

## Interest Group Reviews and Discussion

### CLOSING PLENARY SESSION: INTEREST GROUP DISCUSSION SESSIONS<sup>1</sup>

#### *Reviews and Discussion*<sup>2</sup>

#### RAPPORTEUR REVIEWS

Daniel Bethlehem QC, Legal Advisor, FCO; former Director, Lauterpacht Centre, (Plenary Chair) commented that this was a remarkable gathering, the reason for which was Sir Eli: not only his birthday but his creation of the Lauterpacht Centre. Probably all or at least most of those present felt some ownership of Eli as mentor, friend, and teacher; many would not have the careers they had but for Eli and his support.

In the course of the various interest group sessions, references had been made to the text of *Function of Law*, but not its preface, which showed an evolution in Hersch Lauterpacht's thinking. The preface demonstrates a preoccupation not only with the judicial function but also with the "shortcomings of the international legal system". This theme was picked up by Eli some thirty years after his father's death, in his own Hersch Lauterpacht Lectures on aspects of the administration of international justice. The introduction to Eli's published lectures demonstrated a symmetry between the father and the son, even if their approaches were rather different. Although Eli's book had a different form and focus there was a common thread, a "Lauterpacht tradition" which was manifested in a focus on the importance of process and review, and ensuring courts and tribunals are able to engage in that review (so, for example, that *non liquet* does not carry the day). This is the Lauterpacht tradition which flows from the *Function of Law* to *Aspects of Administration of International Justice*.

Vaughan Lowe has rightly identified the shift from litigation to the transactional part of international law. But this may only be a shift in awareness: there is (and always has been) a "secret life" of international law. International law occupies a good deal of legal and political

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<sup>2</sup> Reported by: Ms Emily Crawford and Ms Kate Parlett.

engagement, and is present at every intimate moment of discussion in foreign ministries. This makes it even more important to look at international law through the prism of inquiry of the interaction between and differences of legal and political reasoning.

A second question is that of who makes the law: states or others? How do they do so? How should states signal any disquiet with the process of iteration of the law which does not involve them but seeks to bind them?

Thirdly, are we adequately addressing the tidal dimensions of international law: as it “flows up the rivers and the estuaries”, in the words of Lord Denning, in interaction with community, regional and domestic law, and with other areas of international law.

**Professor Georges Abi-Saab, Rapporteur, “The International Judicial Function”** noted that the session focussed on the theme: the “International Judicial Function: One or Many?”. The discussion turned around the recent problem of multiplication of jurisdictions and also dealt with the related question of applicable law. He noted that the term “proliferation” had been used to describe activity around the end of the 20<sup>th</sup> century as a result of the successive and quick creation of international tribunals, citing as examples the international criminal tribunals and the International Criminal Court, the International Tribunal for the Law of the Sea and the Appellate Body of the World Trade Organization.

But international tribunals are not “weapons of mass destruction” and noted that the term “proliferation” has unnecessarily negative connotations. The present situation was a product of a sudden increase in the judicial function in international law, which had more positive connotations for international law generally.

During the session it had been noted that this multiplication of tribunals creates potential problems of conflict of jurisdiction, which can result in “forum shopping”, and may also result in the possibility of contradictory decisions. He gave examples of the decision of the ICTY in *Tadic* against the ICJ decision in *Nicaragua*; and the European Court of Human Rights in *Louzidou*. He noted that Judge Guillaume had suggested some possible remedies for these problems, including self-restraint on the part of states in creating new forums and self-restraint on the part of the forums in not over-stretching their own jurisdiction. Another more speculative solution was the creation of a Supreme Court or court of conflicts to resolve these disputes over jurisdiction, or the possibility of giving the ICJ advisory jurisdiction in case of conflict.

The World Court in its two incarnations (the PCIJ and the ICJ) had been working on a concept of the “international judicial function”. What was essential to any assessment of the international judicial function was the consensual basis of international jurisdiction: it is precisely this consensual basis which distinguishes international law processes from municipal law processes. The concept of an international judicial function is comparatively new and no doubt valuable; but it should not draw completely on the concept of judicial function in domestic systems, which is only an approximate analogy.

International courts have to exercise their functions in a way which is compatible with their conditions and their environment, including their jurisdictional confines. The so-called “proliferation” of international courts and tribunals has been as a result of a move (observed by Friedmann) from the law of co-existence to the law of co-operation, and the idea that international law carries positive obligations and common aims. Professor Abi-Saab noted the interplay between the international and the domestic, drawing attention to the special regimes created by international law in domestic spheres, such as trade, environment, human rights etc: this is where the coordination between the international and the domestic is crucial, so that both spheres operate effectively within their jurisdictional confines. There were two factors which emerged by consensus from the discussion: first, that there is a common idea of the “international judicial function”, and second, that it involves a subjective element which is in a sense of community; that is to say, that international law, though created by States, is essentially sustained by a comparatively small epistemic community of practitioners and commentators who share ideas and debates.

**Professor Christopher Greenwood, Rapporteur, “International Law in National Courts”** suggested that national courts have been “the poor relation” to international law, but in recent times international law in national courts has become one of the most important subjects in practice and also in theory. National courts are not required to deal with certain large and significant areas of international law. However, there are aspects of international law which only national courts will deal with (for example, the question of immunities) and there are increasingly large areas of international law which come before both international and domestic tribunals.

The interest group enjoyed a lively and wide-ranging discussion, and consensus had emerged on four propositions.

First, it was important to get theoretical debates into their right context. The relationship between international law and national courts has been discussed in terms of variations on the debate between monism and dualism. But this is not where the answer lies. It is not possible to adopt a general theory about the relationship between national and international law because it is a relationship between international law and “national *laws*”, that is with each separate system of national law. The courts of a state are limited by their own domestic law in the way in which they are entitled to apply and interpret rules and principles of public international law. The discussion in the group showed that the domestic laws varied widely. It is the constitution of each state that allocates the capacity to apply rules of international law, rather than general abstractions such as monism and dualism.

Second, precision is required in identifying the issues: All too often, the discussion revolves around the use of broad abstractions such as “incorporation” (whether a treaty has been incorporated or not). The majority view was that it is necessary to identify why a treaty is being invoked. Is it as a source of legal right; that is, a claim based on the treaty? Or is it as an aid to interpretation of national legislation which is designed to give effect to a treaty, or other national legislation, or some other purpose such as the nature of rights and obligations of international organisations, or as a source of inspiration for concepts of public policy? Only by looking at this carefully was it possible to understand the way in which national courts dealt with international law.

Third, there is a need for proper analysis of national judicial decisions on this subject. IN his view the decisions of the US Supreme Court in the wake of *Avena* were not a rejection of the interpretation of the *Vienna Convention on Consular Relations* by the ICJ, but rather were a rejection of the constitutionality of the means by which the US Administration sought to give effect to its obligations under that Convention. But the *Alabama* principle (that a state cannot rely on own domestic law to justify its violation of international obligation) is a principle of fundamental importance in the international legal order and every national judge needs at least to have this in mind.

Finally, culture matters. The extent to which national judicial and legal culture has shaped attitudes to international law was stressed. The question of capacity or familiarity with international law is important because bringing in questions of international law often invites a national judge to step outside their comfort zone. There should be a fundamental distinction between cases where the underlying issue is something national judges are accustomed to dealing with and cases which essentially require a decision about rights and obligations as between two or

more states. In the first set of cases, the relevance of international law is in some aspect of that action; on the whole, national courts are prepared to enter into that field. In the second set, there is an understandable reluctance for a national court to act as a surrogate for the ICJ or an arbitral tribunal, especially as one of those states is not likely to be a party to the proceedings.

**Professor Philippe Sands, Rapporteur, “The Use of Force: de maximis non curat praetor?”** noted that the discussion in the interest group had been far-reaching and topical, but that the session was not able to forge a consensus. The issue was especially relevant in view of the recent decision to veto Security Council action in relation to Zimbabwe, and in view of the British Foreign Minister’s comments that very morning in which he declined to reaffirm his predecessor’s position, to rule out the use of force in Iran. Based on Professor Gray’s helpful introduction, three themes had emerged in the discussion.

First, the nature of the decision making process: how is it informed today when issues concerning the use of force arise, and what, if any, is the place of the legal adviser or legal considerations in such decisions?

Second, there was general agreement that the rules on the content of law on the use of force continue to be reflected in the *United Nations Charter*: Article 2(4) and Article 51; but there was no consensus as to what that means in different circumstances (for example, the use of pre-emptive force in a technologically different world to that when the Charter was set down).

Third, who are the decision makers in relation to these issues? It is now striking that there are situations in which courts and tribunals, national and international, feel able to deal with these questions. Professor Sands noted in this context the decisions of the ICJ in *Oil Platforms* and *DRC v Uganda*, and the recent arbitral award of the Annex VII Tribunal in *Guiana/Suriname*.

At that point in the discussion, Lord Justice Collins “bowled a googly”, because he asked whether Professor Myers McDougal (or a perversion of those views) had some responsibility for the approach taken in the US.

This led to a fascinating debate about the role of legal academics on the direction of the international legal order, and about the different roles of individuals who may have both advisory and decision-making functions. The role of Thomas Franck as arbitrator in the Annex VII Tribunal in *Guiana/Suriname* was an interesting example of the way an academic who moves into

a judicial or arbitral function is able to extrapolate his or her academic work. Who then shall be the *praetor*?

Professor Sands concluded by noting the increasing role of national courts in relation to issues of use of force, giving the example of the recent decision in *Jones (Margaret)*. Although the world of today is very different to that of 75 years ago, the views of Hersch Lauterpacht on the use of force and the limits of the function of law and the judicial function are still pertinent.

**Elizabeth Wilmshurst, Rapporteur, “International Criminal Jurisdictions”** noted that international criminal law did not feature in *The Function of Law* but that the concept of crimes against humanity was attributed to Sir Hersch Lauterpacht. The discussion had focussed on the question whether there are areas of high policy where international criminal law should not apply. For example, where the decision to prosecute might affect peace negotiations, ought questions of international criminal justice be put to one side? This problem would be confronted shortly since the ICC Prosecutor is expected to apply to a Pretrial Chamber of the ICC for arrest warrants for leaders in Sudan, and comments were emerging in the media that this move would be gambling on the future of peace in the entire region.

Two opposing views had emerged. On the one hand, the primary function of the international system is to maintain peace and security; on the other hand, *fiat justitia*, we must allow international criminal justice to take its course. Consensus emerged somewhere between these two positions. This is also the case in practice, since Article 16 of the *ICC Statute* provides that the Security Council can ask the ICC to suspend proceedings where it regards the continuation of proceedings as a threat to international peace and security. But it was clear that the question raised a difficult dilemma.

The interest group had also addressed the goals or objectives of international criminal jurisdictions, noting that the Rome Statute has had a major impact on national systems in substantive and procedural law and due process, and has been a catalyst in national societies. Other goals are more difficult to identify or quantify, including the question of deterrence.

Specific criticisms of ICC and other international tribunals were raised but these did not undermine the international criminal justice project as a whole. The view was expressed that there was too much proliferation of international and non-international tribunals; that the composition of the judiciary was inadequate or open to critique; and that amnesties ought to be discussed at an

ICC review conference. The session ended with call for realism, since international criminal jurisdictions are relatively new and we must not expect too much of them.

**Jan Paulsson, Rapporteur, “Investment Arbitration: A Wilderness of Single Instances?”**

gave the following report of the interest group:

Preliminarily, we were interested in the origin of this phrase. We were lucky to have access to expert knowledge in our midst. We were thus quickly told that the author of this locution was Alfred, Lord Tennyson, the romantic Victorian poet.

But what was he evoking? The exhilaration of the freedom of the wild? Or despair at the prospect of starvation in a barren wasteland? It took us the entire 90 minutes of the session, as the conversation ebbed and flowed, to get to the bottom of this. A gentle cross examination was pursued.

Q. *What was the poet’s state of mind when he wrote these words; what sentiments was he expressing?*

A. *He was depressed at the state of the law.*

Q. *And what law was that?*

A. *English law.*

Aha! Most interesting! (It was perhaps unsurprising that Tennyson should not have been thinking of international investment law more than a century before it first appeared.) The law which was a wilderness of single instances was precisely English law! And so we saw that a lack of mechanical precision in the law was apparently known to the world even before 1995 when the arrival of investment awards upon the sea of international criticism began to impress itself on waiting scholars.

So the unmanageable amorphousness of terms like “fair and equitable” had counterparts in more prosaic judicial settings? Might we consider the notion of “reasonable care” in the law of negligence – a concept that has been around for centuries but still requires entire books for its definition? And in the international field of particular interest to us here, might we reflect on Lord Bingham’s comment this morning, when he readily conceded that the concept of *justiciability* is not dealt with by the English courts in a “systematic” fashion?

So is all law – from the most venerable origins of the common law to the most up-to-date developments in international law – in a perpetual crisis of legitimacy? Or are difficulties of dealing with core concepts inherent in the development of law? As one of us observed,

investment arbitration, with its formidable expansion in a very short period of time, is the most dynamic area of development of international law; it is hardly surprising that there are incongruities to be worked out as conceptual insights coalesce.

So what might we do to push things along the right path? Better drafting of the relevant legal instruments, perhaps? Of course it would be excellent if BIT's were drafted with more precision. Still, as Manoush Arsanjani cautioned, against the background of her long experience working with the International Law Commission, there are limits to how much can be anticipated, to the degree of specificity of future events for which one can legislate.

To say that there are difficulties is not to call for surrender. Conscious efforts to improve coherence and predictability should doubtless be made. But interested as we are in the *function* of law, we need to begin by thinking clearly about exactly what it is that we want to improve. To escape the sterility of single instances has less to do with reforming process than with the refinement of norms: the establishment, as one participant put it, of more manageable contemporary points of reference. Creating any number of appellate bodies will not achieve a great deal so long as the reference points are smudges; they too would turn out to yield single instances of divination. Conversely, once those points become more distinct and measured by a finer scale, such appellate bodies will have less *raison d'être*.

Surely Max Weber's notions of the sociology of law are outdated. I do not mean to detract from that towering reputation, nor deny the protean importance of his work on the sociology of law. But when societies change, sociologists must follow. And we no longer live in a Weberian world: as Vaughan Lowe said yesterday, and as Daniel Bethlehem gave echo just moments ago, the coal face of law is shifting from litigation to transaction; judicial pronouncements give way to the self-generation of practice. It is no longer true that only the formal mechanisms of the State, or the formal mechanism of the community of States *inter se*, can generate a meaningful understanding of law, a useful understanding of how to act within the law.

Modern sociologists of law observe that the law is communicated, the law is delivered, less in courts or before tribunals than in the way parties and their legal advisers arrange their affairs in a manner which – to use the modern sociological expression – “stabilises expectations.” The cases that go to court are the weird pathologies. If you want to be healthy, and do not have any particular problem, is it not better to follow the general advice of a dietician than to read heavy tomes about leprosy?

How do we apply this to the field of investment arbitration? It's quite simple, really. A purely academic approach is totally misleading because it looks at an epiphenomenon, not the thing in the whole. First, I note in passing that someone who studies no more than the articulation of

principles contained in awards will hopelessly miss the fact that all cases are different – different tribunals, different lawyers, different texts (even variances ever so slight) or different qualities or deficiencies in the pleading – all are liable to produce different results, if not awards rendered *per incuriam*. But now comes the far greater point: law is not to be found in the cases, and therefore the predictability of law is not to be looked for there either.

How many times have we lawyers told ambitious claimants that they do not have a case, and they should not throw good money after bad? We are retailers of the law, and this is the point of delivery. How many times have we told the delegation of government officials that their Minister acted hastily, that the investors' treaty rights seem clearly to have been violated, that the best thing for the State to do is to negotiate intelligently, to aim for damage limitations?

These are cases which are never heard. This is law; this is understanding law, predicting law, complying with law.

What about the cases that *are* heard? These are the cases where the lawyers say to their clients that this is an area where the law is unsettled, and you have, say, a 70-30 chance.

Lo and behold, ten cases are brought or defended on this basis. Lo and behold, seven go one way; three go the other. Incoherent, perhaps, but then this is an unsettled area of the law. Unpredictable? I beg your pardon: certainly not! It is *exactly* what the lawyers predicted!

If there were no uncertainty, and if the need for adjudication had been the consequence of uncertainty, there would by definition be no cases at all. This is not an axiom for investment arbitration, but for all legal systems. Uncertainty is a constant. It needs to be managed, but cannot be eradicated.

The fact is that there is much certainty. It is to be found, not in the single instances of pathology, but in the verdant pastures of a multitude of transactions gone right.

A final comment, if I may, even though it may be somewhat mischievous. Although the views expressed in our session represented a broad range, for example with respect to the limits of arbitral inventiveness, there was much speculation about what Herscht Lauterpacht would have said had he been with us today. And on this subject every speaker said absolutely the same thing: "I am sure what Lauterpacht would have thought – he would have agreed with me." This, as we know, is how Aristotle is used in argument, like Grotius – indeed like Marx. It tells us that Lauterpacht has his place among Titans.

**Professor Philip Allott, Rapporteur, “The Lauterpacht Tradition and its successors: towards theory?”** commented:

There’s no money in theory. You don’t get rich by mere thinking.

Those are truths universally acknowledged.

But we philosophers know *another* truth.

No theory, no law. No theory, no international law. And, then, no money for anyone.

So thinkers *make money* for other people. A first consoling thought for philosophers.

As Cicero rightly says - *Discussions at Tusculum* –

‘Philosophy! ...It was you who brought cities into existence ... Inventor of laws, teacher of morals, creator of order! You were all these things.’

And Cicero was a *practising lawyer!* (also, of course, an aspiring philosopher).

(“And Brutus is an honourable man!”)

So we philosophers meet in our secret covens, with leather patches on our sleeves, and ragged trousers (ragged-trousered philosophers: Robert Tressell), stirring the bubbling cauldron of ideas - eye of Newton, toe of Plato (*Macbeth*).

And we find a second source of consolation.

We ideas-people pull the strings of people who don’t even know that they are puppets. A *very* consoling thought!

Lauterpacht, famously, had a foot in both camps – theory and practice.

So, in our little group, we tried to examine Lauterpacht’s theoretical foot.

Is there anything that could be called Lauterpachtism, *Lauterpachtismus*?

If there is, what is its relevance today?

Professor Koskenniemi, in his address yesterday evening, drew particular attention to Lauterpacht’s intellectual roots in the German-speaking world of his formative years.

It was a world of intense intellectual struggle about practically everything, including about the nature of law, and especially about the nature of public law.

It was a passionate struggle for the very soul of society – a struggle of a kind which is very difficult for us in the Anglo-American mind-world to imagine, let alone to embrace.

Lord Chancellor Ellesmere spoke for the Anglo-protoAmerican *legal* mind-world in 1608 (*Case of the Postnati*) –

‘I will not stand to examine by human reasons whether kings were before laws or laws before kings, nor how kings were first ordained, nor whether the kings or the people did first make laws, nor the several constitutions and frames of states and commonweals, nor what Plato or Aristotle have written of this argument.’

Well, in the German-speaking mind-world, they *could* stand a *very great deal* of examination of such questions – and, indeed, in the Continental European mind-world in general.

Justice Holmes continued the Anglo-American anti-intellectualist legal tradition -

‘When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court.’ ‘The Path of the Law’, in 10 *Harvard Law Review* (1897).

Sixteen years earlier, Holmes had said – ‘We have too little theory in the law rather than too much.’ ‘Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.’

(*The Common Law*, 1881)

But, for Holmes, *theory* is emphatically not the same thing as *philosophy*.

‘Jurisprudence, as I look at it, is simply law in its most generalized part.’ ‘Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth...’

And that is the view of most Anglo-American lawyers to this day and, indeed, it is the view of almost all *international lawyers* to this day. You need *theory* only so far as it can make the *practice* of the law more efficient, and no further.

The culture-shock for a person like Lauterpacht coming to England must have been immense – especially someone who believed that international law was the continuation of public law in a higher sphere.

In those days, we in England stoutly resisted the idea that there could be any such thing as ‘public law’, even in national law.

In those days, in the Anglo-American mind-world, no one actually believed in *international law as law* – let alone as a glorified form of public law.

In those days, international law was a gentlemanly, WASPish sort of thing – in which writers - benevolent, but *deeply superficial*, writers – dispensed a sort of *armchair moralising common-sense* about things international - Wheaton, and Hall, and Westlake, and Maine, and Oppenheim, and *tutti quanti*.

For intellectual exiles brought up in the German-Austrian tradition of social and legal philosophy, you had a choice – you could go the *Morgenthau route* (speaking power to power) or you could go the *Lauterpacht route* (trying to educate the Anglo-American barbarians in the true nature and value of law, including international law).

So – in our discussion in our little group – we considered the possibility that *Lauterpachtism* includes at least the following five things –

- a belief in international law as law, a close relative of national law;
- a belief in the power of law to control and improve the behaviour of governments – a potential power-over-power;
- a belief in the function of law as an enforcer of values, including high values;
- a belief in the idea of rights – above all, human rights – a sort of posthumous natural law, a law above and beyond the law made by governments;
- (the most attractive feature of Lauterpachtism) an ethos of optimism – the optimism of intellectual rationality and moral rationality and legal rationality – a Lauterpachtian inheritance from his teacher Kelsen, whose spiritual mentor was the great and wonderful Immanuel Kant.

Did Lauterpacht *succeed* in educating the Anglo-American intellectual barbarians? Has *anyone* ever succeeded in unsettling the complacency of the Anglo-American intellectual barbarians?

Questions too delicate and controversial to answer here and now.

On another question - whether Lauterpacht has gained *immortality* –we may certainly express an opinion.

Three weeks ago, I was at an event in Neuchâtel (Switzerland) to mark the 250<sup>th</sup> anniversary of the publication of another book – Vattel's *Droit des Gens*.

There I suggested that there are two kinds of prophet – prophets *of* the future and prophets *for* the future.

A prophet *of* the future sees the future correctly, and says things that the future is glad to hear. I placed Vattel in that category – with the immortality of a prophet *of* the future. He saw the future correctly – and said things that the future was glad to hear.

Prophets *for* the future change the world. People like Locke or Rousseau or Kant or Karl Marx or Sigmund Freud.

One might tentatively place Lauterpacht in *both* categories of prophecy.

The things he talked about *did* become part of the more enlightened discourse of international law which began to emerge over recent decades. Evidently, he said things that the future at least felt that it **should** hear.

And the calm assurance of Lauterpacht's belief in international law-as-law, international law as a possible form of power-above-power, as a possible system of rationality, as a possible (if counter-intuitive) source of optimism – these ideas may have *changed the deep-structural world-view* of international law and of international lawyers, of judges, perhaps even of politicians – may have changed their unconscious paradigms.

The ghost of Morgenthau – his *Böse Geist* (Goethe, *Faust I*) – Morgenthau's *Evil Spirit* - still rides fiercely on, menacingly - like the *Erlkönig* (also Goethe), *still* threatening the fragile young life of *the idea of international law-as-law*.

But Lauterpacht's *Good Spirit* – his *Gute Geist* (Kant, *Critique of Judgment I*) – is still on its *civilising mission*, tempting the *better selves* of governments and international lawyers into *better things*, if governments and international lawyers *have* better selves, and are capable of *better things*.

Lauterpacht's Good Spirit continues to be a sort of *subliminal civilizer*, even in *the terrible twilight of godliness* that is the early 21<sup>st</sup> century. (*Göttlichedämmerung* – ? new German word)

Finally, a more personal judgment.

It always seems to me that the Lauterpacht Centre – as a physical presence, as a place, elegant and impressive and warm – somehow *embodies* the Good Spirit of the Lauterpachts – *père et fils* – the Good Spirit of Hersch Lauterpacht having evidently been inherited by his son Eli – Eli, to whom I personally – and so many other people – owe so much.

[Personal anecdote. 1956. My first legal opinion. Advise Eli on the Soviet intervention in Hungary. (He didn't pay me.) Seduced into being an international lawyer. Made to realise the nonsense of international law. Doomed to permanent poverty.]

And so – a general conclusion.

We poor, but not humble, thinkers about International Law would, I think, recognise in Hersch Lauterpacht a *provisional intellectual immortality*.

Inexorable Time will, in due course, make its own *definitive* judgment.

## DISCUSSION

**Sir Nigel Rodley, Professor at University of Essex; Member, Human Rights Committee,** noted that the focus of the Conference had been on the work of Sir Hersch Lauterpacht during the 1930s, and that little mention had been made of the progressive foresight of Lauterpacht's work on international law and human rights, which had been addressed comprehensively in his 1950 monograph *International Law and Human Rights*. Lauterpacht had foreseen the development of international human rights law decades prior to its institutional development. Furthermore, Lauterpacht saw no problem in international law progressing from a law of co-operation to one of "intrusion" – as personified in human rights law and the development of a number of international human rights courts and tribunals, such as the European Court of Human Rights. An "international law of intrusion" suggests that the development of a universal international human rights court is not beyond legal possibilities, though it may be politically untenable. Professor Rodley cautioned, however, against the positioning of international law as merely the sum total of the adjudications of the decision makers, which is perhaps a risk of the New Haven School of policy-oriented jurisprudence.

**Professor Reisman** echoed the acknowledgment of Hersch Lauterpacht's central role in the human rights movement, but contested Professor Rodley's characterisation of the New Haven School as if it were part of the problem rather than the solution.

In reply, **Professor Rodley** stated that, based on his understanding from Myres McDougal, the approach of the New Haven School was to see international law as the sum total of the decisions and words behind decisions and it was essentially sceptical of third party decision-making in relation to international disputes. Notwithstanding that values of human dignity were at its base, policy-oriented jurisprudence seems ultimately to be understood as a doctrine of auto-adjudication which does not account properly for third-party adjudication. This may be a caricature of the approach, but Professor Rodley understood it as shorthand for the kind of approach that is not far removed from some of the justifications raised in practice today.

**Professor Reisman** rejected any implication that the New Haven School might be responsible for the current behaviour of the United States. McDougal was one of the first to write on the international protection of human rights; he was a friend of Hersch Lauterpacht and had been a visiting professor at Cambridge; and his commitment to human dignity is widely recognised. An idea that describing law as a process somehow deprives law of its compulsory power or is an invitation for actors to shirk their active participation would be incorrect. The New Haven school's emphasis is on the complexity of the law-making function and can only be comprehended by taking account of all actors and the influences on them.

**Professor Maurice Mendelson, Blackstone Chambers**, noted that Professor Allott had spoken of the optimism of Hersch Lauterpacht. However, he suggested that there was an unfortunate by-product of the "optimistic" approach to international law, which is manifested in international lawyers asserting that something is the law without carefully examining whether in truth it is.

**Judge Stephen Schwebel, Former President of the ICJ**, stated that he thought Sir Hersch Lauterpacht had no illusions about the weaknesses of international law, which cannot but be so in a system that lacks a legislature and executive. He noted that Hersch Lauterpacht had an extremely high regard for Myres McDougal. He also noted Hersch Lauterpacht's indirect contribution to human rights through his consultation with Justice Jackson in regard to the Nuremberg Trial.

**Dr Marie-Claire Cordonnier-Segger** suggested that in practicing international law and thinking about the function of law today, we should be willing to consider the role of any international agreement that states enter into. She suggested international regimes are an essential element of the function of law in the international community today.

**Professor Martti Koskenniemi, University of Helsinki**, made some comments in the “non-debate” on Cambridge and New Haven. He noted that in 1931 in the *British Yearbook*, Hersch Lauterpacht reviewed Morgenthau’s doctoral dissertation, on *International Legal Norms: their Nature and their Limits*. His review was very positive. Lauterpacht wrote his own book four years later, which dealt with the same issue. Even though Lauterpacht and Morgenthau came from the same stock, they came to what seemed to be complete contradictory conclusions, which could be characterised as idealism and realism, respectively.

Professor Koskenniemi wondered how it was possible that the “New Haven vs Cambridge schools” debate has so thoroughly structured international legal debate over the years, noting that both “schools” essentially deal with the same materials and same issues. Recently the European University Institute published a study on the darker legacies of Europe, specifically modern European history and the emergence of fascism during the inter-war period. The study, which examined the path that a number of European States took prior to embracing fascism, determined that in some places the road to fascism was paved by positivism, in others naturalism, in others sociological or religious arguments. What emerges from this study is that there is no “one road” that is better or worse, or that will definitely lead to salvation or ruin. To extrapolate to international law, nothing “fundamental” hinges on the “New Haven vs Cambridge” debate in terms of which is the better approach to international law. We can deduce from this that our own salvation cannot be based on whatever of these intellectually alternatives we choose, but must be based on something else.

