

Interest Group Discussion Session Papers
Moderator Comments

THE LAUTERPACHT TRADITION AND ITS SUCCESSORS: TOWARDS THEORY?¹

Remarks of Professor Martti Koskenniemi²

The Moderator, Professor Martti Koskenniemi, University of Helsinki introduced the session by considering the Lauterpacht tradition in historical perspective. He posed the question whether Hersch Lauterpacht left us a legacy of international legal theory or international legal practice. Of relevance are four aspects of Lauterpacht's writings, namely: his writings on the role of law in general, particularly *The Function of Law in the International Community* (1933), and *Private Law Sources and Analogies of International Law* (1927); his book on the recognition of states (*Recognition in International Law* (1947)), which suggested a new understanding of diplomacy as the "administration of international rules"; his work on human rights, including his small post WWII booklet on an international bill of rights and his later book on *International Law and Human Rights* (1950); and his famous article on "The Grotian Tradition in International Law" ((1946) 23 *British Yearbook of International Law* 1-53), to which Professor Koskenniemi feels most alien, where he sets out his own views on natural law.

Professor Koskenniemi invited the interest group to consider the Lauterpacht tradition in the contemporary period. He wondered whether there was a resurgence of the Lauterpacht (theoretical) tradition and suggested that, instead, there is a dearth of theory in current international law. He offered four observations. First, the old theoretical terms (such as the traditional debate between natural law and positivism) no longer respond to the any general or abstract questions about how the world should be governed. Positivism and naturalism no longer engender the kind of passion that they used to. We may even consider that they are not so far away from each other – they are aspects of a single discourse that was born sometime in the 13th century, with Thomas Aquinas and William of Ockham, and continued all the way to

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² Reported by: Dr Alex Mills and Ms Margaret Young.

Schmitt, Lauterpacht and Morgenthau. This debate is no longer alive. Secondly, there is a turn to rational choice and utilitarianism (Professor Koskenniemi reflected on the apparent view that the most widely distributed international law book is currently Goldsmith and Posner's *The Limits of International Law* (2005)). Thirdly, there is a turn to ethics, posed not in terms of natural law and religion, but in a sense of ethical personal engagement. The responsibility to protect is emerging as an important theme, especially within civil society, and may be the basis of a new theory. Fourthly, there is a rising discussion, particularly on the continent, of constitutionalism. Professor Koskenniemi's own work on the fragmentation of international law engaged many central European (particularly German) social theorists and philosophers who usually take up arguments of constitutionalist thought.

Professor Koskenniemi asked what could be done in the field of international law theory. No-one could ignore theory; indeed, most practical aspects of our lives could be articulated in terms of larger abstractions. There is a need to move beyond the languages, vocabularies and techniques from our own field. Theory is necessary to reflect on our lives as practitioners – the alternative to theory is stupidity. Professor Koskenniemi offered three propositions. First, the old debate about the binding force of law may not have received the new articulation that it deserves. What is the meaning of this debate? If the debate about natural law and positivism is dead, is it possible to talk about binding force in a way that responds to the various critiques made by legal realists? Secondly, we have not paid enough attention to the sociology of the international world. More work needs to be done to articulate the phenomenon of globalisation in legal terms. The vocabularies of current sociologists articulating globalisation are ideological and often politically obnoxious – but more sociological work needs to be done. Thirdly, more work should be done on our understanding of the history of international law. We need to contextualise legal thinkers in the time in which they were writing. We still lack a good understanding of how the profession became what it is today. What was it that determined its agenda and points of concern? And how did those come to limit its political imagination?