THE FUNCTION OF LITIGATION IN INTERNATIONAL SOCIETY

VAUGHAN LOWE*

I. INTRODUCTION

The title of this article[1] is drawn from Sir Hersch Lauterpacht's famous monograph, published in 1933, entitled *The Function of Law in the International Community*.[2] Writing in a decade when the shattering effects of the physical destruction wrought by World War I were giving way to the debilitating effects of the Great Depression, and when the invasions of Manchuria and Abyssinia would sit side-by-side with the rise of Fascism in Germany and the great Stalinist terror in Russia, Lauterpacht was, not unnaturally, seeking a better way to a peaceful future under the Rule of Law. At that time, the recently established International Court in The Hague was dealing with acutely political cases, such as the question of the compatibility of the Austro-German Customs Union with the post-war peace settlement;[3] and the cool rationality of debate in the Peace Palace seemed to offer a better way.

It is significant that Lauterpacht referred to international community, rather than to international society. He must have been conscious of the German tradition of distinguishing a community, *Gemeinschaft*, from a society, *Gesellschaft*, on the basis that an ideal community is built around a commonality of values and purposes, whereas an ideal society is a looser, less homogenous, more structured group of people drawn together by the perception that their individual self-interests can all benefit from doing certain things together. Law in the International Community: that was Lauterpacht's vision.

In fact, Lauterpacht sometimes referred not to the *Rule* of Law but to the *Reign* of Law,[4] and I think that the difference was more than one of imagery. The Rule of Law may be no more than a standard—a plumb line against which we measure the rectitude of actions in society, but without investing all of our faith in the belief that rectitude will prevail, and keeping ourselves ready to fight for what we believe in; building a society while, in TS Eliot's words, 'Remembering the words of Nehemiah the Prophet: "The trowel in hand, and

* All Souls College, Oxford.

[1] This paper is a version of the first Annual Baker & McKenzie/UCL Centre for International Courts and Tribunals Lecture, delivered at Middle Temple Hall in June 2011.

[2] H Lauterpacht, *The Function of Law in the International Community* (Oxford 1933).

[3] *Customs Regime between Germany and Austria*, Advisory Opinion PCIJ Rep Series A/B No 41.

[4] ibid 437, cf, references to the 'realm' (357) or 'command' (412) of Law.

[*ICLQ* vol 61, January 2012 pp 209–222] doi:10.1017/S0020589311000613

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

the gun rather loose in the holster"'.[5] The *Reign* of Law, in contrast, has an altogether more active air to it: as something asserted, maintained, made visible, and imposed as part of the pattern of everyday life.

II. THE THESIS

At the end of his book, Lauterpacht wrote:

> The reign of law, represented by the incorporation of obligatory arbitration as a rule of positive international law, is not the only means for securing and preserving peace among nations. Nevertheless, it is an essential condition of peace.[6]

Lauterpacht's vision rested upon two main propositions: first, that there is no international dispute that is non-justiciable—no dispute that is so political that it cannot properly be referred to a judicial tribunal for decision. And second, that the submission of international disputes to adjudication should be encouraged.

Both of those propositions seem to me to be doubtful. My doubts are driven by the suspicion that international lawyers—practitioners and scholars alike, in government or in private service—are sometimes too eager to push international law down what they see as the natural evolutionary road of a legal system, starting from neanderthal social rules imposed at the end of a cudgel, and ending, for British scholars at least, in the serene harmony of English Law, celebrating its unswerving faithfulness to fundamental principles, tempered by compassion and pragmatism, and deeply rooted in the community from which it sprang.

In the light of history, it may be that the past decade—epitomized by the remarkable focus on the legal aspects of the invasion of Iraq in 2003 and of the so-called 'War on Terror', by the crushing weight of the cases (now numbering around 160,000) piling on to the docket of the European Court of Human Rights, and by the emergence of international investment arbitration and international trade disputes as two of the most fecund and febrile areas of legal practice—will be seen as the high-water mark of the litigation of international disputes. It may be that there is an increasing perception that courts and tribunals are not at all well-equipped for dealing with certain kinds of international dispute.

I shall consider four examples of characteristics that seem to me to put in doubt the wisdom of referring disputes that bear them to litigation. I begin with two key questions: what is the function of the law, and of litigation, in international disputes?

[5] TS Eliot, *Collected Poems 1909–1935* (Harcourt 1936) 194.
[6] Lauterpacht (n 2) 437.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

My concern is with disputes before all courts and tribunals—and for the most part I use those terms interchangeably—and arising in the context of all aspects of international relations. While my approach is essentially abstract and theoretical, it may help to give a few examples of the kinds of situations that I have in mind. They extend from inter-State conflicts, such as the 2011 conflict in Libya, to complaints by a single individual that his or her treatment violates international rules—the recent European Court case over prisoners' voting rights would be one example,[7] a claim for compensation for a house compulsorily acquired by the State would be another. They include matters such as claims by foreign investors that they have been mistreated by the States in which they have invested,[8] and claims by China to own the Spratly Islands,[9] also claimed by several other States. I intend no precise or subtle definition of international disputes: I mean simply any dispute in which there is, from the perspective of one of the parties, a 'foreign government' involved.

III. THE FUNCTION OF LAW

I begin with the function of law. By 'function', I mean the role that it plays; what it does; how it operates.[10] That is something distinct from the aims or the goals that we attribute to law. We use law as an instrument to advance towards a just, peaceful, stable and prosperous society (and I mean 'society' not 'community', here). We can use law in this way because its function is to mediate the imposition of social pressures for conformity with legal norms, and to do so by simplifying.

The imposition of social pressures is obvious enough: if you rob banks, you are liable to be locked up. If you invade a neighbouring State, you are liable to face cuts in foreign aid and export credits and all-round international hostility.

The 'simplification' point is perhaps less obvious. What I mean is that the law strips away all of the ostensible justifications and arguments that are regarded as irrelevant. It may be that the bank robbers are poor, and spend their cash more prudently than the bank from which they steal it. It may be that the neighbouring State has more oil than it needs and could develop with greater economic efficiency if it were incorporated in a larger State. But the possibility of accepting justifications such as these has, at least in general terms, been thought through during the framing of the relevant laws. If the law does not admit them as defences, such justifications are, broadly speaking, irrelevant to

[7] *Hirst v United Kingdom (no 2)* (2006) 42 EHHR 41.

[8] See, for example, the cases listed on the ICSID website: <http://icsid.worldbank.org/ICSID/Index.jsp>.

[9] See, eg, MJ Valencia, JM Van Dyke and NA Ludwig, *Sharing the Resources of the South China Sea* (University of Hawaii Press 1999).

[10] See V Gray Hardcastle, 'On the Normativity of Functions', and R Cummins, 'Neo-Teleology', in A Ariew, R Cummins and M Perlman, *Functions: New Essays in the Philosophy of Psychology and Biology* (Clarendon Press 2002) 144–156, and 157–172 respectively.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

a legal analysis of the question. A court does not have to ponder the question whether the beneficial redistributive effects of bank robberies and foreign invasions outweigh the social costs of such activities. The law strips away irrelevant arguments about need or efficiency or ignorance or mistake or whatever, and simplifies the question. Did you take their money? Did you invade their territory? That is all that matters.

The function of law is to simplify: and in simplifying it lays bare the basic principles, the ribs of the social architecture that the courts uphold.

IV. THE FUNCTIONS OF LITIGATION

The function of litigation is different. Indeed, a key point about litigation is that it has two functions coexisting in an uneasy balance.

On the one hand, the function of litigation is the settlement of the particular dispute between the parties. People sue to recover their money. In one of the more bewildering paradoxes of modern life, they sue to preserve their privacy. States litigate to determine where their boundaries lie, or to insist upon their right to immunity from the jurisdiction of a foreign court in a particular case.

Of course, litigation does not necessarily settle the dispute. An award for monetary compensation given against a State or an individual will not settle the dispute if the respondent does not—maybe cannot—pay up. But in many, perhaps most, cases the respondent does enough to satisfy the claimant and to enable a line to be drawn under the dispute. The record of compliance with judgments in the International Court of Justice and the European Court of Human Rights, and with the awards of international investment tribunals, for example, is quite impressive.[11] Even in cases where compliance is not satisfactory, the judgment or award does at least move the dispute into a different area, where there is no longer room for serious argument as to whether the claimant is *entitled* to the compensation.

But litigation has another function. It not only looks backwards, to see who was right and who was wrong in doing whatever was done. Its retrospective, dispute-settling character is complemented by a broader prospective effect.

There is a belief that justice requires that like cases should be treated alike; and tribunals are always slow to depart from established principles, no matter how idiosyncratic the facts of the case before them might be. Within common law and civil law systems alike, the clearest and most obvious demonstrations of what a principle means and of how it should be applied are to be found in reports of decided cases. Each reported judgment and award accordingly has a prospective effect, looking to the future and to situations in which the principles upon which they are based might have to be applied.

[11] See, eg, C Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004).

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

The balance that is sought between the private, retrospective function of a judgment in settling the dispute between the parties and what might be called its public, prospective function in articulating legal principles applicable in the future will vary according to the interests of the party concerned. A householder claiming compensation in the European Court of Human Rights may have little interest beyond the compensation—though in many human rights cases, such as the prisoners' votes case,[12] the applicant may be as much concerned with the principle and its application in the future as he or she is with the change in their personal position. The respondent Government, in contrast, may have very little real concern about the payment of compensation to one householder, but be greatly concerned by the implications for what might be many thousands of similarly-placed potential claimants.

In general terms one might say that parties who are repeat players—as game theorists say—are likely to have considerable interest not only in whether they win or lose a particular case, but also in *how* they win or lose it—in the rule that emerges from the decision in the case. In the context of international disputes, Governments or States are always likely to be repeat players—though admittedly some kinds of dispute, such as boundary disputes, may be one-off cases and unlikely to be repeated. A decision in one court denying a claim to immunity, or an award to compensate a foreign investor for losses upon withdrawal of a government subsidy, will be likely to have repercussions in many other cases.

Large corporations—which share many characteristics, including immortality, with States—may have a similar interest in the future impact of decisions in cases in which they are involved. For example, a multinational company might well prefer to lose altogether a claim for compensation for the expropriation or seizure of a small investment in State A rather than to win the claim as the result of a decision that says that the expropriating State is entitled to deduct from the compensation whatever sums the State deems necessary to cover the cost of remediating environmental or social harm caused by the company during the life of its investment. The implications of such a decision for its other investments may far outweigh the benefit of winning the one case against State A.

These days, one would also probably have to say that the repeated presence in international litigation of a score or so of law firms around the world has had the effect that even some cases brought by relatively small claimants fall within the 'repeat player' category. Lawyers are unlikely to be wholly indifferent to the consequences of a judgment in one case for the prospects of other cases in which they are involved.

Of course, regardless of the outcome of the case, international litigation always has the effect of reasserting and reinforcing the institutions of international law through which the dispute is pursued, and in this way

[12] *Hirst* (n 7).

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

strengthening the international legal system as such. It also reasserts and strengthens the rules and principles applied by the tribunal. This reinforcing effect is itself a factor that may be counted by repeat players as a significant advantage resulting from litigation.

V. THE DUAL FUNCTION

It is a mistake to think of litigation simply as a civilized alternative to the use of force. Cases make law. However one might finesse the technically non-binding, non-precedential force of judgments and awards in international law, the principles that are laid down, refined and applied in particular cases are a part of the architecture of the legal system. In the international arena, litigation accordingly operates not merely as an alternative to brute force in the settlement of disputes: it operates also as an alternative to, or substitute for, law reform and treaty-making and the adoption of declarations on points of law by consensus in the UN and other international bodies—the closest that international law gets to legislation. And it is not always a very good substitute. There are categories of dispute that it may be unwise to pursue through litigation.

This is all very abstract. Let me get closer to the category of cases with which I am particularly concerned.

A. Category One: Law in Flux

Take first the international law on the use of force. It is remarkable how much litigation the 2003 Iraq war spawned. In the backstreets of country villages one could see posters saying 'stop the illegal war', aimed at the invasion of Iraq. When has there ever been an armed conflict in which the question of its legality —as distinct from its morality or its prudence—has been so prominent?

Since then there has been the extraordinary and apparently uncontradicted reports of UN helicopters firing rockets at the Presidential palace occupied by one side in what was plainly a civil war in the Ivory Coast,[13] and the only marginally less astonishing reports of European military units enforcing what was called a 'no-fly zone' by targeting Libyan tanks—a form of military equipment not usually noted for its agility in the air—and trying to force the Gaddafi regime from power while vigorously attempting the no less difficult task of explaining why this does not amount to regime change.[14]

Some have argued cogently in favour of the intervention in Libya. But the situation is a perfect illustration of what one might call legal stitch. Just as runners sometimes have to stop because the instinctive reaction of the muscles of the body is to close down in the face of unrealistic demands, so the law has

[13] See <http://www.guardian.co.uk/world/2011/apr/04/laurent-gbagbo-un-attack-helicopters>.
[14] House of Commons Debates, 21 March 2011, cols 700–703.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

sometimes to be given its breathing space, time to recuperate and adjust to new demands. At moments such as this, it may be apparent that there is a broad international consensus that a certain course of action should be pursued, but that the current articulations of legal principles cannot easily accommodate that course of action. In cases where the action is needed as a matter of urgency (the bombing of Kosovo is one example) it may be better—morally necessary, even—to take action first and to work after the event at the precise identification of the latent principle implicit in the action. This was done with great seriousness of purpose by the British and other Governments after the 1999 Kosovo bombing. The Governments delivered detailed and very carefully crafted statements[15] explaining what they saw as the justification for the bombing; and in doing so they laid the foundation for the emergence of a rule of customary international law permitting humanitarian intervention.

If the question of the legality of the bombing of Kosovo had been referred to a court in 1999, it is very likely that the court would have said that in the current state of international law no right to use force in a humanitarian intervention had been established. Such a decision would itself have impeded the emergence of any such rule, as opponents of the development of a right to use force in humanitarian intervention would have been able to point to a decision clearly denying the existence of the right.

That is one situation in which litigation is not good. In general terms, because international law lacks a legislature that can (at least in principle) act swiftly to reverse the effect of court decisions that indicate what are considered to be undesirable limitations in the existing law, it may be better to avoid litigation in areas where the law is in the process of rapid and fundamental change. Even if they have some confidence that they will win the case, litigants who are concerned with the prospective, precedential effect of decisions may be well advised to avoid litigation over questions of law where the law is in a state of flux.

One obvious objection to that point is that it presupposes that the change in the law which appears to be taking shape is desirable; and the claimant in the case may very well wish to argue precisely the opposite—that the change is profoundly undesirable. Libya under the Gadaffi regime, for example, might have argued strenuously for a conservative ruling that the use of force against it was forbidden by customary international law and not legitimized by the UN Security Council resolution.[16] In other words, the chilling effect of litigation upon the development of international law may be very useful if it impedes the development of bad laws.

[15] NATO 'Statement on Kosovo issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C.' (23 April 1999) Press Release S-1 (99)62; and see the papers in (2000) 49 ICLQ 876–943.

[16] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

I do not think that this is a good argument in favour of litigation in situations such as these. The law rarely displays a tendency to respond too quickly to social change, and international law is no exception. If a novel right is claimed, it is likely to be scrutinized and debated in depth and detail; the more so in these days of expert e-mail discussion groups. News that the Pentagon was about to publish a report proposing that cyber-attacks might be classified as acts of war quickly provoked debate.[17] The main strengths and weaknesses of such proposals quickly become apparent as commentators exchange views on their coherence and viability.

What premature litigation (and in particular, compulsory submission to the jurisdiction of international tribunals) does, is short-circuit that debate. It delivers a verdict which purports to settle the question definitively, but does so without the benefit of informed analysis and comment on the matter. Litigation over rights that are in the process of rapid and fundamental change, where the law is in flux, is thus one category of case which I think is an exception to the view that the settlement of international disputes by adjudication is desirable.

B. Category Two: Systemic Problems

Another aspect of those situations is also the basis for a second category: that of disputes that require decisions on systemic problems. These are cases where the limitations upon the powers of courts and tribunals, and their close, fact-specific focus, are likely to hamper their ability to address systemic problems satisfactorily.

Cases usually consist of an argument between only two parties (though intervention by third States is admittedly becoming more common in international tribunals) and concerning a specific dispute in which the live legal issues may be located on the periphery of the legal principles upon which the tribunal will base its decision.[18] That is not a recipe for a satisfactory resolution of systemic problems.

One of the liveliest of current issues in international litigation is the relationship between different tribunals. Those tribunals may be juridical equals—as in cases such as the *CME* and *Lauder* cases against the Czech Republic.[19] In other cases they may stand in a relationship in which at least one of the tribunals would consider itself as superior to the other—the view that is taken by the European Commission of the jurisdiction of the European Court vis-à-vis tribunals established under other international treaties is an

[17] S Gorman and JE Barnes, 'Cyber Combat: Act of War' *The Wall Street Journal* (31 May 2011) <http://online.wsj.com/article/SB10001424052702304563104576355623135782718.html>.

[18] cf, eg art 63 of the ICJ Statute, and art 37 of the Statute of the European Court of Justice, and the case-law thereunder.

[19] The awards (dated 2001) in those cases are reported at the *International Treaty Arbitration* website: <http://italaw.com/>.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

example.[20] The tribunals may be plainly operating on different juridical planes,[21] as in the case of arbitral tribunals and national courts. But what they have in common is the fact that each of the tribunals in the category of cases that I have in mind has its own mandate that appears, on the face of it, to direct it to decide a case over which the other tribunal also appears—in terms of its own mandate—to have jurisdiction.

What to do? Can one tribunal write formally, acting in its official capacity, to another, acting in its own official capacity, and suggest that they sit down to discuss the problem? Does either tribunal, acting in its official capacity, have the right to do anything except defend its own jurisdiction? Does anyone have the right to make an *in*formal approach to seek a rapprochement? Does either tribunal have the legal right to yield ground and refuse to proceed expeditiously to decide a case of which it is validly seized?

I make no attempt to answer those particular questions: my concern is simply to draw attention to the general problem which they embody. The problem is that in the absence of some overarching legal regime that allocates cases between tribunals and sets out principles for dealing with such conflicts, no case-by-case approach is likely to resolve the problem—particularly where ad hoc tribunals are concerned, so that there is no real possibility of a dialogue developing over a series of cases. Further, because no legislature can intervene to regularize the position or correct decisions that may rapidly appear to have been ill-judged or simply wrong, individual decisions are unlikely to provide a satisfactory way of elucidating the law.

A similar, and related, difficulty is evident in other areas. Among the other systemic problems facing investment arbitration tribunals are the manner in which participation by *amici* will be allowed (if it is allowed at all),[22] and the manner in which the provisions of investment treaties relate to provisions in other instruments, such as treaties providing for environmental or human rights protections.[23] What pleadings do *amici* see? May a tribunal decide on the basis of an argument raised by an *amicus* but not pleaded or addressed by either party? Does fact that the banning of an industrial chemical is a measure taken in accordance with an environmental treaty automatically preclude the State's liability to compensate an investor whose profitability is severely affected by the ban?

The questions are endless. Of course, they can be and are answered by tribunals when they arise. The point is not that they cannot be answered, but rather that the issue in a particular case is an aspect of a much broader question which would be better tackled in the round, and as a matter of policy. A good

[20] Case C-459/03 *Commission of the European Communities v Ireland* (2006) ECR I-5335.
[21] cf, *Bank Melli Iran v Council*, Case C-548/09 P, 16 November 2011, para 100.
[22] eg T Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 59 ICLQ 373.
[23] See B Simma, 'Foreign Investment Arbitration: A Place for Human Rights' (2011) 61 ICLQ 573.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

example concerns umbrella clauses—the clauses found in many investment treaties which say something like 'the State shall observe any obligation it has entered into with regard to the investment'.[24] A commitment not to raise the rate of corporation tax, or to give environmental permits necessary for the conduct of the business, might be examples. One question is whether such a clause gives the investor the right to treat a contract with the State as a commitment, and a breach of that contract as a breach of the treaty. This is an important question because if it is a breach of the investment treaty it is subject to the treaty's dispute settlement provisions, which will typically be very much more favourable to the investor than litigation in national courts would be (not least because national courts are usually, and quite properly, bound to give effect to legislation even if it affects contractual rights).

The precise terms of such umbrella clauses differ. For example, compare the widely-drafted clause in *SGS v Philippines*[25] ('Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party'), with the narrowly-drafted clause in *SGS v Pakistan*[26] ('Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party'). The first was interpreted as elevating a breach of contract to the level of a breach of the treaty, and the second was interpreted as not doing so. An OECD study concluded that in the light of this diversity in precise language, 'the proper interpretation of the clause depends on the specific wording of the particular treaty, its ordinary meaning, context, the object and purpose of the treaty as well on negotiating history or other indications of the parties' intent'.[27] Frankly, I doubt that there are many cases in which the precise formulation of the clause (or of its translation into English) was deliberately crafted by the parties with a view to achieving such dramatically different results. But what can any particular tribunal do except interpret the precise language in the treaty with which it has to deal?

Here again is a problem that cries out not for piecemeal solutions, but for a general agreement applicable across the board. (Parenthetically, I wonder if there is not a need for a new kind of multilateral treaty instrument, in which States can agree upon the interpretation of provisions in bilateral treaties concluded between them and listed in a schedule to the multilateral treaty. That could prove a much more efficient way of addressing these problems that the

[24] For example The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) art 10(1) < http://www.encharter.org/fileadmin/user_upload/document/EN.pdf>.

[25] *SGS v Philippines* ICSID Case No. ARB/02/6, art X(2), para 11.

[26] *SGS v Islamic Republic of Pakistan* ICSID Case No ARB/01/13, paras 97, 332.

[27] K Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (Working Papers on International Investment number 2006/3 OECD, October 2006) available at <http://www.oecd.org/dataoecd/3/20/37579220.pdf> p 22.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

renegotiation of the two or three thousand bilateral investment treaties that now exist.)

C. Category Three: Impracticability and the Defrenne Problem

Next, the third category of ill-advised law suits: that of disputes where the practical consequences of implementing the rights that are found to exist effectively preclude any such order—what many think of as the *Defrenne*[28] problem—the epitome of situations in which the perception of the utter impracticability of the implications of declaring the correct legal answer operates as a constraint upon the tribunal.

Defrenne[29] is the case in which the European Court of Justice upheld the principle of direct applicability of the Treaty principle of equal pay for equal work and struck down sex discrimination, but gave it only prospective force, applying only to cases already filed or arising in future, in order to avoid a massive backlog of retrospective claims against employers. While the fact that the principles of legal certainty and non-retroactivity of law are so firmly established may appear to offer some support to the *Defrenne* approach, the Court would, presumably, have reached the same conclusion on the entitlement to equal pay if any one of the millions of other potential claimants in situations similar to that of Gabrielle Defrenne, denied equal pay by their employers, had initiated the proceedings. But the prospective ruling left all of them without a remedy, unless they had already filed a claim.

The real justification was the need for a solution that combined the right decision for the actual parties litigating in the *Defrenne* case with a ruling whose effects as regards third parties would not cause commercial and economic chaos, by bringing down an avalanche of retrospective claims throughout the European Community. It is a perfect example of the divergence between the two functions of litigation: the settling of individual claims and the laying down or clarification of legal principles for application in future cases. It is also a good example of the way in which courts and tribunals can adjust their responses so as to circumvent some of the potentially injurious effects of conflicts between the *retrospective* private function and the *prospective* public function of litigation.

D. Category Four: Honour and Vital Interests

The final category of disputes ill-suited to settlement by litigation goes back to the work of Sir Hersch Lauterpacht. His text[30] was in large measure a reaction against the view, widely held and reflected in the texts of treaties made in the

[28] Case 43–75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

[29] ibid.

[30] Lauterpacht (n 2).

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

early twentieth century, that litigation was suitable for disputes that were largely factual or technical in nature but not for disputes that questioned the 'honour or vital interests' of a State[31]—what we now think of, more loosely, as highly politicized international disputes. This was the focus of Lauterpacht's attack on the notion that some disputes were essentially non-justiciable.

I do not question his view that all disputes are justiciable, in the sense that in every dispute, a judicial body can discern a legal question and may by the application or extension of existing legal rules and principles, answer that question. My point is slightly different. It is not that courts and tribunals are wholly unable to handle disputes over 'honour and vital interests': it is that in this, as in the other categories, litigation tends not to be a very good way of dealing with the matter.

No doubt it is possible to isolate legal issues arising in the context of the armed conflicts in Africa or the Balkans or Georgia. But it is evident that while a judicial decision on those issues may make a contribution towards the settlement of the overall conflict, a decision alone cannot settle it. There needs to be some further process, of negotiation or mediation for example, to complement the litigation, for satisfactory progress to be made.

Like the first three categories, this final category shows the problem of the tension between retrospective analysis of the rights and duties of the parties and, on the other hand, the prospective effect of principles governing future conduct. But in these 'national honour and vital interests' cases, it is the future interests of the parties that are of particular and predominant concern.

Those are four categories of cases in which resort to litigation may be particularly imprudent—law in flux, systemic problems, impracticability and vital interests—all of which are characteristics that point to the awkwardness of handling certain kinds of dispute through litigation. No doubt other categories exist also; and in each of them the limitations of the utility of litigation as a means of settling disputes is compounded in the international legal system because it lacks the hierarchy of standing courts and the corrective power of the legislature, which exist in municipal legal systems.

VI. WHAT TO DO?

Finally, I turn to the question of how to respond to these limitations upon the utility of litigation in international law. Plainly, big policy questions such as the crystallization of law in a state of flux can be helped by serious debate, whether in governmental or non-governmental meetings. The adoption of model laws, or treaties and resolutions, can all do much to anticipate the sort of systemic questions that have been mentioned, and can set out basic principles which

[31] The reference to 'honour and vital interests' comes from the Hague Conventions of 1899 and 1907, which separated out disputes involving such interests. The Conventions are published at the web site of the Permanent Court of Arbitration < http://www.pca-cpa.org/>.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

tribunals can be directed to follow. Those approaches deserve serious consideration as alternatives, often even preferable, to litigation as a means of developing international law. Procedural innovations, easily introduced in model arbitration rules, are particularly promising.

Litigation is never an end in itself: it is always a means to an end. It is always a step towards a solution of the problem, rather than a complete solution in itself. It needs to be complemented by other processes. In each of the categories of dispute that I have described, there has been an evident need to step outside the narrow focus of the litigation and view the position from a broader perspective—a perspective that is as much concerned with questions of policy, practicability and expediency as it is with law. Yet no tribunal charged with the adjudication of the dispute according to law can be expected to relocate its vantage point, so as to view the case from this perspective. One reason for this is that the policy, practicability and expediency of approaches to a forward-looking settlement do not rest upon clear and universally-accepted rules. Returning to the distinction between community and society, I think that the idea of an international community based upon shared global values is a myth; and an unhelpful myth at that. The purpose of international law is not to express, let alone to enforce, a homogenous set of universal values. The structure of international law allows States to be different: indeed, some of its most fundamental principles—sovereignty and self-determination, for instance—serve to secure the right of a State to be different from its neighbours. International law deals in polyphony, not plainsong.

Those differences are very likely to be reflected in the States' approach to questions of policy, practicality and expediency. The 'broader view' cannot be an expression of principles that a tribunal can ascertain in the same way that it ascertains rules of law. It must be negotiated by those concerned—in some cases, by the parties to the particular dispute, but in many cases by a wider group of interested States and persons. That negotiation is performed, in a rather stilted way, when States intervene in a case. The interventions in the recent proceedings leading to the International Court's Advisory Opinion on Kosovo[32] are a good example.

The process of negotiation is more prominent in arbitrations, where the freer procedure and the dialogue between tribunal and parties permit considerable refinement of the true lines of a party's position, and a clearer understanding by the tribunal of what really lies in dispute between the parties, and what principles they agree should be applied between them. In this sense, we are better to think of the Rule of Law in terms of law as a standard or standards (perhaps self-imposed by the parties to a dispute) against which conduct can be measured rather than as the Reign of Law, with homogenous rules applied to all.

[32] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), *ICJ Reports 2010*, available at <http://www.icj-cij.org/docket/>.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press

I think, therefore, that what is desirable is not so much the pursuit of Lauterpacht's goal of increased submission of States to the judicial settlement of disputes, but rather the development of procedures that permit parties to get out of litigation. Exit strategies, which would permit a party either to walk away from a case, or to take time out to pursue alternative or complementary approaches to a settlement.

Of course parties can do this now. They can withdraw cases, and seek to suspend or delay proceedings.[33] The problem is not that it is impossible: it is that it is not easy. Such moves occur within the adversarial context of litigation and may be opposed by the other party or seen as a sign of weakness. Indeed, those pursuing litigation on behalf of a State or a corporation may consider that they cannot yield any ground, even in order to explore the possibility of a negotiated settlement, and even if it is clear that the case is going against them. And delays may wreak havoc with a tight schedule in a busy tribunal.

A formalized procedure, in which at a certain point during the litigation it is mandatory to step aside and to reconsider the possibility that there may be a basis for a settlement without proceeding to a final award or judgment, could be a helpful facility in many cases of the kinds that I have been discussing. A procedure that encourages an honourable, dignified and just settlement, freeing parties of the fear that they will be accused of a failure to pursue the litigation with a proper degree of tenacity and vigour, might be more helpful than the gladiatorial fight to the death.

Such a procedure would not necessarily side-step the adjudication. The tribunal might, for example, be asked to accept certain principles or policies as a premise agreed by the parties, or to give a ruling on certain points of law or fact, or to assist the parties in drawing up a consent award. Such a procedure would, however, remove any presumption that litigation, once started, would press forward to a final judgment.

The lawyers can go home at the end of an international case; but the parties usually have to continue to live with one another. Anything that helps them to find their own way of doing that can only enhance the utility of international litigation.

[33] See, eg arts 43 and 44 of the ICSID Arbitration Rules, <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

https://doi.org/10.1017/S0020589311000613 Published online by Cambridge University Press