

## THE LAUTERPACHT TRADITION AND ITS SUCCESSORS: TOWARDS THEORY?<sup>1</sup>

*Group Discussion*<sup>2</sup>

The Rapporteur, Professor Philip Allott, responded that theory is a demeaning word; the term should be “philosophy”. Philosophers have been considering the human social condition for three millennia. People have realised very late that this applies to the international system. There is no such thing as international legal theory; rather, there is philosophy as applied to the international legal system.

It was impossible to imagine Hersch Lauterpacht as an essence to discover, but we can approach him in three ways. We can ask what he was saying and meaning *in his time*. We can think of what he says to us – we cannot read him without being ourselves, and we have had a lot of experience since he wrote what he wrote, and we can wonder what he would have said today. And we can also look at Lauterpacht as a way of talking about ourselves and our own views (we find in these people what we are looking for). We are challenged by the problem of how we look at, and judge, people who wrote in the past. On this point, Professor Allott disagreed with Professor Koskenniemi’s use of the term “Anglo-American jurisprudential orthodoxy” in his opening lecture to the conference. There is no such thing, because writers such as Dworkin have had no effect in this country on the consciousness of practicing lawyers or even intelligent lawyers.

In contrast to Professor Koskenniemi’s suggestion, Hersch Lauterpacht had had a continual effect on the consciousness of international lawyers. He was the charismatic source to some extent of five aspects of international law. First, there is a belief of international law as law. This was a very new idea which is mostly accepted now. Secondly, there is a belief in the power of international law to control and improve the behaviour of governments, that law improves the behaviour of those subject to it. In contrast to scholars of international relations, Lauterpacht just

---

<sup>1</sup> Cite as: 'The Lauterpacht Tradition and its Successors: Towards Theory?: Discussion' in James Crawford and Margaret Young (eds), *The Function of Law in the International Community: An Anniversary Symposium*, (2008), Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law. Available at [http://www.lcil.cam.ac.uk/25th\\_anniversary/book.php](http://www.lcil.cam.ac.uk/25th_anniversary/book.php).

<sup>2</sup> Reported by: Dr Alex Mills and Ms Margaret Young.

assumed this. Thirdly, there is a belief in the function of law as an enforcer of higher values. This seemed to Lauterpacht to be obvious; law interpreted and applied existing higher values. Fourthly, there is a belief in the idea of rights and above all human rights. This was a posthumous natural law, and an education for power-holders, the idea that there could be rights above and beyond governments. Fifthly (and about which Professor Allott cares most), there is an ethos of optimism. It was remarkable for someone who lived through the 1920s and 1930s to hold a belief in intellectual rationality, moral rationality and legal rationality – a belief that it was possible to talk intelligently about international law, that intelligent people can discuss moral questions, and, a point which is difficult for Anglo-Americans to accept, that it is possible to talk about law as a rational system, not a purely pragmatic process. This ethos of optimism and rationality was an inheritance from Hersch Lauterpacht's teacher, Kelsen, whose spiritual mentor was Kant. Hersch Lauterpacht insinuated into the Anglo-American mind a much higher class of ideas, which have (to some extent) taken root in international law.

**Dr Jörg Kammerhofer, University of Erlangen-Nuremberg**, commented on the influence on Hersch Lauterpacht of a Jew who came to Austria at age 3 and later worked in a British environment. He came to the United Kingdom with a particularly Austrian perspective, rather than natural law in the neo-Aristotelean sense. This developed into pragmatism, probably prompted by McNair. (Professor Allott noted that this was “the Cambridge effect”.) There are two strands of pragmatism: (i) pragmatism without theory; and (ii) theoretical pragmatism. Which strand represents the future? Is it true that “those who are successful don't do theory”?

**Professor Thomas Walde, CEPMLP/University of Dundee**, commented on “optimism”: if one works with “theory”, one can afford a pessimistic perspective. If one works in practice, one needs to inspire one's clients. But he agreed that we do need a history of international law in context. If Lauterpacht were here today, he would not be saying what he said in the 1930s. Commenting on the turn to ethics observed by Professor Koskenniemi, he agreed that the British ILA meeting was full of young people from Amnesty, Greenpeace, etc. Their ethical enthusiasm often echoes the Christian tradition of missionaries. This proselytising is not part of the Chinese or Indian tradition.

**Professor Mary-Ellen O'Connell, University of Notre Dame**, rejected the idea that natural law is dead. She invoked the example of torture and the Bush administration. What did Bush's lawyers do to support a misreading of the Geneva Conventions or a refusal to apply them? They turned to rational choice. Their rational choice analysis shows that international law is not law.

*The Limits of International Law* concludes that only in bilateral treaties does one find binding law. But rational choice is not a theory of law, it is a theory of human behaviour that shows where one might *need* law. Law as *process* is the third leg to add to natural law and positivism. Today, we have to accept an understanding of the interaction and roles of natural law, positive law and process theory.

**Professor Allott** asked whether, if there is a hidden virtue of natural law, we should speak about it openly to people persuaded by “rational choice”.

**Professor O’Connell** replied that it was necessary to speak about it publicly, with courage. We need to respond to torture, and to respond to rational choice theorists. We need to have an answer to the question of why the President cannot break a treaty if he changes his mind. As described recently by John Finnis, we can find in Kelsen and natural law the answer to the question of why law binds, and the higher aspirations for the law, the acceptance of *grundnorms*, of law as law. And then of course we need *process*, to keep moving forward. In a tradition running through Aquinas and Grotius we find natural law serving as governor of positive law. Natural law had to be invoked in 1946 in response to what positive law had wrought. We are again at a moment when international lawyers need to speak with courage; the idea of natural law as the foundation of all law is open for discussion in the United States.

**Professor Koskenniemi** insisted that Hersch Lauterpacht’s article on “The Grotian Tradition” was such a failure because of the absence of awareness on his part that the vocabulary of natural law had also produced or legitimated many of those western practices to which Thomas Walde referred. Lauterpacht did not see the dark side of that vocabulary. He was unable to respond to the concerns of those who felt that natural law had acted as an apologetics of empire. For most people today, however, this is its most obvious meaning. This is why natural law is today dead as a vocabulary of engagement or analysis; no longer able to raise enthusiasm for participation, nor applicable to understand political action. To young people; it stands for dead ideas. The huge problem we face today is the absence of an alternative vocabulary for expressing our ethical or political commitments. Holding on to natural law will not do; a stale vocabulary will slowly kill commitment. It is impossible to write another celebration of the Grotian tradition today and hope that people will be moved. But the difficulty of finding a better vocabulary should not desist lawyers from trying to. And just perhaps, that search might itself count for an authentic ethical commitment today.

**Dr Kammerhofer** suggested that the idea of the *grundnorm* as a natural law concept is a common misinterpretation of Kelsen. It is a condition for the possibility of the cognition of law as law. Law becomes law because we think it is binding, not because of any absolute values. Kelsen was a value relativist. Natural law is a value-absolutist system.

**Professor Mortimer Sellers, University of Baltimore**, commented that the argument about the death or loss of force of this vocabulary was entirely mistaken. It may be dead for a tiny minority of westerners who are tired of this long tradition, but it would be presumptuous to imagine that in 1950 we discovered the failure of this vocabulary. To the contrary, this is a vocabulary which is experienced as immensely inspiring in most countries in the world. It has only lost that value to a few people in the academy. People may be uncomfortable with the term 'natural law' because of its close associations with the Catholic church. But most people think of law as connected with 'justice', and are comfortable with the word justice. Justice implies that something is rationally discoverable. The problem you have with Sir Hersch Lauterpacht is that if there is natural law, all a law professor has to do is assert it. The fear is that empires may justify themselves based on such claims at universal values which are really being imposed. The problem for international lawyers is to construct a process which will be perceived as generally legitimate for negotiating differences or constructing universal values in a way which will be acceptable. The problem is not with justice or universal values themselves, but finding an international law which can legitimately present itself as identifying those values.

**Professor O'Connell** responded that on the point of vocabulary, Mortimer Sellers said it well: people are hungry for this vocabulary. We have been through the postmodern period, in which critical scholars did their damage to vocabulary and language. Martti Koskenniemi is saying that if there is a dark side, throw out everything, but this also loses everything positive. I am, like Sir Hersch Lauterpacht, optimistic about the future, the need to work towards eliminating cruelty, violence, war, abuse of human rights and the destruction of the environment. Yes, we need to be careful with vocabulary, and process is important to limit the way natural law ideas are incorporated into positive law, but international judges are key and we need to make sure they have a vocabulary available to them.

**Professor John Gillroy, Lehigh University**, said that he shared Professor Koskenniemi's frustration with vocabulary. Positivism and pragmatism have inflicted themselves on everything we say and how we say it, such that words here fail. They are not an integrated part of what we do. When you do environmental law, the vocabulary of nature is an afterthought, because the

market drives the vocabulary, and does not care about these abstractions. The turn to ethics is another variant of the same thing. I worry about people who want to do good, and who are frustrated with the law, and the fall-back to the position, for example, of the environment as a matter of personal virtue and not public policy. One thing rational choice scholars have given us is a sense that collective action problems are real and need law to solve them.

**Dr Markus Gehring, University of Cambridge,** asked if we can ignore international relations theory, which has advanced quite dramatically since the 1950s. International lawyers can learn more about international relations theory, and we hope that international relations theorists learn more about international law. I find the constitutionalism dimension appealing, but I sense that at the moment most interdisciplinary scholarship is done by international relations scholars, and sometimes they get the law wrong. This is something lawyers should pay more attention to.

**Professor Allott** responded that international relations is again an unnatural activity compared with the way we discuss social problems nationally. I would like international law to become the subject of every discipline, as we do with national law. Every discipline should contribute, criminology, sociology, philosophy, economics. The idea that international law is a peculiar activity, which contains a dichotomy between those of us who are lawyers and those of us who are sociologists needs to be overcome.

**Professor Koskenniemi** agreed with Professor Allott that international relations theory does not contribute much, notwithstanding that wonderful philosophical or sociological ideas have passed through those departments. The story of the emergence of international relations as a political vocabulary has not yet been told. It was a hegemonic move by a particular group of academics at particular institutions to enhance the status of their particular form of expertise – and the biases that went with it – and who succeeded in integrating their vocabulary in policy circles especially around Washington. We still have work to do so as to demonstrate why it is that the preferences embedded in that vocabulary are the *wrong* preferences, the sort of work being done by Mary-ellen O’Connell to defend the institutions and preferences of international law against those espoused by rational choice theorists. There used to be, as all of us know, a call for greater cooperation between international relations and international law scholars. I always interpreted this call as a strategic move by certain international relations experts to occupy the whole field of normative debate in the international world. As Philip Allott has pointed out there are big philosophical and human issues that have to be dealt with in the “international world” and it is not obvious which vocabulary is best equipped to do this. But everything depends on that choice

– for it also determines what institutions will appear competent and in accordance with what preferences the world will be ruled. I am sceptical about whether such fundamental choices can be clearly articulated at academic sessions, especially sessions in which experts of only a single discipline are present. Or perhaps I am wrong and something is delivered between the lines which refuses a clear articulation. But I think Philip Allott and I do have an agreement about today's academic language, about its being particularly powerless to deliver and sustain the sort of human commitment we would want to support. That's not an optimistic proposition.

**Professor Allott** commented that it sounds very optimistic to him.

**Professor Georges Abi-Saab, Graduate Institute of International and Development Studies; Member, WTO Appellate Body**, noted that the discussion had focused on natural law and voluntarism, but that he had not heard the word society. Why is it that in certain epochs, there is a conviction that things should be done in a certain way, and that begets law? Martti Koskenniemi mentioned that we need to pay more attention to the sociology of law. This also applies to the sociology of knowledge. At certain points, society is convinced that there are absolute values. Human rights is a clear case. The social perception of values and how imperative they are is very important. Language may be hijacked by anyone to do whatever they want. But we have not heard enough about this social dimension. Do you feel there is there a role for social conviction in directing law?

**Professor Allott** replied that, at the risk of promoting his own work, he had written about a million words on the subject. Law depends on social structures which make it possible, including high values. There is a sense of the 'transcendental' which people inherently have, that society, that democracy-capitalism cannot be all that there is. I agree we need to look at the next level above, but then we need to look at the level above that as well, the transcendental.

**Professor Koskenniemi** agreed with Georges Abi-Saab that there is not enough of the social in international law; this was the topic of his Hague Academy lectures. There have been moments of international law which focused on 'international community' and were trying to articulate a firmer sense of social structure of the world. For example, there is a wish in Julius Stone's Hague Lectures in the 1950s to come up with a scientific, sociologically acceptable view of the world. In the 1970s, Marxists presented a particular view of the social that extended also to the international world. Rational choice and utilitarian scholars feed on the absence of sociological work, but this is a digression from taking international society seriously. It is possible to do

rational choice without ever looking out of the window. True, there are problems with the methodology of sociology, but there was an ethos in the effort to articulate the social which he shared and which seemed sorely absent in today's international law debates. It would be wonderful to read a book or a Hague course that would articulate globalisation through a sociological vocabulary in ways which would be legally meaningful and politically useful. In many law schools the sociology of law has had a rough time in the 80s and 90s, but there is some resurgence now. Perhaps it might be hoped that the widespread interest in international law's "fragmentation" will eventually lead to new articulations of the international social world.

**Professor Michael Dunne, University of Sussex**, noted that in the *Austria-German Customs Union Advisory Opinion* of 1931, the Court decided in terms of the words on the page, that it could not say for certain whether the proposed union would lead to what opponents thought was *Anschluss*, but that the historical dynamic was such that that was the direction in which it would go. In the 1960s, the debate on American foreign policy in South-East Asia picked up on the language of the 1930s isolationism. The charge levelled against opponents of US foreign policy in the 1960s was that they were just like the isolationists of the 1930s who brought on WWII. The keys to the 1930s, talking about law, constitutionalism and international structures, were the rejection by the US Senate of the League of Nations, and the tentative steps towards joining the PCIJ which failed in 1935. Why did the US then join the UN and the ICJ in 1945-46? Because at that time the United States thought that it could control these bodies, and that they would be useful to their foreign policy. One of the paradoxes of critics of the isolationists was that they criticised their predecessors for not joining international organisations, but also ignored the work of those organisations. Looking at Sir Hersch Lauterpacht and the way he studied and commented on US policy towards the PCIJ gives us a vocabulary to think of how far ethics and morality overlap with law and legal processes. Sir Hersch Lauterpacht saw an American tradition of reserving competence from international bodies. It is a challenge for lawyers and historians to find a vocabulary which connects to the vocabulary used by the people or the subjects you are talking about, but not to be imprisoned by that vocabulary. We need to work out what internationalism actually means, and find a vocabulary which is sensitive to what is going on substantively, and not fragmenting their different approaches, historical, legal or international relations, from the real world, and the work of Sir Hersch Lauterpacht has been important to my understanding of these issues.

**Professor Koskenniemi** commented that we are all looking forward to a sensitive vocabulary which could take into account all other vocabularies without being immersed in them or hegemonising them at the same time.

**Dr Marc Weller, Centre for International Studies, Cambridge** commented on the contribution of Sir Hersch Lauterpacht, during the cold war period of ultra-positivism, when attempts were made to construct a legal system across ideological blocs. Sir Hersch Lauterpacht's ideas helped reintroduce values into the debate. Martti Koskenniemi appeared to argue that positivism itself masks values. But Philip Allott added to that the hopeful perspective that we can construct systems in which we can have a debate about values as long as we have an open system and dialogue. That is where Sir Hersch Lauterpacht might be today – he might be one of those constitutionalists who could help generate a system outside the strict state structure where rules and values can be debated in an open and inclusive way, and that would take us back to the tradition he has established, and that is why he remains relevant to us now.

**Professor Koskenniemi** agreed that Sir Hersch Lauterpacht would feel himself at home in the German originated constitutionalist debate.

