

International Human Rights Protection Mechanisms Based on the Ideas of H. Lauterpacht

Olga Sheredko

<https://orcid.org/0000-0001-8295-5318>

PhD student

Faculty of International Relations

Department of International Law

of Ivan Franko National University of Lviv

19 Sichovykh Striltsiv str., Lviv, Ukraine 79000

Vilnius University Law Faculty

Sauletekis av. 9, I block, Vilnius

E-mail: oliasheredko@gmail.com

The Article aims at revealing the ideas of Hersch Lauterpacht on the mechanism of human rights protection that can be found in today's international mechanisms for safeguarding human rights. Analysis covers the idea of an international body suggested by H. Lauterpacht that was aimed to provide the observance of fundamental human rights and freedoms. The research involves a comparison of the human rights protection mechanism proposed by H. Lauterpacht and the current mechanisms on both universal and regional (European) levels.

Keywords: international law, human rights, H. Lauterpacht, Universal Declaration of Human Rights, mechanism for protection of human rights.

H. Lauterpachto idėjomis besiremiantys tarptautiniai žmogaus teisių apsaugos mechanizmai

Straipsnyje atskleidžiamos Herscho Lauterpachto idėjos dėl žmogaus teisių apsaugos mechanizmo, kurias galima rasti šiuo metu egzistuojančiose tarptautinėse žmogaus teisių apsaugos sistemose. Tyrimas apima H. Lauterpachto pasiūlytos tarptautinės institucijos, skirtos žmogaus teisių ir pagrindinių laisvių įgyvendinimo priežiūrai, idėją. Lyginami H. Lauterpachto siūlyti žmogaus teisių apsaugos mechanizmai ir tarptautiniu universaliu bei regionų (Europos) lygmeniu egzistuojančios žmogaus teisių apsaugos sistemos.

Pagrindiniai žodžiai: tarptautinė teisė, žmogaus teisės, H. Lauterpacht, Visuotinė žmogaus teisių deklaracija, žmogaus teisių apsaugos mechanizmas.

Introduction

After the Second World War, respect to human being and human rights became one of the most important topics in the international community. There was an urgent need of the proclamation of fundamental human rights and freedoms globally. After the adoption of the Universal Declaration of Human Rights in 1948, it became necessary to provide a real mechanism for human rights protection. As the result of

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great work, the universal mechanism by the United Nations Human Rights Committee and the regional mechanisms, such as the European one, were created. Each mechanism has its own features, but all of them still share one common aim – to protect human rights in practice.

The system established by creating different mechanisms for human rights protection is very similar to the ideas that H. Lauterpacht outlined in his monograph in 1945 under the title *An International Bill of the Rights of Man* (Lauterpacht, 1945, p. 69–74). Although each international human rights protection mechanism is specific (e.g., differences of the judicial panel), in general, they reflect the same main idea and the aim to strengthen and promote human rights.

It is fundamentally important to compare the suggestions of the scholar and the real mechanism existing today and make conclusions on whether and how his ideas have contributed to the international law. It is relevant to analyse the system in the middle of the 20th and at the beginning of the 21st century.

The system of human rights protection is, of course, wider and deeper than just the adoption of an international document. It must be created and be functioning efficiently on different levels.

The main sources that were used in this article are the monographs by H. Lauterpacht and the founding treaties of international organizations created to protect human rights and the ideas of the doctrine on human rights protection (articles of scholars).

The object of the research is the ideas of H. Lauterpacht on human rights protection as outlined in his works and which resemble the current international universal and regional (European) mechanisms.

The aim of the article is to outline the ideas of H. Lauterpacht on human rights protection and to establish their possible impact on the current universal and regional systems for human rights protection as well as to compare the main elements of the European mechanism and the model proposed by H. Lauterpacht. In order to achieve the aim, the following tasks are outlined:

1. To present and analyse the main works of H. Lauterpacht as an input on the evolution of human rights protection;
2. To overview international universal and regional (European) systems for the protection of human rights as affected by the human rights supervision model proposed by H. Lauterpacht;
3. To show the real connection between the ideas of H. Lauterpacht and the European mechanism of human rights protection.

The methods that were used in the article are the following: the historical method was invoked to analyse the development of the conception of human rights and ideas of H. Lauterpacht and his contribution; comparative analysis was necessary to compare the ideas suggested by H. Lauterpacht and the current mechanisms of human rights protection; the analytical method was invoked to analyse and interpret the statements in the Bill of H. Lauterpacht; systematic approach was followed in assessing each element of the human rights mechanism and the mechanism itself in a comprehensive framework.

H. Lauterpacht's works, ideas and life path have been researched by a number of scholars including: Butkevych V. H., Repetskyi V. M., Rabinovych P., Dobriansky S. P., Zeman I. V., Gutnyk V. V., Sands Ph., Barton G., Feinberg N., Fitzmaurice G., Herzog C., Jenks, C. W., Jennings R., Kelsen H., Koskeniemi M., Lauterpacht E., Redzik A., Scobbie I. G. M., Schwebel S. M., Stone D., Troebst S., Paz R. Y., Carty A., Simpson B., Vrdoljak A. F., Jessup Ph. C., Baxter R. R., Capps P., and others. Among these authors, some of them agreed on H. Lauterpacht's impact on the creation of international documents on human rights and their mechanisms, however, there is still the need to show the real contribution to the mechanisms on human rights protection in this article.

1. Origins of the human rights protection mechanism: impact of H. Lauterpacht

Human rights went through different stages of development. H. Lauterpacht believed that every person is entitled to natural rights, and that those are inalienable by the fact of human nature and the law of nature which goes back to antiquity (Lauterpacht, 1950, p. 80) and that the natural law has always been the main inspiration of the doctrine of human rights (Lauterpacht, 1950, p. 75).

H. Lauterpacht believed that stoic philosophy made a great input in the human rights theory by “continuation of the tradition of freedom and equality in Roman political and legal philosophy” (Lauterpacht, 1950, p. 83).

Since the second half of the 18th century, natural rights became a part of the national law of many states and reflected a new stage of the human rights development globally, but H. Lauterpacht outlined that the human being was still an ‘object’ of law but not a subject in international law (Lauterpacht, 1950, p. 75, 76, 77). According to his views, an individual has to be a subject of international law to protect his/her rights. The recognition of human rights in international law took place later at different stages of different groups of rights. In 1977, Karel Vašák suggested in his article the ‘generations of human rights’. In general, the concept of human rights we have today was developed through ages. K. Vašák divided human rights into three generations:

1. First generation – ‘negative rights, or political and civil rights;
2. Second generation – social, economic and cultural rights;
3. Third generation – rights of solidarity (Vasak, 1977, p. 29).

According to the international documents that have been adopted, all these generations of human rights were established on the universal level.

The main purpose of international law is to protect the individual rights that are natural rights on an international level. Among the main historical events in this field, there is the Universal Declaration on Human Rights which was adopted in 1948, but the ideas of such a document had already been suggested years before. In 1917, A. Alvarez wrote a draft declaration on the fundamentals of a future international law that included human rights in the section named *International Rights of the Individual* (Burgers, 1992, p. 450, 451). This draft became a first step of creating The American Declaration of the Rights and Duties of Man 1948 (Baeriswy Banciella, p. 135). H. Lauterpacht was the first one who suggested a specific mechanism for human rights protection on the international level in his draft of an international document named *An International Bill of the Rights of Man* that was published in 1945. A famous scholar of international law who believed that human is the most valuable creature in the world made a draft of a document to protect human rights.

This draft was published in his book *An International Bill of the Rights of Man* in 1945. In April 1942, H. Lauterpacht was asked to write a book on the international law of human rights by the American Jewish Committee (Lauterpacht, 2010, p. 251). And, in December of the same year, he already made a paper on The Law of Nations, the Law of Nature and the Rights of Man to the Grotius Society (Lauterpacht, 2010, p. 252). That was a first part of his great work together with the series of lectures that he gave in Cambridge in 1943 (Lauterpacht, 2010, p. 252). The second part is specifically the draft of the Bill which includes the mechanism itself (Lauterpacht, 2010, p. 252). The structure of the Bill consists of three parts (Lauterpacht, 1945, p. 69–74.). In the first and in the second parts, H. Lauterpacht proclaims the main human rights, and, in the last one, a mechanism for human rights protection is described (Lauterpacht, 1945, p. 92). First, Article 15 stipulates that all human rights (proclaimed in the First Part) have to be adopted by a State “as part of its domestic law and constitution” (Lauterpacht, 1945, p. 72). He believed that the human rights and freedoms proclaimed in the Bill must be adopted in

the domestic law of each and every country (Lauterpacht, 1945, p. 179). H. Lauterpacht stated in Article 18 the proclamation of human rights on international level, namely, that the Bill should be: “an integral part of the Law of Nations,” and that it should be “placed under the guarantee of the United Nations of the World and Its observance shall be a matter of concern to all the United Nations” (Lauterpacht, 1945, p. 73). According to these ideas of H. Lauterpacht, in order to provide effective proclamation and protection of human rights, an international mechanism is needed. In 1945, when his book was written, there was no international mechanism for human rights protection at the universal or regional level.

The whole mechanism of the Bill is described in Article 19. According to this draft, a High Commission for the supervision of the observance of the Bill should be established within the framework of the political organization of the United Nations of the World (Lauterpacht, 1945, p. 73). Each member of the commission should be a person ‘of the highest distinction’ appointed by the Council of the United Nations (as he suggested). The structure of the Commission also includes a Secretariat that is formed by President of the Commission (Lauterpacht, 1945, p. 73).

According to the draft, the Commission is supposed to:

- collect information (Lauterpacht, 1945, p. 73);
- receive petitions and representations bearing on the observance of the Bill (Lauterpacht, 1945, p. 73);
- communicate with and receive observations from the States that are dealt with a petition that are mentioned above (Lauterpacht, 1945, p. 73);
- submit annual reports to the Council (Lauterpacht, 1945, p. 73);
- draw the attention of the Council to such infractions of the Bill that may call for action by the Council if there is a need (Lauterpacht, 1945, p. 73, 74).

The idea of the Bill includes two types of the international mechanism for securing and observing the Bill: supervision and enforcement (Lauterpacht, 1945, p. 196). An interesting idea was suggested by H. Lauterpacht that the right to petition to the Commission is given not only to states, but also to individuals and organizations (Lauterpacht, 1945, p. 74). The supreme agency for securing the observance of the Bill must be the Council, and every United Nations member state has a right to call the attention of the Council if there is any violation of the Bill (Lauterpacht, 1945, p. 74). H. Lauterpacht mentioned that the Permanent Court of International Justice is supposed to give an advisory opinion on any question of law relating to the observance of the Bill if there is a request by the Council (Lauterpacht, 1945, p. 74). H. Lauterpacht also describes a mechanism for cases of the breach of the provisions of the Bill: actions by the Council, such as political, economic, or even military, if there is a need to protect human rights (Lauterpacht, 1945, p. 74)¹.

According to the views of H. Lauterpacht, the legal nature of the International Bill has a few main characteristics:

- The Bill is a legal instrument (Lauterpacht, 1945, p. 75);
- The Bill creates legal rights and duties between states and citizens and between states themselves (Lauterpacht, 1945, p. 75);
- The Bill is an enforceable part of international law (Lauterpacht, 1945, p. 78, 79);

¹ The term ‘United Nations of the World’ is used because it was written by H. Lauterpacht, and, as his son E. Lauterpacht explained, the draft of the Bill appeared “in 1943 at a time before there were any developed proposals for what became the United Nations” (Lauterpacht, 2010, p. 253). The explanation of the terms ‘Council of the United Nations’ and ‘the Permanent Court of International Justice’ that were used, although these were not founded, but, supposedly, H. Lauterpacht made his proposals on the example of the system of bodies of the League of Nations by adding his own view.

- General and universal provisions of the Bill are supposed to cover the diversity of different legal systems in the world (Lauterpacht, 1945, p. 80);
- The Bill is a codification of generally accepted principles of law (Lauterpacht, 1945, p. 81);
- The Bill is a radical innovation in international law (Lauterpacht, 1945, p. 81, 82).

2. Human rights protection mechanism at the Universal level: contribution of H. Lauterpacht

Development of human rights reached a significant stage when the matter of human rights protection became no longer confined to the domestic affairs of independent states but rather got attributed to the responsibility of the international community and an issue of international law. One of the main ideas of H. Lauterpacht is that international law aims to protect human rights from the arbitrariness of independent states. The statement in the preamble of the UN Charter worded as “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [...]” represented the main idea of a new stage of development of international law of human rights. Nowadays, international law of human rights and its system is developed and established in various international documents at different levels in the universal framework provided by the UN. The system and concept of the United Nations human rights law is based and built on “natural law, political principles, national and international legal instruments, and humanitarian agreements” (Messer, 1993, p. 222).

Today, in a system of human rights protection, we can see some ideas that were suggested by H. Lauterpacht and that were inspired by the 1948 Universal Declaration on Human Rights (Universal Declaration on Human Rights, 1948). It is necessary to divide the human rights protection systems into two types: international and regional. The idea that H. Lauterpacht’s proposals were used for creating regional and universal mechanisms of human rights protection has been suggested (Rabinovych, 2013, p. 9), and it is important to show the real connection between his ideas and the current mechanisms of human rights protection.

Following the adoption of the Universal Declaration on Human Rights, two covenants were adopted in 1966: the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, 1966), and the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights, 1966). The Optional Protocol to the International Covenant on Civil and Political Rights was also adopted the same year (and came into force in 1976) (Optional Protocol). According to the Optional Protocol, a mechanism for the protection of human rights established in the Covenant can be suggested to be universal. In the Preamble of the Optional Protocol, it is stated that Human Rights Committee is enabled to receive and consider communications from individuals who claim to be victims of violations of any of the rights that are stated in the Covenant. The structure of the Committee is set up in the Covenant on Civil and Political Rights, and it shall consist of eighteen members (Art. 28).

The Universal mechanism of the protection of human rights contains features which are aligned with the proposals of H. Lauterpacht: firstly, it is on the universal level; secondly, it provides a right of the petition of individuals in case of human rights violations. The idea of the mechanism in the works of H. Lauterpacht was the most important because, in 1948, after the adoption of the Universal Declaration on Human Rights, he published the article *Universal Declaration on Human Rights* where he expressed criticism while adding that human rights had been proclaimed on the universal level, but at the same time there had been a “rejection of the legal duty to give effect to them [human rights]”

(Lauterpacht, 1948, p. 356). In this case, we have to remember that the suggested mechanism was established later, notably, in 1966 (1976), already after the untimely death of H. Lauterpacht in 1960 (Sands, 2017, p. 217).

There are different regional mechanisms that are functioning today on a regional level, but the European mechanism on human rights protection has the biggest similarities to H. Lauterpacht's suggestions on the mechanism of human rights protection. Moreover, H. Lauterpacht gave his suggestions for creating the European court of human rights in 1950.

3. European mechanism for human rights protection and the ideas suggested by H. Lauterpacht

The European system is based on the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. According to the Convention, states are responsible to secure the rights and freedoms defined in this Convention and the Protocols. The supervision is provided by the European Court of Human Rights (European Convention on Human Rights, 1950). The Court is functioning on a permanent basis, and the number of judges is equal to that of the High Contracting Parties (Art. 19, 20). The Court may receive applications from any person, non-governmental organization, or a group of individuals claiming to be the victim of a violation by one of the member states of the rights set forth in the Convention or the Protocols (Art. 34). This mechanism was created in order to ensure respect of the provisions of the Convention by the states (Robertson, 1960, p. 2) and also advisory jurisdiction according to the Convention and Protocol No. 16.

The capacity of the individual that H. Lauterpacht viewed as one of the most important in international law is the possibility to protect his/her rights at the international level individually. This is the main idea of his concept of human rights recognition and protection at the international level. The mechanism he suggested accompanied by The Bill was supposed to be "as an instrument creating legal rights and obligations" (Lauterpacht, 1945, p. 169). At the international level, the protection of human rights is provided and represented by the *High Commission* in the Bill.

H. Lauterpacht stated that the International Bill of the Rights of Man was "conceived as one of the bases of the future international order," and that it "cannot be accepted without a substantial sacrifice by States of their freedom of action." As H. Lauterpacht believed, human rights need to be protected by the international law, and this can be possible by the "nominal price," as he himself stated (Lauterpacht, 1945, p. 82). An example of such a sacrifice can be shown in the recognition of crimes against humanity; H. Lauterpacht stated firstly that the acknowledgment of the fundamental human rights took place by the recognition of crimes against humanity indirectly (Lauterpacht, 1950, p. 35); secondly, that the idea that crimes against humanity are punishable, states that human rights are grounded in international law which is higher than a State's law (Lauterpacht, 1950, p. 36).

H. Lauterpacht's ideas on the international mechanism of the human rights protection found realization at both universal and regional levels. The mechanism suggested by H. Lauterpacht and the mechanism that currently exists have a lot of similarities. The differences are in the bodies responsible for the creation of a mechanism, some of its functions, the number of judges, etc. The main and the most important similar feature presented in the ideas of H. Lauterpacht is the opportunity of the individual to protect his rights in a certain institution by him/herself. As it was noted regarding all institutions, an individual has a right for a petition if his/her rights have been violated.

In the components of the mechanisms that were overviewed, it can be suggested that the European mechanism of the human rights protection in the embodiment of the European Court of Human Rights

is the most similar to what was suggested by H. Lauterpacht. Scholars agree that H. Lauterpacht made a great contribution to the mechanisms of human rights protection with his works, especially about the European Court of Human Rights. It has even been stated that the “institutional structure contained in the European Convention of Human Rights was partially derived from Lauterpacht’s work” (Fassbender, 2012, p. 1181).

Moreover, in 1949, H. Lauterpacht gave his opinion on creating the European system of human rights protection in a presentation titled “The Proposed European Court of Human Rights” during the meeting of the Grotius Society (Lauterpacht E., 2010, p. 262), and his proposals concerned the rights that should be protected, the jurisdiction of the court, a right on individual petitions, requirements for judges of the court, along with some other points (Lauterpacht H., 1949, p. 26). Meanwhile, Lord Kilmuir in the letter to the son of H. Lauterpacht, Elihu, said: “I had the good fortune to have your father’s personal help when I was preparing the European Convention of Human Rights” (Lauterpacht E., 2010, p. 264).

The importance and efficiency of the European mechanism for human rights cannot be denied today, years after its creation. It is believed that the European Court of Human Rights is “the world’s most successful international human rights tribunal” (Moeckli, 2017, p. 441). The European system of human rights protection made a new standard of effective human rights protection that is represented by individual petitions followed by the possibility of individuals to restore violated rights directly by themselves.

Conclusions

1. H. Lauterpacht proposed the adoption of a Universal document on human rights with a mechanism for human rights protection in 1945, before any of the subsequent documents were adopted and mechanisms established. The main ideas of H. Lauterpacht on the protection of human rights that have been implemented later are: an international document as the basis; the structure of the mechanism, such as a commission, a committee, or a court; giving the right to this body over the national states to protect human rights, thereby confirming the main idea that the human being is the most valuable in the world.
2. International universal and regional mechanisms on human rights protection went through years of formation, and the systems that exist today are based on the concept of natural law. H. Lauterpacht was undoubtedly the one who inspired the creation of such mechanisms. The analysis of H. Lauterpacht’s works makes it obvious that his ideas were revolutionary and found the application later. The idea of H. Lauterpacht to create a universal system of human rights protection has been achieved starting with the adoption of the Universal Declaration on Human Rights and further establishing treaty-based bodies competent to consider communications, such as the Human Rights Committee on the international level. The connection with H. Lauterpacht’s ideas can be shown as he criticized the system which did not include the mechanism of the protection of human rights.
3. All international human rights protection mechanisms that exist today have the authority to take decisions on the matters of human rights. As H. Lauterpacht suggested in his works, the recognition of human rights is provided by an international document, whereas the protection of human rights is supposed to be provided by an international body. The main idea is that such a mechanism must be higher than and binding on the states. At the European level, human rights are proclaimed by the European Convention on Human Rights and protected by the European Court of Human Rights. The European system has the most similar structure to the one suggested by

H. Lauterpacht. H. Lauterpacht made essential contribution by giving proposals to the creation of the European Court of Human Rights. Firstly, the idea of creating the European Court on Human Rights was to ensure the respect of the rights that were proclaimed in the Convention, and H. Lauterpacht believed that the mechanism of the human rights protection is to protect individuals from the arbitrariness of the State. Secondly, the possibility to make an application is ensured to every individual, i.e., in the European system, each individual can make an application to the Court. In comparison, in H. Lauterpacht's system, each individual was supposed to be eligible to apply to the High Commission. Thirdly, the mechanisms safeguarding the respect of human rights must be ensured by the right of any State to draw attention to the problem of a violation of human rights, as H. Lauterpacht mentioned, or by making an application to the European Court of Human Rights in the European mechanism.

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International Human Rights Protection Mechanisms Based on the Ideas of H. Lauterpacht

Olga Sheredko

(Ivan Franko National University of Lviv (Ukraine))

(Vilnius University (Lithuania))

S u m m a r y

In the article, the main ideas of H. Lauterpacht on the recognition and protection of human rights are outlined. Analysis of the mechanism of human rights protection suggested by H. Lauterpacht is provided. His unique ideas are highlighted, such as human rights recognition with the international document *An International Bill of the Rights of Man* along with the embodiment of the provisions of the Bill through a High Commission for the supervision of the observance of the Bill.

The description of different mechanisms both at the universal level and the European level on human rights protection is made, and a comparison of H. Lauterpacht's ideas and modern mechanisms is given. Similarities and differences of H. Lauterpacht's ideas regarding the currently applicable mechanisms of human rights protection are outlined and discussed. The analysis of the main principles of the work of mechanisms is provided.

The article reveals the main idea of the link between the views on human rights protection of H. Lauterpacht and the present-day system of human rights protection. The European Mechanism has a prominently similar structure to the one suggested by H. Lauterpacht, which is based on individual applications (while considering the fact that H. Lauterpacht's system was suggested as a universal system). In the article, the real contribution of H. Lauterpacht to the creation of the European system of human rights protection has been shown. The Universal system somewhat differs from the one suggested by H. Lauterpacht, but the main idea has been taken into account – namely, that of individual petitions (communications).

The research is concluded with the finding that the idea of the supervision on human rights at different levels is observed, but the structures are different, and the most similar is the European system represented by the European Court of Human Rights. When H. Lauterpacht's ideas were published, they were innovative, but found their realization later, and the years of work showed that his proposal was necessary for the real recognition and protection of human rights.

H. Lauterpachto idėjomis besiremiantys tarptautiniai žmogaus teisių apsaugos mechanizmai

Olga Sheredko

(Lvivo nacionalinio Ivano Franko universitetas (Ukraina))

(Vilniaus universitetas (Lietuva))

S a n t r a u k a

Straipsnyje pristatomos pagrindinės H. Lauterpachto idėjos dėl žmogaus teisių įtvirtinimo ir apsaugos, nagrinėjamas šio mokslininko aprašytas jų įgyvendinimo užtikrinimo mechanizmas. Pabrėžiamos jo unikalias idėjos, iš kurių – žmogaus teisių reglamentavimas tarptautiniame dokumente „Tarptautinė žmogaus teisių chartija“ (angl. *An International Bill of the Rights of Man*) ir komisijos įsteigimas jo nuostatų įgyvendinimo priežiūrai.

Pristatomi tarptautinio universalios ir regiono lygmenų žmogaus teisių apsaugos mechanizmai ir jie lyginami su siūlytaisiais H. Lauterpachto bei veikiančiais šiandien. Nurodomi H. Lauterpachto idėjų ir esamų žmogaus teisių apsaugos mechanizmų skirtumai ir atskleidžiami jų veikimo pagrindiniai principai.

Straipsnyje daugiausia pabrėžiamas H. Lauterpachto idėjomis pagrįstos ir dabar veikiančios žmogaus teisių apsaugos sistemų santykis. Mechanizmas Europoje, leidžiantis pateikti individualius skundus, yra labiausiai panašus į siūlytąjį H. Lauterpachto, nepaisant to, kad jis siūlė universalią sistemą. Straipsnyje parodytas realus H. Lauterpachto indėlis kuriant Europos žmogaus teisių apsaugos mechanizmą. Universaliu lygmeniu veikianti žmogaus teisių apsaugos sistema skiriasi nuo siūlytosios H. Lauterpachto, tačiau išlaikoma esminė idėja – individualūs skundai.

Tyrimas leidžia padaryti pagrindinę išvadą, kad H. Lauterpachto žmogaus teisių apsaugos idėja atsispindi visais lygmenimis veikiančiuose mechanizmuose, tačiau skiriasi jų struktūra, o labiausiai panaši yra Europos Žmogaus Teisių Teismo atstovaujama sistema Europoje. H. Lauterpachto idėjų paviėšinimo metu jos buvo novatoriškos. Šios idėjos buvo įgyvendintos vėliau, ir ilgametė patirtis parodė, kad jo siūlymas buvo būtinas realiam žmogaus teisių įtvirtinimui ir apsaugai.

Olga Sheredko is a PhD student of Ivan Franko National University of Lviv, Faculty of International Relations, Department of International Law, and an Erasmus+ exchange student (international credit mobility) at the Faculty of Law, Vilnius University (February 2022 – January 2023).

Olga Sheredko yra Lvivo nacionalinio Ivano Franko universiteto Tarptautinių santykių fakulteto Tarptautinės teisės katedros doktorantė pagal *Erasmus* mainų programą Vilniaus universiteto Teisės fakultete (2022 m. vasario mėn. – 2023 m. sausio mėn.).