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Lauterpacht's Method

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Abstract

Hersch Lauterpacht's method for international legal science, which he calls progressive interpretation, is reconstructed here. This method takes as its starting point the claim that international law should be functionally oriented towards two ideals – the establishment of peace between nations and the protection of fundamental human rights. It is the need to anchor his idealism to the 'realities of international life' (e.g. state practice) which provides the basis for his important, and highly plausible, method for the study of international law. That is, progressive interpretation articulates the international community's on-going attempts to express preferred normative goals which are immanent within the day-to-day workings of the international legal system. International legal doctrine is the *institutional expression* of the international community's fundamental normative commitments, it is not simply that which is considered ideally just. Alongside a reconstruction of Lauterpacht's method, two substantive contributions are made. The first traces the connections between progressive interpretation and more recent legal philosophers who adopt an interpretivist methodology, such as Ronald Dworkin. The second reconsiders Lauterpacht's qualified constitutive theory and shows how his method reveals it to be a plausible legal doctrine, despite a relative lack of supporting state practice, and in the face of considerable academic criticism.

Keywords: Hersch Lauterpacht, Recognition, Ronald Dworkin, Interpretivism.

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[The] legitimate province [of international lawyers] is and must remain the exposition and progressive interpretation of the existing law in terms of the abiding purpose of the Law of Nations.[1]

I. INTRODUCTION

The academic writings and judicial opinions of Hersch Lauterpacht are full of theoretical insight into the nature and structure of the international legal order. The originality of his thought and his ability to incorporate a coherent and sophisticated philosophy of law into both his writings on international legal doctrine and his role as an international judge place him in the first rank of international lawyers of the twentieth century. This article is an examination of Lauterpacht's work and, more specifically, sets out his method for international legal science, which he calls progressive interpretation. The focus is on his writings from 1940 onwards, and especially on his controversial work *Recognition in International Law*.[2] Method, in what follows, concerns the questions of how international legal science is possible and how claims about the international legal order are to be justified.

Progressive interpretation centres on Lauterpacht's concept of international law. His concept of international law implies a necessary connection between law and morality. That is, international law should be functionally oriented towards both the establishment of peace between nations and the protection of fundamental human rights. From his 1925 paper on Westlake onwards, the moral value of peace is at the centre of his claims about the function of international law. The claim that the protection of human rights is also a function of the international legal order is only explored fully after 1940.[3]

[1] H Lauterpacht, 'The Reality of the Law of Nations' in E Lauterpacht (ed), *International Law. Being the Collected Papers of Hersch Lauterpacht, volume 2, The Law of Peace* (CUP, Cambridge 1975) 47. This lecture was delivered on 27 May 1941. References to Lauterpacht's *Collected Papers*, which are edited by E. Lauterpacht, are given as *CP*, followed by the volume and page number. Hence, the above citation would be *CP*, II, 47.

[2] H Lauterpacht, *Recognition in International Law* (OUP, Oxford 1947).

[3] Lauterpacht's earliest published work is his doctoral thesis from the University of Vienna from 1922 entitled 'The Mandate Under International Law in the Covenant of the League of Nations'. Here, he considers and defends the work of positivists such as Nippold and Jellinek, and consequently offers a very different position to that found in any of his publications in English (See *CP*, III, 29, esp. 52-55). It is tempting to suggest that Lauterpacht's first major article in English from 1925, on Westlake, establishes the view set out in the present article. Here Lauterpacht endorses Westlake's claim that international law must be rooted in, on the one hand, the 'realities of international life' as well as, on the other, an appreciation of the fundamental moral concerns of the international community (See H Lauterpacht, 'Westlake and Present Day International Law' (1925) 5 Economica 307-325; *CP*, II, 385-403, 402-403). After the Second World War, a human-rights oriented interpretative method becomes explicit. According to Brian Simpson, Lauterpacht was the first person to defend the normative primacy of human rights in a modern British academic setting. Simpson also argues that Lauterpacht was the first to defend the claim that such rights could not be adequately protected by state legal orders, and that they could only satisfactorily be protected at the

Although his functional orientation leads some to consider his method as overly idealistic,[4] Lauterpacht's philosophy of international law is sensitive to both the pragmatics of dispute settlement, and the relevance and importance of what states do in determining the proper content of international legal norms. The need to anchor his idealism to the 'realities of international life'[5] is that which distinguishes his work from traditional natural law theory. As is clear from the extract which opened this article, the interplay between fact, function and morality is at the core of progressive interpretation.[6]

Progressive interpretation offers an important, and highly plausible, methodological approach for the study of international law which has not been explored sufficiently.[7] Alongside a reconstruction of Lauterpacht's method, I make two substantive contributions. My first contribution traces the connections between progressive interpretation and more

international level. See B Simpson, 'Hersch Lauterpacht and the Genesis of the Age of Human Rights' (2004) 120 LQR 49 and also see H Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man' (1943) 29 Transactions of the Grotius Society 1.

[4] See EH Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (Palgrave MacMillan, Basingstoke 2001, first published in 1939). See also, M Koskenniemi, 'Hersch Lauterpacht (1897-1960)' in J Beatson and R Zimmermann (eds), *Jurists Uprooted* (OUP, Oxford 2004) 601-680; K Wohlström, 'On Disillusionment and its Limits: Images of the Interwar Legal Project in International Relations and International Law' (2010) 80 BYIL 361-408.

[5] H Lauterpacht, 'Westlake', *CP*, II, 402-403.

[6] This combination of idealism, pragmatism and sensitivity to function also permeate his approach to judicial practice. Rosenne makes this point when he writes that despite his lack of experience of litigation or arbitration, '...it may fairly be stated that, of all members of either the Permanent Court or the present Court, Lauterpacht was probably the one who, prior to his translation to The Hague, had... studied in depth the fundamental problems of contemporary international litigation, and had done so within the context of a new, and generally satisfying, underlying philosophy of contemporary international law....' (S Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge' (1961) 55 AJIL 825, 826). Lauterpacht was formally admitted as a judge on 10 February 1955. His separate opinions are found in the following cases: *Question of Voting Procedure Related to Reports and Petitions Concerning the Territory of South West Africa* [1955] ICJ Rep 67, 90-123; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* [1956] ICJ Rep 23, 35-59; *Application of the Convention of 1902 Governing the Guardianship of Infants* [1956] ICJ Rep 55, 74-101; *Case of Certain Norwegian Loans* [1957] ICJ Rep 9, 34-66. His dissenting opinions are found in the following cases: *Interhandel Case* (Preliminary Objections) [1959] ICJ Rep 6, 95-122; *Case Concerning the Aerial Incident of July 27, 1955* (with Wellington Koo and Sir Percy Spender) [1959] ICJ Rep 127, 156-194; *Case Concerning Sovereignty Over Certain Frontier Land* [1959] ICJ Rep 209, 230-232. The only advisory opinion is the following: *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against UNESCO* [1956] ICJ Rep 77. His only concurring judgment is the *Case Concerning a Right of Passage over Indian Territory* [1957] ICJ Rep 125.

[7] The European Journal of International Law has published a number of symposia on important international lawyers since its inception in 1990, and considered Lauterpacht's work in 1997, alongside reprints of recollections of Lauterpacht. See M Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law (1997) 8 EJIL 215-263; I Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8 EJIL 264-298; C Herzog, 'Sir Hersch Lauterpacht: An Appraisal' (1997) 8 EJIL 299-300; R Jennings, 'Hersch Lauterpacht: A Personal Recollection' (1997) 8 EJIL 301-304; S Schwebel, 'Hersch Lauterpacht: Fragments for a Portrait' (1997) 8 EJIL 305-308; H Kelsen, 'Tributes to Sir Hersch Lauterpacht' (1997) 8 EJIL 309-312; E Lauterpacht, 'Sir Hersch Lauterpacht: 1897–1960' (1997) 8 EJIL 313-320. See also A Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2009) 20 EJIL 1163-1194.

recent legal philosophers who adopt an interpretivist methodology. While there are similarities between Lauterpacht's method and that of recent natural lawyers who adopt a kind of interpretative method (for example, John Finnis[8]), it is the parallels between Ronald Dworkin's constructive interpretation and progressive interpretation which will be focused on in what follows.[9] In the last fifteen years or so, Dworkin's methodology has been applied to the study of international law by, amongst others, John Tasioulas, George Letsas, Anthea Roberts and Başak Çali on the grounds that it provides a powerful and novel way of thinking about the international legal order.[10] Dworkin, himself, has recently made some tentative steps toward articulating an interpretative vision of international law.[11] I will show that an interpretative approach to international legal science, which bears a close resemblance to Dworkin's, was advanced by Lauterpacht. The key resemblance is that, for both, legal science should proceed on the basis of an attempt to interpret existing legal practices through an appreciation of the function(s) or purpose(s) of law. Those who argue that international law might benefit from an interpretivist method, and who turn to Dworkin, should take note of this point.

Although various aspects of progressive interpretation are reflected in Lauterpacht's writing on, for example, non-justiciability,[12] state immunities,[13] the sources of international law,[14] and the laws of war,[15] my starting point is Lauterpacht's much-derided qualified constitutive theory. This theory, set out in *Recognition*, is a defence of the claim that states have a duty to recognise.[16] The duty to recognise is often charged with being an inaccurate representation of state practice and for this reason it is here that his methodological approach is clearest. This is because he takes a position on international legal personality which does not straightforwardly conform to the majority of state

[8] J Finnis, *Natural Law and Natural Rights* (OUP, Oxford 1980) chapter 1.

[9] As far as I am aware, this was first noted by M Koskenniemi in *From Apology to Utopia: The Structure of International Legal Argument* (revised edn CUP, Cambridge 2005) 55-59. Note that Dworkin uses the word 'interpretive' rather than the usual English spelling which is 'interpretative'. For the sake of consistency, throughout the text I use the words 'interpretative' and 'interpretivism' throughout the text. See N. Simmonds, *Central Issues in Jurisprudence* (2nd edn. Sweet and Maxwell, London 2002) 193n7.

[10] J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 OJLS 85; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford 2007); B Çali, 'On Interpretivism and International Law' (2009) 20 EJIL 805; A Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757.

[11] R Dworkin, 'Human Rights and International Law' (2011, unpublished manuscript).

[12] H Lauterpacht, *The Function of Law in the International Community* (OUP, Oxford 1933). Also see M Koskenniemi's introduction to the revised edition of *Function* (OUP, Oxford 2011) xxix.

[13] H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220.

[14] H Lauterpacht, 'The Convent as the "Higher Law"' (1936) 17 BYIL 54

[15] H Lauterpacht, 'The Limits of the Operation of the Laws of War' (1953) 30 BYIL 206.

[16] H Lauterpacht, *Recognition*. See also E Lauterpacht, *The Life of Hersch Lauterpacht* (CUP, Cambridge 2010) 299-300 and 332-8.

practice. It is on this point that a second, and more important, contribution is offered. In Lauterpacht's duty to recognise, the relationship between state and judicial practice, on the one hand, and his vision of the function and purpose of international law, on the other, becomes attenuated. There has been a considerable amount of discussion of this point, but in a more general context, by Dworkin and those who support or criticise his work. By using this discussion I aim to deepen and enhance Lauterpacht's method, and show how qualified constitutive theory can be considered a *plausible* legal doctrine (in the sense of not being outlandish, flatly wrong, or even if more plausible interpretations are on offer), despite a lack of supporting state practice, and in the face of considerable academic criticism. My discussion of Lauterpacht's duty to recognise, leads into a reconstruction of his progressive interpretation. My aim is to show how Lauterpacht intends for the latter to defend the former. Attention is then turned to an explanation of the links between progressive interpretation and Dworkin's interpretivist method. I then conclude by explaining in more general terms, how progressive interpretation can aid international lawyers' attempts to construct customary international law.

II. Recognition as a Legal Duty

Lauterpacht accepts that statehood and personality under international law is conferred on communities through recognition by existing states. Thus, recognition has a legal effect and he adopts a form of constitutive theory. What makes his position different from the traditional constitutive theory is the argument that existing states are under a *duty*, rather than having discretion, to recognise communities as states which have fulfilled certain factual criteria like a defined territory, stable population and effective governance. Thus states have a *duty to recognise*. This position is not well accepted, and *Recognition* has been subject to some very critical reviews. The hostility to the duty to recognise is generally for the reason that while states obviously recognise each other, there is little evidence that they act under any sense of obligation or duty in doing so. According to his critics, Lauterpacht gets it flatly wrong: states have *discretion*, rather than the duty, to recognise. If they choose to recognise, they can do so on whatever terms they like and it is highly unlikely that such acts of recognition are personality-conferring. As this criticism, and the view on personality determination in international law that it implies, was well-accepted at the time Lauterpacht wrote on this subject, one must wonder why he took such a controversial view. The answer to this problem is ultimately to be found in his method of progressive interpretation. However, in order to get to this answer, it is first necessary to set out briefly the debate on legal personality within which the duty to recognise is Lauterpacht's contribution.

A. Recognition and Personality Determination

In any legal system, there must be a way to determine those to whom its norms apply: that is, who are legal subjects. This is because it is generally the case that only subjects can be right-bearers and duty-holders within a legal order. Non-subjects need not normally be held responsible for violations of, or to be protected by, legal norms. A lack of clarity concerning subject-status can be a cause of fundamental co-ordination problems because it implies that, as a matter of law, it is unclear who owes what to whom. In all legal orders, answers to questions of personality are sometimes vague and difficulties concerning exactly who or what falls within the jurisdiction of the legal order must be determined by its courts.[17] But this dissonance must be minimised as far as possible so that legal subjects are clear about what they owe to, and what they are owed by, other legal subjects.

There are a number of reasons why this dissonance is a serious problem for the international legal order. One is that the subjects of the international legal order are no longer just states. There has been a proliferation of international organisations, as well as a general recognition of rights and responsibilities of individuals, non-state ethnic groups and political organisations. Often these non-state subjects have rights and duties which are different to those traditionally held by states. This first reason is of lesser importance for present purposes than a second reason. The demise and reconfiguration of states through secession, revolution, devolution, civil war, invasion, annexation, and so on, is a crucial source of uncertainty in the international legal order. As states break up, become governed by morally reprehensible groups, or invade each other, so those who administer the international legal order are faced with difficult questions of legal personality.

In order to limit the effect of these two sources of uncertainty, the international legal order should have a *system* which stabilises personality. Focusing on statehood, this system must stabilise personality so that it is clear (i) what the content of the criteria of statehood are; and, (ii) how difficult cases are to be resolved. Through this system, the rights and duties which flow from statehood can then be conclusively determined as a matter of international law. There are two ways in which the problem of system design is tackled by international lawyers. These are the well-known constitutive and declaratory theories. Neither, as will be shown, provides an entirely satisfactory system which can determine and stabilise personality if this means that both aims (i) and (ii) must be satisfied. The duty to recognise is proposed by Lauterpacht as a way to minimise the defects of both of these theories.

[17] This has recently emerged in cases concerning questions of 'effective control' over overseas territory, as well as the immunity of foreign sovereigns and officials. See, for example, *Al-Skeini and others (Respondents) v. Secretary of State for Defence* [2007] UKHL 26; and, *Jones and Mitchell v Kingdom of Saudi Arabia)* [2006] UKHL 26.

The declaratory theory holds that factual criteria (like effective government, stable population and defined territory) must be held by a putative state before it can genuinely attain statehood. This was the predominant view at the time Lauterpacht was writing. It remains so today, but Crawford has argued persuasively that now factual criteria must be supplemented by a limited set of criteria of legitimacy (e.g. self-determination).[18] From this perspective, recognition by states is either a purely political act (Brownlie[19]) or establishes ordinary diplomatic relations (Verdross[20]). Either way, recognition by other states has no *legal* effect in the creation of states.

While declaratory theory establishes clear criteria by which it is possible to determine, as a matter of international law, when a state comes into existence, many of its proponents do not readily acknowledge the problem that it is sometimes controversial whether such criteria have been met by a putative state. They dodge this issue by assuming that statehood arises as a matter of fact, and that normally no legal *judgment* is required to determine whether something is a state or not. Declaratory theory presupposes that conditions like effectiveness or legitimacy are legally relevant facts like turning eighteen, and they assume that both sort of legal relevant fact can be calculated objectively. However, while we may know what being eighteen means, it is sometimes controversial whether someone is in fact eighteen.[21] By analogy, it is difficult to see how the existence of criteria of statehood is calculable in the same way as someone's age is, and whether such conditions are present in a given circumstance is much more factually ambiguous. Thus, for declaratory theory, the problem of settling difficult cases is not solved and is often ignored.[22]

In *Recognition*, Lauterpacht repeatedly states this problem. For example, he writes '[t]he declaratory view . . . avoids this particular difficulty [that there are difficult cases], but it does so by the easy device of asserting that a State exists in international law as soon as it exists, and, accordingly, recognition is a formality.'[23] But '. . . such existence may be and often is the question at issue'. Elsewhere he writes that '[l]egal personality is a creation of law, not of nature . . . .The question is whether [states] are independent in the meaning of international law. But this is not a question admitting of a self-evident answer.'[24] Thus, the primary defect of declaratory theory is that it does not include a necessary institutional mechanism which is capable of resolving difficult cases.

[18] J Crawford, *The Creation of States in International Law* (2nd edn, OUP, Oxford 2006).
[19] I Brownlie, *Principles of Public International Law* (7th edn, OUP, Oxford 2008) 89-90.
[20] A Verdross, *Die Verfassung der Volkerrechtsgemeinschaft* (Julius Springer, Vienna 1926) 180. See also, J Crawford, *Creation of States*, 27-28 and see H Lauterpacht, *Recognition*, 2.
[21] The need for a legal judgment must always be a possibility. In this context, the registration of births as a matter of legal obligation can be seen as specific legal mechanism to preempt controversy.
[22] See J Crawford, *Creation of States*, 20-26.
[23] H Lauterpacht, *Recognition*, 58.
[24] Ibid, 49.

The alternative, constitutive, theory is that recognition is determinative of statehood as a matter of international law. Thus, states exist to the extent that they are recognised by other existing states.[25] Criteria of statehood deployed by declaratory theory are properly understood as commonly used reasons offered by states when they recognise others. There is some sense in this approach if one accepts a consent-based theory of legal obligation. That is, if all legal obligations flow from the consent of states, when a new state comes into existence it *claims* rights which are imposed as duties on existing states. However, without the consent of existing states these rights cannot be valid. The act of recognition constitutes that acceptance.

The constitutive approach may hint at a solution to at least one problem with declaratory theory which was identified above. Kelsen, who approves of the constitutive view, and who taught Lauterpacht at the University of Vienna,[26] sets out this solution. Foreshadowing Lauterpacht's critique set out above, he writes: '[i]f international law did not determine what a state is, then its norms, which obligate and empower the states, would not be applicable'.[27] But how does the international legal order settle this issue? His answer relies on a form of what he elsewhere refers to as 'peripheral imputation'.[28] That is, if the international legal order 'attaches to a certain fact as condition a certain consequence, then it must determine in what manner and especially by whom the consequence provided for may be attached to it.'[29] This indicates that the legal fact (state in the sense of international law), from which flows the consequence (the rights and duties associated with statehood), must be determined by some institution. For Kelsen, this determination is made by states recognising one another as 'organs'[30] of the international legal order. This is the only realistic institutional possibility in the absence of 'special organs'[31] designed for this purpose such as an international court. Constitutive theory identifies recognition by states as the institutional mechanism by which questions of legal personality are settled in the international legal order, thus providing a practical solution to the problem of declaratory theory.

There are, however, several serious problems with constitutive theory as a mechanism for personality determination. Two are particularly relevant for present purposes. First, statehood becomes contingent and

[25] See H Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 AJIL 605.

[26] H Kelsen (1961) 10 ICLQ 2 (reprinted in (1997) 8 EJIL 309-312).

[27] See H Kelsen, 'Recognition in International Law', 606.

[28] H Kelsen, *Introduction to the Problems of Legal Theory* (S Paulson and B Litschewski-Paulson (trs), Clarendon Press, Oxford 1992, first published in 1934) 23-25. See also H Lauterpacht, 'Kelsen's Pure Science of Law' in *Modern Theories of Law* (OUP, Oxford 1933) 105-38; and, see *CP*, II, 410, 416.

[29] H Kelsen, 'Recognition in International Law', 606.

[30] H Kelsen, *Introduction*, 123.

[31] H Kelsen, 'Recognition in International Law', 607.

variable, thus we might question whether it provides an effective system of personality determination.[32] Secondly, while constitutive theory establishes a mechanism by which personality can be determined, unlike declaratory theory it does not offer stable legal criteria by which statehood can be determined. In its most extreme form, (i) recognition is an act which has a legal effect in determining statehood; (ii) states have a discretion whether to recognise or not; and, (iii) states can recognise on whatever terms they choose. This extreme form of constitutive theory seems to be a straw man to be attacked by critics.[33] Most advocates of constitutive theory are more moderate. On this moderate view, states are not granted an *unprincipled* discretion to recognise. For example, Kelsen argues that '[e]xisting states are only empowered – they are not obliged – to perform the act of recognition.'[34] But if they do choose to recognise, they should do so using criteria of effectiveness. Regardless, though, of whether one adopts an extreme or moderate constitutive theory, the problem with it is that *to not recognise certain factual conditions as constitutive of statehood does not constitute a wrongful act*.[35] Even in its moderate form, there is no wrong committed if states refuse to recognise an effective putative state.[36] Constitutive theory provides a mechanism (i.e. recognition) but there are few or no constraints which control how states should recognise in *accordance with law*. This is in stark contrast to the highly developed sets of legal constraints which control how states as organs of the international legal order can create legal obligations

[32] This problem with constitutive theory is remarked on by Kelsen. He writes (without passing judgment) that 'the legal existence of a state... has a relative character. A state exists only in its relations to other states. There is no such thing as absolute existence'. (Ibid, 609). Talmon makes the same point but adopts a more pejorative tone: '[t]he most compelling argument against the constitutive theory is that it leads to relativity of the "State" as subject of international law. What one State may consider to be a State may, for another, be a non-entity under international law.' (S Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium non Datur?*' (2004) 75 BYIL 101, 102). This same problem is acknowledged by Lauterpacht in *Recognition*. He writes: 'The State is bound by minute rules to respect the sovereignty and independence of other States. But as, in accordance with the traditional view of the function of war, it is left to its discretion, it is free to decide, according to its unfettered discretion and by consulting its own interests only, whether another community shall enjoy the rights of sovereignty and independence in statehood. By the simple device of refusing – or possibly withdrawing – recognition, a State is legally entitled, according to a widely adopted [constitutive] view, to deny the right of independent existence to a political community apparently fulfilling the conditions of statehood.' (H Lauterpacht, *Recognition*, 4).

[33] For example, E Borchard, 'Recognition and non-Recognition' (1942) 36 AJIL 108. Kelsen speculates that the extreme form of constitutive theory may have existed in the early development of the international legal order but it did not exist by the time he was considering the subject. Given the pre-positivistic origins of the international legal order, this is unlikely. See H Kelsen, 'Recognition in International Law', 608.

[34] Ibid, 610.

[35] Ibid, 608.

[36] Crawford identifies the problem with this approach: '[i]f individual States were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communication, a system for registering the assent or dissent of individual States without any prospect of resolution. Yet it is, and should be, more than this—a system with the potential for resolving problems, not merely expressing them.' (J Crawford, *Creation of States*, 20).

(e.g. the law of treaties), or hold other states responsible for wrongful acts (e.g. the law of state responsibility).

Put this way, the difficulties of the constitutive and declaratory theories appear as mirror images of each other. Declaratory theory provides the legal criteria but no institutional mechanism, whereas constitutive theory provides a mechanism, but neither the legal criteria nor an obligation to recognise in accordance with them. Lauterpacht accepts this diagnosis of the problem at the heart of the international legal order, and offers his duty to recognise as a solution.

B. The elements of Lauterpacht's duty to recognise

Lauterpacht claims that constitutive theory is correct in all but two respects. First, states must recognise as a matter of legal duty rather than recognition being a discretionary power. Second, states have a duty to recognise according to the criteria established by the declaratory theory like an effective government, stable borders and permanent population.[37] This duty to recognise provides, at least functionally, a neat solution to the perennial problems with the constitutive and declaratory theories just set out. This is because the conditions of statehood are borrowed from declaratory theory, but the institutional mechanism by which the existence of these conditions is determined is state recognition. For the duty to recognise, Lauterpacht regards state recognition as performing an administrative function within the international legal order *qua* interstate system which parallels the law of treaties or the law of state responsibility.[38]

Despite its functional plausibility, international lawyers have been sceptical about Lauterpacht's claims.[39] This scepticism is expressed most forcefully by another of Kelsen's students from the University of Vienna, Josef L. Kunz.[40] His view will be set out, before considering in brief whether Kunz's criticism is entirely plausible on the basis of Kunz's own inductive empirical method. Attention will then be focused on why Kunz's criticism is ill-founded given Lauterpacht's interpretivist method.

[37] He writes: 'To recognise a political community as a State is to declare that it fulfils the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition.' (H Lauterpacht, *Recognition*, 6).

[38] He writes '[i]n the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfil that function in their capacity as organs of international law. In thus acting they administer the law of nations.' (H Lauterpacht, *Recognition*, at 6). See also, A Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 211 EJIL 210.

[39] See J Kunz, 'Critical Remarks on Lauterpacht's "Recognition in International Law"' (1950) 44 AJIL 713; R Oglesby (1948) 42 AJIL 235; P Brown (1942) 36 AJIL 106; and, H Briggs, 'Recognition of States: Some Reflections on Doctrine and Practice' (1949) 43 AJIL 113.

[40] See J Kunz, 'Critical Remarks'. More generally see J von Bernstorff, *The Public International Law Theory of Hans Kelsen* (CUP, Cambridge 2010, first published in 2001).

In a 'savage'[41] review of Lauterpacht's approach in the *American Journal of International Law* from 1950, Kunz claims that the duty to recognise could not find any purchase in state practice. Referring to his own work he writes:

> In 1928 this writer published a comprehensive monograph on recognition, in which he tried to state the positive international law on the basis of a full study, summary and critique of the practice of states, court decisions and the literature. His neutral and impartial study led to the adoption of the so-called 'declaratory doctrine'. He proved that under positive international law there is no legal right to recognition by new states or de facto governments, nor is there any duty to recognise them.[42]

Specifically, it should be stated, Kunz's claim must be that while it was obvious that states recognise one another as a matter of state practice, what is lacking is the belief by state officials that recognition is a matter of legal obligation: there is no or little *opinio juris* to support Lauterpacht's claims. So, as states do not recognise as a matter of duty, there is no wrongful act and no international responsibility.

This critique is well-accepted, but it is neither entirely nor obviously correct. This is because there is some, albeit scant, evidence of relevant state practice, backed by *opinio juris*, which exists both now and at the time Lauterpacht was writing. It is necessary to consider some of this evidence for a specific reason. I do not want to claim that Kunz is wrong and that the duty to recognise is a norm of customary international law. There is, in my view, little state practice to support Lauterpacht's claims. Rather, I show in part four of this article that, for Lauterpacht, there is a complex interplay between function, justice and fit to various state practices involved when an international lawyer attempts to describe customary international legal norms. His view is that scant evidence of state practice (and relevant *opinio juris*) is not always fatal for the existence of a customary international legal norm. However, he does argue that there must be *some* practice to interpret. If there is no practice, the jurist fails to interpret existing practices and instead invents new ones. Thus the viability of Lauterpacht's duty to recognise relies, on this method, on there being at least some state practice to interpret, even if it does not require the extensive uniform state practice which Kunz is looking for. Kunz's position is that the scant practice, which suffices for Lauterpacht, is fatal to the existence of custom: custom can only arise from induction from steady and intentional conformity to customary norms in the practice of states. This is why the evidence must be considered here.

If it exists, the duty to recognise has three elements. These elements establish (i) the substance of the duty; (ii) the scope of the duty; and, (iii) the consequences of a violation of the duty.

[41] J Dugard, *Recognition and the United Nations* (Grotius Publications, Cambridge 1987) 8.
[42] See J Kunz, 'Critical Remarks', 713.

(i) The first element is the substance of the duty to recognise. If it exists, it must be a duty for states to act on the customary rule which requires them to recognise a state to the extent that it is effective. Existing states, *qua* organs of the international legal order, are tasked with making the judgment of whether a putative state is effective or otherwise. Although some reconstructive work is necessary here, it can be suggested that a wrongful act arises in three cases. First, a violation of the duty emerges when a state refuses to recognise what is correctly judged to be an effective state. Lauterpacht traces the diplomatic correspondence of the United States regarding the independence of various South American states at the beginning of the nineteenth century as an illustration of practice which regards this conduct as illegal.[43] On the basis of this practice, for European states to not recognise these new effective states is a violation of their rights. On Lauterpacht's account, refusal to recognise Kosovo would be an omission which constituted a wrongful act if Kosovo should be correctly judged as an effective state. These examples are plausible, even if it is unclear exactly how the wrongful act would be characterised in each case.[44] Second, a violation of the duty emerges when a state recognises what is correctly judged to be an ineffective putative state. Lauterpacht points to practice in which the premature recognition of secessionist movements is considered to be a violation of international law. If Kosovo is correctly judged to be not a state because it is ineffective, there is a duty on states to not recognise it as such: to do so would be to violate Serbia's rights. Once again, these examples are plausible, even if it is unclear how the wrongful act in each case should be characterised.[45] Third, a state could commit a wrongful act by recognising on the basis of another rule. In *Recognition*, Lauterpacht discusses the United States practice from 1819 which made it a condition of recognition of South American states that 'no special privileges of indefinite duration . . . be granted to Spain'.[46] His position was that this would be an 'abuse' of the function of recognition

[43] H Lauterpacht, *Recognition*, 18-19.

[44] The question of whether there is a violation of a duty to recognise *qua* independent wrongful act, or whether it is a violation of a more fundamental norm of international law. For example, the recognition of Kosovo, assuming that the correct judgment is that it is an ineffective state and part of Serbia, could be alleged to be a violation of the duty to recognise and/or a violation of article 2(7) of the Charter of the United Nations. Lauterpacht's position is set out in his discussion of premature recognition in *Recognition*. He writes 'Premature recognition is a wrong not only because, in denying the sovereignty of the parent State actively engaged in asserting its authority, it amounts to unlawful intervention. It is a wrong because it constitutes an abuse of the power of recognition.' (H Lauterpacht, *Recognition*, 9; and E Lauterpacht, *A Life*, 332-338). Lauterpacht's position appears to be that many rights in international law are derived from those inherent in statehood. For example, violations of rules concerning immunity or jurisdiction are wrongful acts in themselves, but violations of these rules also deny rights inherent in statehood. On the basis of this argument, certain acts of recognition, which are violations of the duty to recognise, are *conceptually* similar to many other established rules of international law in that they can be ultimately rooted in the sovereign rights of states.

[45] See above (n 44).

[46] H Lauterpacht, *Recognition*, 33 and also 162-163.

in the international legal order. A more recent example of a violation of this rule could be the recognition by European states of Croatia and Bosnia-Herzegovina in 1992. It could be said that the recognition of these states was based upon the commitment or otherwise of the political bodies which claimed governmental authority in these putative states to various normative principles, rather than being based on a judgment of effectiveness.[47] There will be significant differences of opinion as to whether there has been a violation of international law in all the examples just given. However, it is suggested all would be illegal on Lauterpacht's account if the three types of wrongful act just described are indeed subsumed by his duty to recognise.

(ii) The second element of the duty to recognise concerns its scope. There were two options open to Lauterpacht. First, the duty to recognise could be a bilateral relationship between the potential right-holder (the putative state) and the duty bearer (the recognising state). Alternatively, the obligation could be *erga omnes* and owed to all states. Lauterpacht's view is that it is a duty each state 'owed to the society at large' and is therefore *erga omnes*.[48]

There is some equivocation as to whether acts of recognition which violate international law are *erga omnes* on Lauterpacht's own account. One example he uses is the premature recognition by France of the United States in the late eighteenth century. This triggered reprisals by the United Kingdom justified on the grounds of a perceived violation of British sovereignty. This example suggests that an act of recognition may imply the responsibility toward those states subjectively harmed by the act. This suggests the bilateral character of the wrongful act.[49] Returning to the example just given, the United Kingdom appears to take the position that by recognising one of its colonies which claims independence, but which is in fact not at that time independent, France has committed a wrong against it. This conclusion, however, should be held with a degree of caution for two reasons. First, in many systems of law it is often open to legal subjects to hold public bodies to account for harms they suffer, even though this might also protect a public good, or help to ensure good governance. Judicial review, for instance, has exactly this role in most legal orders. Following this line of argument, the state which has suffered a wrongful act of recognition has the greatest interest in holding the responsible state to account and should normally do so. However, this is not inconsistent with the possibility that such actions defend more

[47] See C Hilgruber 'The Admission of New States to the International Community' (1998) 9 EJIL 491; C Warbrick and V Lowe, 'Recognition of States' (1992) 41 ICLQ 473; M Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 BYIL 333; R Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1992) 4 EJIL 36-65. S Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition'. See *Restatement (Third) Foreign Relations Law of the United States*, §202, comment 'f' on 'unlawful recognition'. See 32-33, below, for a discussion of Lauterpacht's discussion of the legitimacy as a criterion of statehood.

[48] H Lauterpacht, *Recognition*, 74.

[49] J Crawford, *Creation of States*, 376-378 and H Lauterpacht, *Recognition*, 17-19.

general interests protected by the international legal order, or that third states could have standing when a dispute arises. Second, the examples of direct violations of the duty to recognise given above rest upon one factual scenario: there is a state which has suffered a wrongful act. In other examples of violations of the duty to recognise, the entity which has suffered is not a state, or not a state as far as the non-recognising state is concerned. Functionally speaking, the duty to recognise must be *erga omnes* to ensure that there is international responsibility in each case of a violation of the duty, and should not simply be based upon the status of the entity which has suffered. With normative criteria like the right of self-determination in mind, this is exactly the rationale for the development of obligations *erga omnes* through the jurisprudence of the ICJ in the *Namibia* and *Western Sahara* Advisory Opinions, the *East Timor* case and Article 48 of the Articles on State Responsibility.[50] However, there is no evidence of this reasoning having been applied to situations when the factual existence of a state was denied.

(iii) In light of illegal acts of recognition, there are various demands for cessation or for the restoration of the *status quo ante*, declarations of legal nullities, attempts to apply countermeasures, acts of non-recognition, or calls for arbitration. Although examples of these responses are littered throughout *Recognition*, they are not dealt with systematically by Lauterpacht.

Lauterpacht considers that there are clear examples of state practice which support elements of the duty to recognise, and these do not appear completely outlandish. But they are tenuous, perhaps construct the relevant wrongful act in a way that is far-fetched, and there are many other examples of state practice which could be pointed to which do not support the duty to recognise. In light of this, Lauterpacht must face the question of how practice like that just set out 'adds-up' to customary international law. What is the threshold beyond which Lauterpacht fails to interpret existing practices as legal doctrine and instead begins to invent new doctrine?

Kunz would undoubtedly argue that Lauterpacht is inventing a new doctrine, and that his claims cannot be verified in a 'neutral' or 'impartial' sense. Kunz claims that for Lauterpacht 'the wish was the father of the thought' which resulted in 'a book, written with the preconceived wish to "impress upon the student the fact that the practice of states in the matter of recognition is more permeated with law and principle than is currently assumed."'[51] Therefore, the book was 'in danger of falling

[50] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1970] ICJ Rep 17; *Western Sahara* [1975] ICJ Rep 12; *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90. See also J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, Cambridge 2002) 276-280.

[51] J Kunz, 'Critical Remarks', 715. See review by P Brown (1942) 36 AJIL 106 which is similar in content, if not the tone, to that offered by Kunz on Lauterpacht.

short [or fell short] of scientific truth.'[52] According to Kunz, if Lauterpacht had adopted a more scientific (inductive and empirical) method which focused on the facts (i.e. state practice and *opinio juris*), and did not rely on various preconceptions or normative ideals when interpreting state practice, he could not have defended the duty to recognise. The facts, Kunz argues, do not lead to this duty, but rather lead to declaratory theory. Lauterpacht makes a mistake if he thinks, as he does in part, that the duty to recognise is justified because it is 'believed to have been accepted by the preponderant practice of States.'[53]

This was not the first time that Lauterpacht was criticised by positivists or realists for his idealism and lack of scientific accuracy.[54] If Lauterpacht's method is inductive, Kunz has a point given the relatively scant practice which can be pointed to, to defend the duty to recognise. Equally, though, if Kunz thinks that this is all there is to Lauterpacht's method, Kunz is also mistaken. Kunz is attempting to judge Lauterpacht and his duty to recognise according to Kunz's own empirical inductive method, rather than taking seriously Lauterpacht's own methodological perspective which is set out and applied in *Recognition* and generally throughout his work.

C. Justification of the Qualified Constitutive Theory

It is simply the case that Lauterpacht refuses to hold that legal science can be understood in a neutral or value-free way. Rather, Lauterpacht's general view is that various practices of international life – judicial decisions, resolutions of international organisations, conventional moral or legal principles, and, most importantly (at the time he was writing) the practices of states – must be interpreted through an understanding of the function of the international legal order. This is immediately clear when one considers the sentence after the quotation just set out in which Lauterpacht seems to endorse some form of empirical inductive method. He writes that the duty to recognise is '... also considered to represent rules of conduct most consistent with the functional requirements of international law conceived as a system of law.'[55] In essence, Lauterpacht's claim is that an understanding of function – that is, the point of international law – is necessary to interpret the complex, disparate and multifaceted practices just described as legal doctrine.

Lauterpacht holds, problematically, that the majority of state practice corresponds to the duty to recognise. But he does not defend the claim that it does so either uniformly or universally. He writes that '... although followed in practice with some regularity, [the duty] cannot be

[52] Ibid.
[53] H Lauterpacht, *Recognition*, 33.
[54] E Lauterpacht, *A Life*, 66 and above (n. 4).
[55] H Lauterpacht, *Recognition*, 6.

regarded as having been uniformly acted upon or clearly perceived by governments. Neither [has it] secured the assent of the majority of writers on the subject.'[56] It is apparent from this statement that if Kunz claims that the duty to recognise fails because it does not fully correspond to state practice, then Lauterpacht agrees. Of course this must be the case to some extent. For any rule of custom, there will be divergence in state practice (not least, because there are wrongful acts committed in violation of a custom, and because custom changes through changing practice), and writers on the subject will often disagree about the exact content of its rules. But this is not exactly Lauterpacht's point: it is more subtle and should not be misunderstood. Neither state practice as a whole nor the agreement of international lawyers can be taken as *conclusive* evidence that the duty to recognise is correct or incorrect.

Specifically, Lauterpacht's point is that there is no complete uniformity of motive as to why states recognise other states, and therefore we cannot use such state's practice or motives as straightforward evidence which can verify a particular customary norm. Rather, the international lawyer has to interpret state practice in order to make sense of it as examples of legal doctrine: state practice does not, so to speak, stand up by itself, and those practices which are legally relevant must be distinguished from those that are less relevant or not relevant. With this in mind, Lauterpacht claims that recognition by states of putative states has to be split into two categories. The first is where states act in accordance with the rule which requires them to recognise a state to the extent that it is effective. The second is where states do not act in accordance with this rule: that is, they refuse to recognise an effective state, recognise an ineffective putative state or recognise on the basis of another rule. The first category of acts establishes the duty to recognise. The second category of acts is, strictly speaking, *ultra vires*, irrelevant in terms of personality determination, and often wrongful under international law. Lauterpacht's step, then, is to distinguish acts of recognition which are pursued as a 'as a matter of arbitrary policy' from those which are pursued as 'a legal duty.'[57] Both have attendant consequences under international law.[58]

To take his argument one step further, the following passage is important. He writes '... it is a fact that the tests of recognition, although supported by the bulk of state practice and by cogent legal principle, have often yielded to motives and considerations often foreign to the

[56] Ibid.

[57] H Lauterpacht, *Recognition*, 56. Koskenniemi describes this aspect of Lauterpacht's strategy well. He writes that '*Recognition* is a consistent and far reaching attempt to imagine international law as a complete and self-regulating system. What first appears as an act of political will is revealed as an exercise in interpretative discretion.' See M Koskenniemi, 'Victorian Tradition', 239.

[58] This also gives a potential response to Brownlie's criticism of the duty to recognise when he writes 'Recognition, as a public act of state, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if any entity hears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations.' (See I Brownlie, *Principles*, 90).

purpose of recognition.'[59] The straightforward point here is the one just made: states sometimes recognise on the grounds of policy rather than legal principle. But the crucial part of this statement is that Lauterpacht introduces a twin justificatory strategy for the duty to recognise. It must conform to (i) cogent legal principle; and, (ii) state practice. Regarding (i), he is referring to the idea discussed above that the international legal order must be rooted on a principled system for personality determination in order to ensure the proper functioning of the international legal order. However, and responding to (ii), this must not be merely a hypothetical system. At the time he was writing, it could not be, therefore, 'the special organs' which Kelsen speculates might be best able to effectively resolve the problem of personality determination, simply because they did not exist. Rather, the proposed institutional system must find some purchase in the mass of material that might broadly be considered part of the international legal order. Put another way, we must take state practice as we find it, and try to discern a system of personality determination within it.

Lauterpacht can be left to summarise the approach just set out. He writes that '[i]n a properly constituted political society the function – which is perhaps the most important function of any legal system – of ascertaining the presence of the conditions of legal capacity and existence is performed by impartial organs delegated by the law for that purpose.'[60] He considers that state recognition performs this institutional function: 'In international society that task is as a rule fulfilled by individual states acting on their own responsibility and endowed with wide discretion in the appreciation of the relevant facts.'[61] However, 'it is a discretion determined by international law. In granting or refusing recognition the State administers international law; it does not perform a legally indifferent act of national policy.'[62] Thus, there is a legal duty to recognise effective states, but whether a state is effective or not is a matter of judgment by states. Understood this way, Lauterpacht will, in part, agree with Kunz's critique that state practice does not uniformly or consistently support the duty to recognise. But in making this criticism Kunz does not recognise that Lauterpacht is engaged in a process of interpretation of state practice which is neither 'neutral' nor 'impartial'.

III. Progressive Interpretation

The approach to state recognition just set out is an example of Lauterpacht's general methodological approach which he calls

[59] H Lauterpacht, *Recognition*, 32.
[60] Ibid, 33.
[61] Ibid.
[62] Ibid.

progressive interpretation. In brief, this approach requires that various facts associated with international life – such as state practice or acts of international organisations – be interpreted in line with the international law's function and substantive value orientation. This leads to a novel way of explaining how state practice can give rise to customary international legal norms, such as the duty to recognise. Progressive interpretation needs to be set out in detail before it can be shown how his duty to recognise fits into this general methodological approach.

A. Lauterpacht's concepts of law and international law

Lauterpacht sets out his general approach to legal theory in his essay from 1932 entitled 'The Nature of International Law and General Jurisprudence'.[63] His discussion in this essay concerns the familiar problem of 'the determination of the legal nature of international law'.[64] In his view, '[t]he answer to this question obviously depends upon the conception of law which we adopt as the basis of the investigation'.[65] Later in the same essay he writes: '[t]he notion of law with the help of which the international lawyer gauges and determines the nature of the rules which form the subject-matter of his science is necessarily an *a priori* one'.[66] The idea that we need an *a priori* concept of law to allow the cognition of empirical phenomena is, it can be surmised, one that flows from his teacher, Kelsen.[67]

As is well-known, Kelsen developed an austere concept of law which he used to interpret the 'chaotic material' of the law – from its 'statutes, regulations, judicial decisions, administrative acts, and the like' – as a 'unified legal system'.[68] This approach, which is in its own way interpretative, is one that is pure from morality and empirical fact.[69] While Scobbie, von Bernstorff and Koskenniemi have identified the strong epistemological links between Kelsen's method and that of Lauterpacht, it is the *morally substantive* and *purposively orientated* concept of law which Lauterpacht adopts which distinguishes his philosophy from that of his teacher.[70] By 1932, Lauterpacht is explicit about his different

[63] H Lauterpacht, 'The Nature of Law and General Jurisprudence' (1932) 12 Economica 301-320 and *CP*, II, 3. This essay was rewritten and formed part of *The Function of Law in the International Community*.

[64] Ibid, 7.

[65] Ibid.

[66] Ibid, 21.

[67] Ibid, and J von Bernstorff, *International Law Theory of Hans Kelsen*.

[68] S Paulson and B Litschewski-Paulson, *Normativity and Norms* (OUP, Oxford 1998) at xxxvi.

[69] Ibid.

[70] See I Scobbie, 'The Theorist as Judge', 264; J von Bernstorff, *International Law Theory of Hans Kelsen*; and, M Koskenniemi, 'Victorian Tradition', 215 and *Function*, xxxiii. von Bernstorff argues that through the 1920s Lauterpacht began to distance himself from Kelsen. He writes '[Lauterpacht] had been influenced by Hans Kelsen at the beginning of [his] academic career[], but later distanced [him]self from [Kelsen] intellectually precisely because of his moral agnosticism. For both men, morality assumed a foundation role in international law, though in different ways.'

approach. He writes that: '[a] more satisfactory solution [to the positivism of Kelsen] can be found in the hypothesis which, by courageously breaking with the traditions of a past period, incorporates the rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions'[71]

Not surprisingly, in his work through the 1930s, the 'interests' and 'functions' of the international community seemed to be concerned mainly with the maintenance of peace, and he generally did not develop these concepts in detail at this time. However, by the early 1940s, he had fleshed out these concepts. In a lecture given to the Royal Institute of International Affairs, Chatham House, London on 27 May 1941 called 'The Reality of the Law of Nations' he claims that international law has five social purposes.[72] The first is 'to protect and secure the independence of States by the prohibition of the use of force and by the collective enforcement of that prohibition'.[73] Secondly, a purpose of international law is 'to render the elimination of force tolerable and durable by the provision of an absolute duty of judicial settlement of disputes and of submission to the decisions of a supra-national political authority decreeing changes in the existing law and existing rights'. The third purpose is 'to give effect, through appropriate limitations and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international'. The fourth purpose is, 'by fostering the sentiment of and obedience to law among nations, to develop and finally establish the consciousness of the essential identity of moral standards applicable to States and individuals alike'. The fifth and final purpose of international law is 'the creation of conditions and institutions calculated to bring about the transition to the realisable and certainly not infinite ideal of the Federation of the World conceived as a commonwealth of autonomous States exercising full internal independence, rendered both just and secure by the power of the impersonal sovereignty of the *civitas maxima*'. Put another way, his vision comprises a substantive orientation (which is the protection of human rights), a functional orientation (peaceful settlement of

(J von Bernstorff, *International Law Theory of Hans Kelsen*, 228). So, while 'Lauterpacht shared Kelsen's conviction that the international legal order had to be conceptualised as a complete system of legal rules...both authors dismissed the notion of gaps in the international legal order. For Lauterpacht, however, completeness was a question of substantive unity, which had to be achieved by the ingenious application of natural-law principles by the legal craft.'(Ibid, 259). Although this is not a thesis which is defended here, it seems to me that Lauterpacht's work on Westlake is crucial in the development of his philosophy of international law. It is in his paper from 1925 on Westlake that we first see the tentative endorsement of the twin commitments to function and fit to state practice that pervade his interpretative approach throughout his work. However, it is clear that the aspects of Kelsen's work described by von Bernstorff do pervade Lauterpacht's method throughout his career and render it much more theoretically sophisticated than that of Westlake.

[71] H Lauterpacht, 'Nature', *CP*, II, 18.

[72] H Lauterpacht, 'Reality', *CP*, II, 22-52.

[73] Ibid, 47. The rest of the quotes on this page are from this essay.

disputes and co-ordination of international relations) and institutional mechanisms which can effectively implement these two purposive orientations. Ideally, the institutional structure to which his concept of international law aspired was the modern (and federal) state.[74] This, at least in his later academic writings, is his concept of international law.

He then employs this concept of international law to interpret the bulk of the past practices of international law (institutional developments, state practice, etc.) as examples, or not, of his concept of international law becoming reality. This is progressive interpretation. He writes:

> [i]t is within the province of the science of international law to supply a progressive interpretation of these constitutional charters and of any supplementary instruments calculated to add to their effectiveness and their authority. Such a progressive interpretation is fully consistent with the main established canons of construction, namely, with the principles of effectiveness and interpretation by reference to general legal principles and the social ends of law.[75]

A good example of his approach to methodology is found in his essay from 1950 entitled 'International Law after the Second World War'. Here he argues that there are 'three principal contributions of the post-war period to the development of international law'.[76] These 'lie mainly in the undoubted improvement of the structure of international organisation; in the growing acceptance of the principle of enforcement of international law not only in relation to States, but also against individuals acting on their behalf; and in the recognition of the inalienable rights of the individual conceived as the ultimate unit of all law'.[77] The concept of international law is used in this interpretative exercise as 'a rational standard of both political action and academic study', rather than an 'infinite ideal.'[78]

B. The immaturity of the international legal order

While Lauterpacht sees considerable progress in the institutional structure of the international legal order, he does not regard it as conforming to his institutional ideal. The federation of states, or *civitas maxima*, was clearly *lex ferenda* at the time he was writing, and it remains so now: the

[74] He writes that '[o]f these institutions the State is, in the relations of the individual, the normal and typical manifestation' (ibid, 47). See also his lecture 'Sovereignty and Federation in International Law' (written around 1940, and first published in *CP*, III, 5 for an extended treatment of his views on institutional form.

[75] H Lauterpacht, 'Reality', *CP*, II, 44.

[76] H Lauterpacht, 'International Law after the Second World War' (lecture to the Hebrew University of Jerusalem in 1950. Published for the first time in *CP*, II, 159), 167.

[77] Ibid.

[78] H Lauterpacht, 'Sovereignty', *CP*, III, at 25.

international legal order is institutionally immature.[79] As an immature order, state institutions have to collectively bear various administrative roles within the international legal order *qua* interstate system. The obvious example of this immaturity is in the creation of international legal norms: 'the organs of the formation of the will of the international community are, in default of an international legislature, States themselves, their consent being given by custom or treaty'.[80] The duty to recognise is to be understood in the same way. It describes the institutionalised process, undertaken by states, that leads to personality determination. These two ways in which states administer the international legal order are defects of the system but,

> . . . even when viewed in their alarming comprehensiveness, [they] are not destructive of the legal nature of international law so long as they are conceived as associated with a transient state of immaturity which humanity, prompted by the growing interdependence of the modern world, is destined to overcome by conscious effort. So long as this is borne in mind, it is better to admit the various defects of international law . . .[81]

We are now in a position to state why Lauterpacht endorsed the duty to recognise. Progressive interpretation requires the international lawyer to acknowledge the functional necessity of a system which settles questions of personality in international law. The question of the institutional form of this system is left open and need not resemble the systems found in domestic law, although this is often and ideally the case. The duty to recognise is this system, even if it is functionally imperfect in many ways.[82] Lauterpacht is then able to be critical of state practice which fails to recognise on the basis of a legal duty as being 'mistakes', 'lofty policy', where 'the function of recognition is being abused for the purpose of securing particular national advantages'.[83]

It could be supposed that the International Court of Justice's willingness to offer an Advisory Opinion on the Unilateral Declaration of Independence issued by the democratically elected Assembly of Kosovo is evidence of the progressive development of international law. This could be on the grounds that personality determination is being settled by international adjudicative institutions rather than the imperfect, flawed and immature interstate system described by the

[79] He writes '[i]nternational law will not achieve a full measure of reality until it is organically woven into the fabric of a supra-national entity.' (H Lauterpacht, 'Reality', *CP*, II, at 47).

[80] H Lauterpacht, 'Nature', *CP*, II, at 17.

[81] H Lauterpacht, 'Reality', *CP*, II, 31.

[82] These imperfections mean that the duty to recognise is problematic for some of the same reasons as other forms of constitutive theory. Specifically, the existence of states remains necessarily contingent, but his approach can be said to limit the dissonance associated with other versions of constitutive theory. Lauterpacht, however, would undoubtedly regard this problem as another illustration of the immaturity of the international legal order. This is perhaps how he would respond to Crawford's criticism of qualified constitutive theory and constitutive theory in general. See J Crawford, *Creation of States*, 20-22.

[83] H Lauterpacht, *Recognition*, 33.

duty to recognise. However, this optimism can only be tempered by the judgment itself. It is suggested that Lauterpacht would share Judge Simma's lament about the narrow interpretation of the question submitted to the Court by the General Assembly, and highly limited discussion of whether Kosovo might be considered an independent state and why. The court refused to consider the question of the relevance of recognition in the formation of legal doctrine.[84] As a result, Judge Simma said of the Opinion that it 'excludes from the Court's analysis any consideration of the important question whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met.'[85]

For the above reasons, Kunz's claim that international legal science should proceed on the basis of 'neutral and impartial study'[86] seems alien to Lauterpacht's method. Rather, state practice does not reveal anything in itself, and is only revealed as international legal doctrine to the extent that it conforms to an immanent understanding of the function of the international legal order. This obviously begs the question of what the function of international law is, and Lauterpacht is up-front about the concept he supports. By adopting this method, the legal scientist neither assumes conformity in state practice nor assumes that it is an incoherent mess of material in which no order can be discerned. Lauterpacht's view is that his concept of international law mediates state practice: practice is revealed as meaningful *qua* legal doctrine to the extent that it reflects one's underlying concept of international law. While this argument will be set out in detail in section 4, Lauterpacht's position must be that if practice does not correspond at all to his concept of international law, it cannot be law-creating.

C. Legitimacy

The substantive moral orientation which is at the heart of Lauterpacht's concept of international law arises in relation to questions of statehood when he considers revolutions. He is prepared to apply the principle *ex injuria jus non oritur* to those entities created through force, but he writes that 'principle of effectiveness must be proved by free popular approval of the authority which has come to power by way of revolution.'[87] This should not be taken out of context. Perhaps somewhat surprisingly, criteria of legitimacy *affirm the existence* of an effective regime for

[84] Advisory Opinion of 22 July 2010, para 51. ICJ declared that the question submitted to by the GA does not 'ask about the validity or legal effects of the recognition by Kosovo by those States which have recognized it as an independent State'.

[85] Declaration of Judge Simma para 1.

[86] J Kunz, 'Critical Remarks', 713.

[87] H Lauterpacht, *Recognition*, 139.

Lauterpacht.[88] After the quotation just cited, he writes 'whatever its merits, the test of subsequent legitimation must be regarded as an affirmation of the legal view of recognition, i.e. of the view that there is a duty of recognition, as distinguished from the purely optional right to recognise, as soon as there is present the primary condition of effectiveness of governmental power.'[89] Thus, it would seem that the duty is to recognise effective, not legitimate, states. His scepticism about legitimacy as a condition of statehood is at least in part driven by a worry that in some circumstances popular approval can be manipulated or conjured up by morally dubious, but effective, regimes. However, he regards the potential for abuse can be removed by 'appropriate [international] machinery'.[90] He writes that '[t]here is no reason why, once collective recognition based upon the principle of consent of the governed has become a rule of international law, the international organisation of States should not develop organs and procedures for achieving that object.'[91] Furthermore, he regards the international supervision of elections to be 'a rational development' in the international legal order.[92]

This idea of the rationality of international institutions which are able to ensure that the governments of states are legitimate chimes with both the substantive orientation, as well as the ideal institutional form, associated with progressive interpretation. However, it remains the case that he sought to restrict the duty to recognise to criteria of effectiveness alone in *Recognition*. Why did he do this given his method? It is difficult to say. His view that legitimacy might only be a condition of statehood when a much greater level of institutional integration had come about in international life was one he stated in his early essay on Kelsen published in 1933.[93] It seems that his view did not change after human rights came to the fore in his writings at the start of the 1940s and in *Recognition* from 1946 (even though much of this book was drafted in the late 1930s). One possibility, though, is that in 1946, to add a criterion of legitimacy to the

[88] H Lauterpacht, 'The Principle of Non-Recognition in International Law' in Q Wright, H Lauterpacht, E Borchard, P Morrison (eds), *Legal Problems in the Far Eastern Conflict* (Institute of Pacific Relations, New York 1941) 129-156. See also, E Lauterpacht, *A Life*, 334.

[89] H Lauterpacht, *Recognition*, 140.

[90] Ibid.

[91] Ibid, 138.

[92] Ibid, 139.

[93] In this essay, he writes: 'If there existed an effective international order it might be possible to secure in the fundamental hypothesis of municipal law some element of material justice by the simple means of international law refusing to recognise a municipal system which is lacking in certain minimum standards of justice. At present there is no such international authority, and, recognition being a matter for each individual State, i.e. its legal order, on the sole basis of actual power, that is to say, of habitual obedience to the successful authority. Peace and authority and government are in any case better than anarchy. This *désintéressement* of the international society in the quality of the bases of the municipal system is not necessarily permanent. It is a function of the degree of integration of the international community. But in the meantime an initial hypothesis transforming power into right undoubtedly constitutes, juridically, the basis of a peaceful order.' (*CP*, II, 427) This is perhaps the clearest expression of the substantive orientation of his early interpretative method, which became more closely aligned to the protection of human rights after 1941.

factual criteria upon which the duty to recognise rests would fail against his method. While there are a variety of possible systems for personality determination which are closer to his idealised concept of international law, this is not the task he sets himself: *he is interpreting existing practices not inventing new ones*.

IV. Interpretivist Theories of Law

Kelsen's philosophy of law is often perceived as influential to Lauterpacht's writings. But though this connection is interesting historically, Lauterpacht's claims about the substantive and functional orientation of law and international law render his interpretative approach fundamentally different to that offered by Kelsen.[94] Looking forward to current legal philosophers, it should not be surprising that Lauterpacht's method resembles that of some modern natural lawyers. There are, for instance, connections between the work of Lauterpacht and John Finnis. Both accept (i) practices should be interpreted as legal phenomena according to their relevance or correspondence to the central case of law; (ii) the central case of law must be conceptualised from the point of view of practical reasonableness which is a moral viewpoint; and (iii) that law must be conceptualised as a purposive phenomenon.[95] There are, however, two differences which take Lauterpacht some distance from Finnis (and neo-Thomist natural law in general). The first is that Lauterpacht sees law as an *expression of* fundamental and *commensurable* human moral interests like human rights and peace, whereas Finnis considers law as a system which pursues the common good by *mediating* varied and *incommensurable* basic goods. Secondly, and more importantly for present purposes, Lauterpacht considers that the moral interests which he defends should be used to interpret various practices of international law. As will be shown, 'fit' to these practices operates as a constraint on possible interpretations of legal doctrine, even if ultimately these practices can be considered non-legal if they fail to correspond to his concept of international law. To explain, practices are, *inter alia*, judicial decisions, resolutions of international organisations, conventional moral or legal principles, and the norm-guided practices of states.[96] These are, we should note, *past* practices and interpretation is, in this sense, backward looking. Legal doctrine is an interpretation of what has occurred in the past in light of his *preferred normative*

[94] See note 71 above.
[95] J Finnis, *Natural Law and Natural Rights*, chapter 1.
[96] See S Shapiro, 'On Hart's Way Out', in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to* The Concept of Law (OUP, Oxford 2001) 150-191.

orientation. Past practices and an understanding of the normative orientation of international law are both constraints on plausible attempts to articulate legal doctrine. These two constraints operate in what Lauterpacht calls his 'socially obtainable natural law'.[97] In Finnis's natural law theory, *fit* to past practices does not obviously operate as a strong constraint. Thus, past practices which do not correspond to his central case of law are defective as law and ultimately not law at all.[98] These two differences move Lauterpacht's progressive interpretation away from traditional natural law theory and its modern restatements, and closer to Dworkin's constructive interpretation.

Tracing the link between Lauterpacht and Dworkin is not only useful because of recent interest in interpretivist approaches to international law, but also for the following reason: A general problem with interpretivist theories, which has been considered extensively in the literature, concerns the extent to which any particular proposal for a legal doctrine must fit with past practices of law. Dworkin considers that it must, as does Lauterpacht, but the extent to which it must raises problems. One is how much past practice is required for a legal doctrine to exist. Another is whether the amount of practice required varies given the importance of a particular doctrine to maintain fundamental values of a legal order. Because of its apparent lack of support in past practices, and because of the importance of establishing a stable system of personality determination in the international legal order, the duty to recognise is an excellent 'test-case' which can be reconsidered so as to provide a potential answer to these problems. Let me set out this argument by first considering the relationship between the interpretative methods adopted by Dworkin and Lauterpacht, before moving to consider the problem of how and why proposals for legal doctrine (such as the duty to recognise) should fit past practices.

A. Constructive interpretation and progressive interpretation

Dworkin's central methodological preoccupation concerns how the legal scientist (*qua* observer) can articulate the viewpoint of legal officials (such as the judge[99]) and explain what this articulation says more generally about the nature of law. His argument is that the legal scientist must engage in an interpretative exercise which attempts to reconstruct

[97] H Lauterpacht, 'Kelsen', *CP*, II, 425.

[98] In general it is not entirely clear how much distance can be drawn between Finnis and Dworkin on the issue of fit. However, in my view 'fit' is less of both a real and perceived constraint in Finnis's work when compared to Dworkin's. See J Finnis, *Natural Law and Natural Rights*, chapter 10. J Finnis, 'Natural Law and Legal Reasoning' in R George (ed.), *Natural Law Theory: Contemporary Essays* (OUP, Oxford 1992) 134-157. See also, M Murphy, *Natural Law in Jurisprudence and Politics* (CUP, Cambridge 2006) chapter 2.

[99] See M Koskenniemi, 'Victorian Tradition' and I Scobbie 'The Theorist as Judge' on the role of the judge in Lauterpacht and Dworkin's work. Also, see H Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons, London 1958) chapter 1.

the internal viewpoint of the legal official in accordance with a set of preferred normative values.[100]

Dworkin focuses on the past practices of law which, he explains, consist of various propositions of law and various justificatory grounds for them. A proposition of law is, for example, a provision of a statute. A justificatory ground is that Parliament enacted the provision. These practices are identified at a pre-interpretative stage. Dworkin then moves to the interpretative stage. There are intuitively a range of plausible linkages between these propositions and justifications. However, his claim is that the relationship between propositions of law and the justificatory grounds of law is explained by understanding the value or point of law. Thus the justificatory ground of law offered in support of a proposition of law is plausible because it ultimately supports or helps pursue certain fundamental values embedded in legal order. In the example just given, the act of legislation is capable of justifying the legal proposition because the former expresses the democratic will, seeks to achieve justice, or helps put in place a coherent and stable system of co-ordination. Dworkin's central point is this: an understanding of the point of law is ultimately rationally inescapable if the legal official is to have a justification for coercing a legal subject into conformity to a legal norm.

An attribution of point or purpose, which is also an account of why the practice is *valuable* or *justified*, is a necessary part of any legal practice and is an essential part of any interpretation of legal practice by legal officials of coercive acts they undertake. However, for Dworkin, the interpreter must not take his interpretation directly from the officials' interpretations of the social practice. This is because various conceptions of the point of law evolve over time, and vary between legal officials. Rather, the interpreter can only impose his or her own understanding of the point or purpose of law to justify various past practices. However, this imposition cannot be arbitrary: the 'interpretation of any body or division of law . . . must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve.'[101] Thus, constructive interpretation explains why past practices of law are justified in accordance with a normatively preferred understanding of the point and purpose of law. A plausible interpretation, therefore, must *fit* with past practices but it must also provide a plausible *justification* for them.

Dworkin then argues that serving the political value of integrity provides the most plausible candidate for the point and purpose of law, and how past practices of law can be justified. Although a complex and multifaceted concept, integrity is at root a value which encompasses a

[100] See R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 Philosophy and Public Affairs 87 and 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 OJLS 1.

[101] R Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) 160.

set of fundamental legal and political principles, like equality and dignity, by which a community, through its institutions, give expression to the idea of justice.[102] Thus integrity is an *institutionalised* conception of justice. To explain, if a judge sees law as purely an expression of substantive justice, then he is a legal realist. This is because he does not take into account the ways in which similar questions have been answered by previous officials within the legal order of which he is a part. Officials who are part of political and legal institutions should make decisions by taking into account past practices because these practices are examples of where the institutions of which they are a part have previously spoken on a matter on behalf of the community. Put another way, integrity requires that the legal official makes decisions which take account of the way in which substantive justice has been expressed through legal doctrine in the history of the institution in which he plays a role. In a sense, for the judge, 'fit' is a principle of procedural justice.[103] For a legal scientist, who observes a legal order rather than being an engaged participant, the same constraints apply, but in a slightly different way. If the legal scientist just states what is just, he fails to interpret existing practices, and instead invents new ones. If he just states practice, without attention to the point and purpose, he fails to explain its character as an exercise in justifying the coercive acts of legal institutions.

The final stage is a post-interpretative stage where the interpreter 'adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretative stage.'[104] This is a 'reforming'[105] stage where the interpreter comes up with proposals about how practices can be reformed so as to better correspond to the point and purpose of law. For Dworkin, this stage concerns how past practices can be reformed so as to increase the integrity of the system.

Constructive interpretation intersects with progressive interpretation in a number of ways which become clear when one recalls the main features of Lauterpacht's method. The conceptualisation of international law proceeds on the basis of Lauterpacht's preferred normative orientations (that is, peace and the protection of human rights). Second, past practices are correctly interpreted as international legal doctrine to the extent that they further these aspirations. It can only be from these practices that the network of duties and responsibilities which regulate state action emerge, and his normative orientations allow Lauterpacht to explain why this network is legally obligatory. In a general sense, Lauterpacht identifies many doctrines, as well as the developing institutional form of the international legal order, that can be interpreted as

[102] See R Dworkin, *Justice for Hedgehogs* (Harvard University Press, Cambridge Mass. 2011) chapter 9 and also see G Postema, 'Integrity: Justice in Workclothes' (1997) 82 Iowa Law Review 821.

[103] See R Dworkin, 'Hart's Postscript', 25-26.

[104] R Dworkin, *Law's Empire*, 66-67.

[105] R Dworkin, *A Matter of Principle*, 160.

international legal phenomena in accordance with his preferred normative orientation. State recognition in pursuance of a legal duty is revealed through this method as performing a vital institutional function in the international legal order.

This argument reveals that for Lauterpacht, international legal doctrine cannot be free-floating; it must be connected to, and must explain the legality of, past practices. This is exactly where the distinction emerges between Lauterpacht and other natural lawyers, and where his interpretative method comes to the fore. Explicitly, he writes: 'law must be based on facts – in so far as such facts are not themselves contrary to law.'[106] Properly understood, the interpretation offered by the jurist should articulate the international community's on-going attempts to give expression to preferred normative goals which are immanent within both the past and the day-to-day workings of the international legal system. Therefore, international law is interpreted as the *institutional expression* of the international community's fundamental normative commitments and is not simply that which Lauterpacht considers to be ideally just. Although not quite capturing the depth of Lauterpacht's claims, von Bernstoff makes this point when he writes:

> For Lauterpacht – in contrast to Verdross – direct recourse to foundational moral principles was no longer an option. He understood morality as natural justice that always remained in the background of the positive legal order. Morality for him played a vital part through filling gaps and directing legal development towards the ends of universal justice.[107]

The third step of Lauterpacht's method requires that those elements of past practices that genuinely carry legal significance, and which provide the grounds for legal rights and duties, should be distinguished from those that that are best described as mistakes, peripheral to the international legal order. For example, and as already mentioned, recognition on the basis of policy alone is to be understood as where 'the function of recognition is being abused for the purpose of securing particular national advantages.'[108] This stage also involves a critical examination of state recognition as a system of personality determination and how the system itself can be improved or replaced by another system which is better justified against his concept of international law.

It should be clear from this comparison that both Lauterpacht and Dworkin adopt a similar method which attempts to interpret existing practices in light of a similar preferred normative orientation. As it turns out, in a recent, and as yet unpublished, work on interpretivism and international law, Dworkin outlines an interpretative method for public international law which is very close to Lauterpacht's view

[106] H Lauterpacht, *Recognition*, 5-6.
[107] See J von Bernstorff, *International Law Theory of Hans Kelsen*, 252.
[108] H Lauterpacht, *Recognition*, 33.

which was just stated. His claim is that international legal norms are justified by the application of two sorts of constraint. First, the principle of salience requires that any putative norm must have widespread acceptance by states in their past practices. Second, any such norm must be consistent with the point of international law, which is to protect communities from external aggression (i.e. they must have peace) as well as from domestic barbarism (i.e. each member of a community must have their dignity protected through the enforcement of fundamental human rights).[109]

B. Fit and Justification

For both Dworkin and Lauterpacht, the interpreter articulates legal doctrine by interpreting past practices in accordance with the point or purpose of law. Plausible interpretations must fit with, as well as justify, past practices. However, this leads to a problem. On the one hand, morally preferable interpretations which exclude (or underdetermine) many past practices should presumably be rejected.[110] On the other hand, past practices must sometimes be rejected as aberrant if they cannot be rendered consistent with the moral point of law, and undermine the integrity of law.

Dworkin does not accept that a failure to fit to past practices is a reason to reject an interpretation. On Postema's reconstruction of Dworkin's concept of integrity, this is a point where the legal *official qua* participant must show 'regret' about the past practices of the institution of which he is a part.[111] For the externally situated and observing legal *scientist*, Dworkin's position, according to Stavropoulos, is that past practices are not 'immune from discount as a mistake, as a piece of fool's gold lurking among the genuine samples.'[112] But then one might rightly wonder at what point does the interpretation become sufficiently disconnected from existing practices so as to fail as an interpretation of them. Moreover, in other places, Dworkin seems to contradict this view. For instance, Dworkin argues that the interpreter has failed to provide an interpretation of law if he fails to fit the interpretation to past practices. To fail in this way would amount to simply declaring what the interpreter considers to be just, rather than interpreting what is law.[113]

[109] R Dworkin, 'Human Rights and International Law'.

[110] See L Alexander and K Kress, 'Against Legal Principles' (1996-1997) 82 Iowa Law Review 739, 777; G Postema, 'Justice in Workclothes'; and, S Guest, 'How to Criticise Ronald Dworkin' (2009) 69 Analysis 1.

[111] G Postema, 'Justice in Workclothes'.

[112] N Stavropoulos, 'Interpretivist Theories of Law' [2003] Stanford Encyclopedia of Philosophy.

[113] Dworkin writes that 'if [the lawyer's] threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation – then he cannot claim in good faith to be interpreting his legal practices at all.' R Dworkin, *Law's Empire*, 255.

Dworkin offers at least two ways to steer between these two possibilities, the second of which is more satisfactory than the first. First, he does suggest that there is often no clear way of providing a precise formulation of the relationship between fit and justification but this should not concern us unduly and is unproblematic. For instance, he writes that the 'judge's duty is to interpret the legal history he finds, not to invent a better history. The dimension of fit will provide some boundaries. There is . . . no algorithm for deciding whether a particular interpretation sufficiently fits . . . not to be ruled out.'[114] Presumably Dworkin would argue that a similar attitude should be taken by a legal scientist attempting to interpret past practices. Either way, he seems to be saying that fit to past practices operates as a constraint, but in a relatively loose and non-exclusionary way and it cannot be conclusively determined when an interpretation should be ruled out.[115] Second, Dworkin writes that the guiding principle of the 'integrity and coherence of law as an institution' structures the judge's 'convictions about how much of the prior law an interpretation must fit, and which of it, and how.'[116] The political value of integrity implies an inverse relationship, or for some a 'sliding scale',[117] between the two variables of fit to past practices and justification of past practices in line with the point and purpose of law, when selecting an interpretation of what the law requires. Put straightforwardly, if a particular legal doctrine is crucial for the integrity of the system then the interpreter can accept a lower level of correspondence to past practices.

C. The duty to recognise and 'fit'

Put in Dworkin's words, the problem with the duty to recognise may be that '[t]he justification [of the duty to recognise] need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.'[118] At this point, Kunz's criticism can be seen in a new light. An interpretivist who takes the general critical attitude of Kunz may argue that Lauterpacht had invented a new practice and has failed to

[114] R Dworkin, *A Matter of Principle*, 160; S Fish, 'Working on the Chain Gang: Interpretation in Law and Literature' (1981-82) 60 Texas Law Review 551.

[115] See Alexander and Kress, 'Against Legal Principles' on the distinction between looser and tighter relationship between 'fit' in judicial and legislative reasoning. My suspicion is that, in the final analysis, Dworkin's view is that less 'fit' is required the greater the importance of the normative principle at stake. Therefore, ultimately, a loose relationship between 'fit' and 'justification' is accepted by Dworkin.

[116] Ibid.

[117] See J Tasioulas, 'In Defense of Relative Normativity', 109-112 and F Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146. See J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174-207.

[118] R Dworkin, *Law's Empire*, 66.

interpret past practices. This is a genuine problem for Lauterpacht on the basis of his own methodological precepts.

How might Lauterpacht respond to this criticism? One response could be that if we do not accept a duty to recognise, our conclusion may well have to be that there is no functionally coherent system of personality determination in international law. While this conclusion might confirm the opinion of the law student that personality is an area where international politics is dressed up as international law, it does leave the international lawyer with an ontological problem about the existence of a fundamental aspect of the international legal order which he or she would do well to avoid if possible. As Dworkin puts it, to take this line would undermine the 'integrity and coherence of [international] law as an institution'. Dworkin, however, then asks the interpreter to alter their 'convictions about how much of the prior law an interpretation must fit, and which of it, and how'. Reading this claim into Lauterpacht's duty to recognise, it could be said that the importance of a stable system of personality determination which is able to cohere, and maintain the integrity of, the existing system of international law would only require a relatively small correspondence to past practices to be justified. In other contexts, for example, the extent of maritime delimitation, where the integrity of the system is not at stake if we adopt one rule or another, a clear and consistent line of past practice would be required to establish the rule.

This argument helps defend Lauterpacht's duty to recognise. That is, having a stable system of personality determination is of such importance to the integrity of the system that only a small amount of past practice is necessary to sustain it as a legal doctrine. This idea is perhaps what Lauterpacht is expressing when he writes that '[w]e are not at liberty to assume, without overwhelming proof, the existence of a gap so detrimental to the reality of the international legal order', where the gap referred to corresponds to the absence of a stable system of personality determination.[119] And there is, at least, a small amount of practice which supports the duty to recognise. Thus, if Lauterpacht's method has any plausibility, the duty to recognise is more credible than has generally been thought.

This argument might not be entirely consistent with the traditional canons on how customary international law emerges, but it does have some resonance in both international legal scholarship and practice. For example, John Tasioulas has argued that an interpretative approach similar to that set out in this article is reflected in the judgment of the ICJ in the *Nicaragua Case* where it 'adopted a revolutionary technique that enabled it to derive customary norms prohibiting the use of force and intervention despite the absence of supporting general state practice,

[119] H Lauterpacht, *Recognition*, 7.

and in the face of considerable inconsistent practice.''[120] On Tasioulas's reading of this case, the importance of securing the world order value of peace between states allows the ICJ to accept a lower standard of fit to past practice when determining the existence of relevant customary international law. Obviously, the past practices the ICJ has to interpret were much richer than the relatively sparse examples from state practice which Lauterpacht relied upon in the 1930s and 1940s. Furthermore, it has to be recognised that the *Nicaragua Case* was legally anomalous in that the ICJ's jurisdiction was restricted in a way that prevented it from considering parallel obligations found in the Charter of the United Nations.[121] Despite these differences, this Judgment does seem to reflect the idea that a lower threshold of fit to past practice may be sufficient when the integrity of the international legal order is as stake. We should note that this exact position is taken by Dworkin when he argues that past practices can be disregarded when they fail to further the purposes of international law.[122]

International law is a relatively immature system of law. One feature of this immaturity is that it is not clear how questions of personality are to be settled. Lauterpacht's duty to recognise provides an answer as an attempt to interpret state practice in a way that maintains the integrity and coherence of the international legal order. If there are reasons to value integrity and coherence in law, then Lauterpacht's duty to recognise should be valued for the same reasons. This is the case even though alternative and more plausible interpretations may be on offer which correspond to Lauterpacht's concept of international law *and* fit more closely to past practice.[123] Kunz considered *Recognition* was written to 'impress upon the student the fact that the practice of states in the matter of recognition is more permeated with law and principle than is currently assumed.''[124] This is true – even inevitable – but is it such a bad thing?

V. Conclusion

Lauterpacht's duty to recognise is a proposed legal doctrine which is not supported by a steady and consistent body of state practice. However, it is an attempt to solve a problem which threatens the integrity of the international legal order. If one requires the duty to recognise to be consistent with clear and constant state practice, it cannot be said to be law. This is why positivists, such as Kunz, reject Lauterpacht's claims.

[120] J Tasioulas, 'In Defense of Relative Normativity', 97.

[121] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits (1986) ICJ Rep 14

[122] R Dworkin, 'Human Rights and International Law', 34.

[123] Perhaps Talmon's incorporation of non-recognition into a response for a wrongful act by a state is a contender here. See S Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition'.

[124] J Kunz, 'Critical Remarks', 715.

However, international lawyers' obligation to find coherence and integrity of the system can lead to support for the duty to recognise despite the claims of positivists. To apply progressive interpretation requires us to not accept that fit to past practice is the only reason for accepting or rejecting various doctrines as customary international law. The most important values and needs of the world community should structure our interpretation of past practices.

Lauterpacht's method was never developed in systematic detail, or discussed at great length. This article is a reconstruction of material found in a number of Lauterpacht's lectures and articles. One may wonder why he did not spell out his methodology explicitly. Obviously, he was a practical man well versed in theory, but perhaps the former characteristic led him to be more concerned with providing solutions to the severe problems of international relations which existed at the time he was writing. This said, what remains clear is that by 1940 in his earliest works on human rights, he had developed a novel and sophisticated method for legal science which underpins the rest of his academic and judicial work, and which resonates with the most advanced legal theory on offer today. In this sense, Lauterpacht's method was not an anachronistic approach to international law rooted in 'Victorian' values.[125] Rather, it is an important contribution to international legal theory which can be used to solve persistent problems concerning the integrity of the international legal order.

[125] M Koskenniemi, 'Victorian Tradition'.