et la théorie des différends internationaux*, Recueil Sirey, 1933.

13) The doctrine of the political dispute had its basis in treaties, although they did not explicitly refer to the "political dispute" itself. Many of the international arbitration treaties concluded during the first four decades of the twentieth century distinguished disputes of a legal nature from other ones, and regarded only the former as justiciable; e.g. article 1 of the arbitration convention of Germany with Belgium (Locarno, 1925): "All disputes of every kind between Germany and Belgium with regard to which the Parties are in conflict as to their respective rights...shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice...".

14) *La notion du "politique"*, pp.37-38.

State relations, not positive laws, could provide a sound basis for the concept of political dispute.

Looking to base the concept on the reality of international relations, Morgenthau made a distinction between "tensions (*Spannungen*)" and "disputes (*Streitigkeiten*)." Disputes are "the collisions between States, which find a precise, clearly formulated expression in the form of claim and objection to the claim." The object of a dispute is rationally formulated such that it is possible to decide and settle it on the basis of generally applicable norms[15]. According to Morgenthau, a State does not always rationally base its conduct on these norms. Instead, driven by an impulse to attain a higher status in international society, a state often aspires to change the normative *status quo*. Such an irrational aspiration causes another kind of collision between states. In contrast to disputes, "tensions" are defined as "those collisions between States, which are concerned with a discrepancy, claimed by one State in proportion to another State, between the present legal status and the actual power arrangement."[16] Tensions cannot be resolved "on the basis of the positive international law, or *any other system of norms susceptible of general application*."[17]

A dispute does not always arise independently of a tension. Morgenthau thought that the two kinds of collisions often influence each other. Sometimes a part of a tension is rationally formulated and integrated into the domain of a dispute, and sometimes a dispute represents a tension which itself is not expressed explicitly[18]. Morgenthau defined a political dispute as a dispute that is connected to a tension (*eine Streitigkeit, die in Verbindung mit einer Spannung steht*)[19] Here it should be noted that he did not deny the possibility of resolving a political dispute by application of legal norms. Rather, he admitted that judges could decide any political dispute on the basis of generally applicable norms — whether of positive international laws, of the general principles of law, or of analogy to another advanced legal system— so long as even the political dispute is rationally formulated as a *dispute*. However, a decision based on these norms would never lead to a satisfactory solution to the underlying tension in a dispute. If a court dared to decide a political dispute, it would either focus on the State's rationally expressed points without acknowledging a related tension, or introduce some irrational elements in order to decide about an underlying tension, the whole of which cannot be rationally formulated. In either case, the court would lose the trust of States. In the latter case, the court would deviate from

15) "[Die Streitigkeiten] sind die zwischenstaatlichen Gegensätze, die in der Form von Forderung und Bestreitung der Forderung einen präzisen, klar formulierten Ausdruck finden, und die ... ohne Ausnahme Gegenstand eines internationalen Prozess werden können, da die Begründung der Parteivorbringen dem Bereich der allgemeiner Anwendung fähigen Normen entnommen sind" *Die internationale Rechtspflege*, p.73).

16) "diejenigen zwischenstaatlichen Gegensätze ..., die eine von einem Staat im Verhältnis zu einem anderen Staat behauptete Diskrepanz zwischen der bestehenden Rechtslage und dem tatsächlichen Kräfteverhältnis zum Inhalt haben"(*Die internationale Rechtspflege*, p.78).

17) *La notion du "politique"*, pp73-74, emphasis by TN.

18) *Die internationale Rechtspflege*, pp80-83; *La notion du "politique"*, pp.80-84.

19) *Die internationale Rechtspflege*, p.87.

its role as judicial organ. In the former, the court could not settle the entire collision and might even exacerbate the problem[20]. Loss of trust is fatal, especially to a international court, because:

> "Die Wirksamkeit eines jeden Rechtspflegeorgans, insbesondere eines solchen, das seinen Geltungsgrund in dem Willen der Rechtsunterworfenen selbst hat, hängt von dem Vertrauen ab, das ihm die Rechtsunterworfenen entgegenbringen."[21]

Morgenthau concluded that we must deny the justiciability of a political dispute, even though a court can rationally come to a decision about every international dispute.

By demonstrating the limited function of international justice, Morgenthau maintained that it was necessary to introduce the reality of state relations into legal thought, and that this could not simply be subsumed under a complete logically constructed system of legal norms. The application of systematically constructed legal norms cannot, or should not, solve every international dispute. Of course, such an argument squarely conflicts with Lauterpacht's view. Lauterpacht was filled with a desire to achieve "peace through court" and focused his efforts on realizing the universal application of judicial settlement. He thought that the two main tasks of international lawyers in his day were first to abandon the "distinction between justiciable and non-justiciable or legal and political disputes"[22] and then to "develop an attitude of criticism in regard to the ...argument that law is not a panacea" which is "able to secure peace in all circumstances."[23]

According to Lauterpacht, judicial process is the most important element for the establishment of rule of law and peace, because it is not "the existence of a sufficient body of clear rules of conduct" but of "a judge competent to decide upon disputed rights and to command peace" which is essential to the existence of law.[24] In *The Function of Law in the International Community* Lauterpacht tried to establish the possibility of universal international justice by demonstrating the completeness of the international legal system and the justiciability of every international dispute. In this sense Lauterpacht defended the positivist method against anti-positivists who criticized its logical-normative thinking, and who pointed out the limited usefulness and applicability of a logically constructed "complete" legal system. That Lauterpacht adopted a positivist position in his methodology, can be better understood if one looks at his argument about a gapless system of law.

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20) *Ibid.*, p.87-90.
21) *Ibid.*, p.84.
22) Lauterpacht, *The Function of Law in the International Community*, Clarendon Press, 1933, pp.434-435.
23) *Ibid*, p.437.
24) Lauterpacht, *The Function of Law in the International Community* Clarendon Press, 1933, p.424. *Cf.* Scobbie, *op.cit.* n.4, p.270.

2. Negation of *lacunae* in the Positivist Methodology

For Lauterpacht, completeness is an "*a priori* assumption of every system of law," and "it is inconceivable that a court should pronounce a *non liquet* because of the absence of law."[25] The completeness of the international legal order was essential for his project of "peace though court," because otherwise a court would not be able to settle every international dispute through an application of the law.

In this argument, he named "the positivist doctrine" as his enemy. According to Lauterpacht, the insistence on the admissibility of judicial *non liquet* is "the logical consummation of positivist doctrine."[26] If "only rules expressly recognized by international custom and treaties" were the exclusive sources of international law,[27] then as long as treaties and customary laws remained partial and fragmentary, there would always be gaps in international law. For this reason, Lauterpacht argued, positivism is flawed.

The fragmentary nature of positive rules, however, is not fatal to his project at all. Lauterpacht thought he could construct a complete legal system of such rules, with the help of general principles which could be amply supplied by analogy to "general principles of private law recognized by the main systems of jurisprudence."[28]

> "There may be gaps in a statute or in the statutory law as a whole; there may be gaps in the various manifestations of customary law. There are no gaps in the legal system taken as a whole."[29]

One might think that such a systematic method is a powerful counterargument to positivism. Yet, an almost identical passage is found in a book[30] by Paul Laband, a representative of German public legal positivism in the nineteenth century[31].

> "Gesetze können lückenhaft sein, die Rechtsordnung selbst aber kann ebenso wenig eine Lücke haben, wie die Ordnung der Natur."[32]

In other words, the belief that there are no gaps in the legal system even though there may be gaps in statutory laws, was not the expression of anti-positivism but of positivism in

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25) Lauterpacht, *The Function of Law*, p.64.
26) *Ibid.*, p.65.
27) *Private Law Sources and Analogies*, p.43.
28) *Ibid.*, p.85.
29) Lauterpacht, *The Function of Law*, p.64.
30) Paul Laband, *Das Budgetrecht*, unveränderter Nachdruck der 1.Auflage aus dem Jahr 1871, Walter de Gruyter, 1971. It was originally published as an article in *Zeitschrft für Gesetzbgebung und Rechtspflege in Preussen* Bd.4, 1870.
31) Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 2. Bd., C. H. beck, 1992, pp.341-348
32) Laband, *Das Budgetrecht*, p.75.

German legal history.

Laband's book, *das Budgetrecht*, concerns the Prussian constitutional conflict (*Verfassungskonflikt*). In the early 1860's a serious conflict arose when the overwhelmingly liberal assembly (*Landtag*), which opposed military reform, refused to approve the budget introduced by the Prussian monarch and his followers. The then valid 1850 Prussian Constitution had no provision explicitly regulating what should happen if the budget failed to win approval and did not come into effect. The liberal majority of the assembly advocated as an appropriate interpretation of the Constitution an "*Appelltheorie*"(theory of appeal) , according to which the king can only either dismiss his Ministry or dissolve the assembly to appeal to the electorate. However, Bismarck, who had been appointed by the king during the crisis as the new prime minister, appealed to "*Lückentheorie*" (theory of gap), which held that the Constitution could offer no legal solution to the conflict. Bismarck avoided discussion about possible interpretations of the Constitution, and simply justified the budget-less government by the necessity that the state should continue to exist. The conflict itself was ended by Bismarck's political victory in 1866, but the theoretical questions were left unsettled.[33]

Although the Prussian constitutional conflict centered on the struggle for sovereignty between the prince and the assembly, Laband treated the issue without reference to any "political" issues. Political questions, such as whether monarchical or popular sovereignty should be established, were foreign to his jurisprudence. He restricted his research to interpretation of existing constitutional law. The 1850 Constitution had very simple budget regulations[34] and provided no guidance in the case of the assembly's refusing to approve a budget. Failure to lay down a rule covering the case, Laband admitted, meant that the constitutional statute (*Verfassungs-Urkunde*) had a gap. For Laband, however, it did not mean that the Constitution of the State had a gap, for the legal order is gapless even when statutes are incomplete. He maintained that in the case of a gap in the statute we should draw the settlement of the debatable problem from more general principles of law.[35]

Through logical operations of legal principles and concepts, such as the distinction between the statute in the substantive sense and in the formal sense, classification of budget into the administration (*Verwaltungsakt*), and necessary conformity of administration to law, Laband demonstrated the limited competence of the assembly. He showed that the right of the assembly to amend, or to refuse, a budget should be restricted, that the assembly had a obligation to approve a considerable part of budget introduced by the government and that

33) Concerning the Prussian constitutional conflict, see: Dietmar Willoweit, *Deutsche Verfassungsgeschichte*, 3.Auflage, C.H.Beck, 1997, pp.250-252; Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, Duke UP, 1997, pp.16-19.

34) "Alle Einnahmen und Ausgaben des Staats müssen für jedes Jahr im Voraus veranschlagt und auf den Staatshaushalts-Etat gebracht werden. Letzterer wird jährlich durch ein Gesetz festgestellt" (the article 99).

35) "Die Lückenhaftigkeit der Verfassungs-Urkunde nöthigt...nur dazu, die Entscheidung der streitigen Frage aus allgemeineren Rechtsprizipien abzuleiten" (Laband, *Das Budgetrecht*, p.76).

the approval by the assembly of a budget was not a necessary condition for governmental revenue collection and expenditure[36]. Laband, a representative positivist, thus justified Bismarck's budget-less government though his gap-filling interpretation of the Constitution.

The general concepts of law (*die allgemeinen Rechtsbegriffe*) are the essential elements for Laband's jurisprudence. For him, positive laws are made through the application and combination of general concepts of law, and every legal institute is to be subordinated to "a higher and more general concept of law."[37] It is the task of his jurisprudence to ascribe each legal rule to a more general concept and, on the other hand, to derive the consequence from this concept[38]. Moreover Laband seemed to rely on analogy with private law[39], although Lauterpacht asserted that the positivist school rejects such analogies.[40] Laband himself declared that in his book about German public law he would use the general concepts of law which had been developed in the field of private law.

> "Auf dem Gebiet des Staatsrechts [kehren] zahlreiche Begriffe wieder..., welche ihre wissenschaftliche Feststellung und Durchbildung zwar auf dem Gebiete des Privatrechts gefunden haben, welche ihrem Wesen nach aber nicht Begriffe des Privatrechts, sondern allgemeine Begriffe des Rechtes sind."[41]

In short, Laband, as a positivist, thought that jurists should make a legal system gapless with the help of general principles or concepts of law, which can sometimes be elaborated by analogy with private law, so that they can logically and objectively produce an appropriate decision about every problem, even when there is an apparent gap in statutory laws. How similar is this position to that of Lauterpacht, who has been regarded as an opponent of

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36) Walter Pauly carefully analyzes the complicated argument in *Das Budgetrecht*: Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus, Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom Öffentlichen Recht im 19.Jahrhundert*, J.C.B.Mohl, 1993, pp.177-186. For a concise explanation in English, see: Peter C. Caldwell, *op.cit.* n.33, pp. 19-21.

37) According to Laband, the general concepts of law are universally applicable as "the logical categories" and shared among all legal orders. Particularity of each legal order is produced not by different concepts so much as by the different ways the same general concepts are applied and combined. "Eigentümlich ist der deutschen Verfassung, sowie jeder konkreten Rechtsbildung, nur die tatsächliche Verwendung und Verbindung der allgemeinen Rechtsbegriffe; dagegen ist die Schaffung eines neuen Rechtsinstitutes, welches einem höheren und allgemeineren Rechtsbegriff überhaupt nicht untergeordnet werden kann, gerade so unmöglich wie die Erfindung einer neuen logischen Kategorie oder die Entstehhung einer neuen Naturkraft."(Laband, *Das Staatsrecht des Deutschen Reiches*, 1.Bd.,1.Aufl., 1876, Vorwort)

38) Laband, *Das Staatsrecht des Deutschen Reiches*, 1. Bd., 2. Aufl., 1887, Vorwort.

39) Laband was criticized by a contemporary for the analogy of public law with civil law: Michael Stolleis, *op.cit.* n.31, pp. 346-347.

40) Lauterpacht, *Private Law Sources and Analogies*, p.7.

41) Laband, *op.cit.* n.37, Vorwort.

positivism?

3. Positivism in Other Branches of Law

Lauterpacht himself was aware that his characterization of the positivist doctrine was not applicable to what was called positivism in the fields of private and public law. He admitted that "the positivist doctrine in international law resembles only in name the corresponding tendencies in other branches of law" and that "[i]n other branches of law it is the essence of positivism that it denies the existence of gaps in the law."[42]

In fact, in German legal history, the postulate of completeness of the legal order was not contradicted by positivists but by anti-positivists. For example Hermann Heller, in the context of criticizing the positivism, wrote:

> "[Die] Vorstellung von der Rechtsordnung als einem einheitlichen, geschlossennen, lückenlosen System von Rechtssätzen [ist] eine historisch-soziologisch höchst voraussetzungsvolle Denkweise."[43]

> "Die juristische Forderung der Lückenlosigkeit des rechtlichen Normbestandes ist ... nicht, wie die Normlogiker wollen, ein apriorisches Postulat des Juristen, sondern kann sinnvoll erst und nur innerhalb der modernen Staatsorganisation erhoben und nur von und in ihr bis zu einem gewissen Grade erfüllt werden."[44]

The methodology called "legal positivism (*Rechtspositivismus*)" is said to have first appeared, at least in German legal history, in the field of private law. The historical school developed by C.v.Savigny "had applied the greater part of its force to the construction of a systematic science of civil law"[45] despite the fact that its creed seems to contradict rational systematization of laws.[46] Such a tendency was inherited and strengthened by "*Pandekten-wissenschaft*," whose methodology is called "positivism" in German private legal history.[47] Franz Wieacker indicates two points about positivism.

> "Eine gegebene Rechtsordnung ist stets ein geschlossenes System von Institutionen und Rechtssätzen, und zwar unabhängig von der sozialen

42) Lauterpacht, *The Function of Law*, p.67.
43) Hermann Heller, *Staatslehre*, A.W.Sijthoff's Uitgeversmaatschappij N.V., 1934, p.265.
44) *Ibid.*, p.267.
45) Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2. Aufl., Vandenhoeck & Rupprecht, 1996, p.430.
46) Walter Wilhelm, *Zur juristischen Methodenlehre im 19.Jahrhundert*, Vittorio Klostermann, 1958, pp.57-63.
47) Wieacker, op.cit. n.45, p.430-431.

> Realität der durch die Institutionen und Rechtssätze geregelten Lebensverhältnisse."[48]

> "Das System des rechtswissenschaftlichen Positivismus ist ein geschlossenes System; es beansprucht seinem Begriff nach Lückenlosigkeit."[49]

Positivism, which called for the construction of a complete and self-contained system of legal norms and the subsumption of every possible case under a gapless system, was imported into the field of public law by C.F. v. Gerber who had begun his academic career as a private lawyer before shifting to public law.[50] Laband is regarded as "the intellectual executor of Gerber's testament (der geistige Testamentsvollstrecker Gerbers),"[51] because he adopted Gerber's method and successfully applied it to the Constitution of the newborn German empire.

It is not too much, therefore, to say that Lauterpacht's methodology, namely his program to construct a complete international legal system by which a judge can legally and objectively settle every international dispute, not only shared elements with Laband's, but also was a relative of German legal positivism in general. Acknowledging this connection, we would no longer be surprised to see that Lauterpacht drew on Windscheid's *Pandekten*, a masterpiece of German positivism, to reinforce his theory of analogy[52].

From here, we should investigate the theory behind Lauterpacht's attitude toward two kinds of positivism. He decidedly rejected the positivist doctrine in international law, which regards the will of the State as "the ultimate and exclusive source of law"[53] and which would necessarily admit a gap in international law. On the other hand, he accepted the method of positivism "in other branches of law," which aims at constructing a complete and self-contained legal system. It may be helpful to refer to Wieacker's classification of positivism into either legal scientific positivism (*den rechtswissenschaftlichen Positivismus*) or statutory positivism (*den Gesetzespositivismus*). The latter is based on "the conviction that every law should be produced by the legislator of a State and exhausted in its commands."[54] This State Will doctrine should be theoretically distinguished from positivism as a method of legal science, which "derives the legal rules and their application exclusively from system, concepts and theorems of legal sciences, without conceding law-

48) *Ibid.*, p.433.

49) *Ibid.*, p.436.

50) Gerber's research programme both as a private lawyer and as a public lawyer is explained in detail in: Wilhelm, *op.cit.* n.46, especially at pp.91-93/pp.133-152. Stolleis concisely describes "the methodological change in the public law" accomplished by Gerber: Stollies, *op.cit.* n.31, p.331-337.

51) Stolleis, *ibid*, p.341.

52) Lauterpacht, *Private Law Sources and Analogies*, p.85, footnote 1.

53) *Ibid.*, p.43.

54) "[die] Überzeugung, dass alles Recht vom staatlichen Gesetzgeber erzeugt werde und sich in seinen Befehlen erschöpfe"(Wieacker, *op.cit.* n.45, p.432).

making or law-changing authority to the non-juristic evaluation and objectives."[55]

Just as Hans Kelsen, a self-acknowledged positivist[56] and teacher of Lauterpacht[57], severely criticized the State Will doctrine[58], so did Lauterpacht refute the State Will doctrine called "positivist doctrine in international law" or "the doctrine of rigid positivism" which was an aspect of "the doctrine of sovereignty,". The theories of Gerber and Laband might be partly rejected by Lauterpacht[59], insofar as they based law on the will of the State. As we have seen above, however, there is a good reason for saying that Lauterpacht accepted the essence of their methodology.

4. Conclusion

I am not concerned with the distinctions between different meanings of the term "positivism". After all, enumerating all these definitions, if possible, would only further confuse the term's meaning, and probably make it insignificant. Instead, it is more fruitful to identify one significant sense of the term and then construct the relevant doctrinal history.

From this point of view, Lauterpacht's definition of positivism, or "the positivist doctrine," is of little significance, because today it seems that only a few international lawyers hold the view that "the will of the State is the ultimate and exclusive source of law." Maybe the definition has hardly ever been theoretically relevant, for Lauterpacht himself pointed out that so-called "positivist" writers on international law had not consistently adhered to the State Will doctrine.[60]

On the other hand, the methodological argument concerning the usefulness and applicability of a complete and self-contained system of legal norms has played a considerable part in the doctrinal history of international law. The argument about justiciability between Morgenthau and Lauterpacht, as discussed above, should be regarded

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55) "[Der rechtswissenschaftliche Positivismus ableitet] die Rechtssätze und ihre Anwendung ausschliesslich aus System, Begriffen und Lehrsätzen der Rechtswissenschaft..., ohne ausserjuristischen ...Wertungen und Zwecken rechtserzeugende oder rechtsändernde Kraft zuzugestehen" (*ibid.*,p.431).

56) "Jetzt, da ich, die Resultate meiner monographischen Vorarbeiten zusammenfassend und ergänzend, ein System der Allgemeinen Staatslehre versuche, sehe ich deutlicher als früher, wie sehr meine eigene Arbeit auf der grosser Vorgänger ruht; fühle ich mich inniger als bisher jener Richtung staatstheoretischer Erkenntnis eingeglierdert, als deren bedeutendste Vertreter in Deutschland Karl Friedrich von Gerber, Paul Laband und Georg Jellinek genannt werden müssen"(Kelsen, *Allgemeine Staatslehre*, Julius Springer, 1925, Vorrede).

57) Kelsen himself wrote, "Hersh Lauterpacht was one of my best students when I was teaching General Theory of State and Austrian Constitutional Law at the Law School of the University of Vienna, immediately after the First World War" (A tribute to Lauterpacht from Kelsen, *European Journal of International Law*, vol.8, 1997, p.309, originally published in 1961).

58) Kelsen, *op.cit.* n.56, pp.71-76.

59) Laband has occasionally been criticized for his founding of statutory positivism, but his methoddology cannot be reduced to it. See: Pauly, *op.cit.*, n.36, pp.186-192.

60) Lauterpacht, *Private Law Sources and Analogies*, pp.51-54.

as an expression of the methodological argument in the realm of international law. Brierly's insistence of the necessity of a so-called peaceful change for securing the redress of a "legitimate grievance" against the legal *status quo* is closely related to the prior discussion of the limited function of international justice as well as the limited applicability of the legal system.[61] Stone's criticism of Lauterpacht was also largely concerned with the positivist premise of a gapless legal system.[62]

Whether or not the positivist method of constructing a complete system of legal norms without reference to non-juristic elements is useful and effective, has been and will continue to be an essential problem for international lawyers. In my view, the entire project of international law aims to apply legal thought to international phenomena in order to articulate them and thus make them controllable. As long as the success of the project, *i.e.* the effective application of legal thought to international problems, does not seem self-evident, we should ask ourselves whether and how legal thought, most of which has been historically developed in internal private law, can truly be applied to them.

In considering such questions, the methodological argument about the usefulness of pure juristic thought is deeply relevant. It would therefore be more fruitful to understand "positivism" in the methodological sense, and to count Lauterpacht among the positivists. Then we would more clearly comprehend the historical and present meaning of arguments about his methodology.

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61) J.L.Brierly, "International Law and Resort to Armed Force", *The Basis of Obligation in International Law*, Clarendon Press, 1958, pp.230-241, originally published in 1932; *The Law of Nations*, Clarendon Press, 1928, pp.184-190. Later he became critical of the opportunistic argument of peaceful change but did not change his insistence upon some alternatives to judicial settlement of disputes, because "[t]he dissatisfaction of a state with the status quo raises a question which is not a judicial one, and cannot be turned into a judicial question by adopting judicial methods of procedure"(*The Law of Nations*, Clarendon Press, 5*th* ed., 1955, p.292).

62) Julius Stone, "Non Liquet and the Function of Law in the international Community", *The British Year Book of International Law*, 1959(1960), pp.124-161.