OPENING PLENARY SESSION: THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY[1]

Plenary Session Remarks and General Discussion[2]

The Chair, Professor James Crawford, Director of the Lauterpacht Centre for International Law, welcomed participants and thanked Cambridge University Press and the Foreign and Commonwealth Office for their financial support. This was the 25th celebration of Sir Elihu Lauterpacht's idea to have a centre of international law at Cambridge open to anyone who wanted to study or research international law. The Symposium was also a celebration of Sir Elihu Lauterpacht and his 80th birthday. It was framed not as a series of set pieces but as a conversation about international law in our time.

Professor Martti Koskenniemi, University of Helsinki, presented his paper, "The Function of Law in the International Community: 75 years after".[3] In introducing his paper, Professor Koskenniemi remarked that he had presented a lecture on Sir Hersch Lauterpacht ten years before in the same place on the occasion of his Lauterpacht Lectures. The topic of that lecture series, the relationship between international law and international politics, remained prominent, as exemplified by issues such as participation in military actions and the prohibition of torture. Sir Hersch Lauterpacht wrote his book, *The Function of Law in the International Community*, in 1933, in a time of political crisis.

OPEN DISCUSSION:

Sir Michael Wood, Lauterpacht Centre, talked about the relevance of *The Function of Law in the International Community* for today's "international community", a term which, he noted in passing, is today sometimes misused by politicians and others. The fundamental question was whether

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[2] Reported by: Ms Monique Sasson and Dr Isabelle Van Damme.
[3] Published in the online proceedings (see above n 1) and also in (2008) 79 *British Yearbook of International Law* 353.

international law has progressed over the past 75 years. He disagreed with Professor Koskenniemi's impression of a lack of progress. In particular he could not agree with the suggestion that international lawyers generally suffer from rule scepticism. Had Sir Hersch witnessed today's developments in international law, he would have scarcely recognized the subject. Ultimately, many of the jurisprudential issues raised by Sir Hersch Lauterpacht have been resolved as intended by him, for example, as to such issues as gaps (*non liquet*), the principle of non-justiciability and the self-judging invocation of "vital interests". This might suggest that Professor Koskenniemi's diagnosis of the state of international law is too negative. Moreover it is too simple to measure States' acceptance of international law from their acceptance of binding decision-making. At the international level, the refusal to accept jurisdiction, or even on occasions to conform to a judicial decision, does not mean that the State does not consider itself bound by the law. If it was the case that Sir Hersch Lauterpacht had been brought up in the German tradition, identified by Professor Koskenniemi as the constitutional approach, Sir Michael Wood nevertheless hoped and believed that Sir Hersch's conversion to pragmatism upon arriving in Britain had been genuine.

Professor Michael Reisman, Yale University Law School, commenting on the final part of Professor Koskenniemi's paper, indicated his disagreement with some of the analysis. He agreed on the continuing significance of The Function of Law in the International Community, but was of the view that the last half of the book was of more lasting value than the first, on which Professor Koskenniemi had focused. Professor Koskenniemi's comments were centred around the question of how politics and international law should relate. But the focus should include "who" will determine the "how" and the criteria they should apply.

Among the decision-makers who will make that decision, the international judge was central to Sir Hersch Lauterpacht's theory. He was acutely sensitive to the inevitably creative role of judges when interpreting texts and identifying facts but may, perhaps, have proposed too much creativity. The crucial issue is to what extent the judicial function can extend to situations not established by law-making processes. Sir Hersch had argued that in the absence of an international legislator, the judge makes law and thus becomes a type of law-maker. This leads to a further question: in the absence of an international legislator to change obsolete rules, how can judges make the law and how should they act as judicial law-makers? Professor Reisman proposed that if a bilateral dispute is brought consensually to a court or tribunal having contentious jurisdiction, the judge should not issue a non liquet judgment but should resolve the dispute without, however, purporting to make law that applies erga omnes. This is not

problematic from a moral or legal standpoint, for the parties have asked for resolution of their dispute. In disputes with more complex dimensions and especially advisory opinions, judges should refrain from purporting to make rules applicable erga omnes, for consent by the omnes for that function had not been granted. A creative role may, thus, be appropriate in contentious jurisdiction but not in advisory proceedings, which will require more judicial caution and restraint.

Perhaps Sir Hersch's confidence in extending judicial creativity derived from the rather limited scope for international law which he entertained. He wrote in The Function of Law in the International Community that "[t]he scope of matters governed by international law is on the whole confined to the regulation of the external relations of States. It does not and cannot aim at regulating the lives of the members of the international community in the same intensive and pervading manner as municipal law does" (p. 249). This is no longer the case. In the 21st century, international law deeply penetrates the State and the life of its citizens. In this context, the rule-making process must be carried out, taking into account certain transparency requirements, including open information processes, wide participation, the formation of self-implementing packages, etc. In this new context, international judges and arbitrators cannot be efficient as law-makers by contrast to open legislative processes; even if the panels on which they sit are constituted by five or fifteen judges.

Professor Vaughan Lowe, University of Oxford, said that it was unconceivable that in the 21st century anyone would write a monograph with the same title and the same scope as Hersch Lauterpacht's *The Function of Law in the International Community*. The book's scope was the potential of international law rather than its achievements, with a focus on courts and the question of justiciability. The current focus would be on the transactional features of international law rather than on the settlement of disputes. International law has become a method for doing things more than a method for settling disputes; and to the extent that international law is focused on dispute settlement, such disputes are mostly resolved by submission to the jurisdiction of domestic courts, not international courts and tribunals. As a result, the framework of analysis as presented in *The Function of Law in the International Community* would no longer be acceptable. Nevertheless, the distinction between legal and political issues remains, as illustrated by the Iraq war and the issue of climate change, which are approached as legal issues, while the Palestinian question and poverty-reduction are (rightly or wrongly) mostly framed as political questions. This triggers a more fundamental question of the distinction between political and legal analysis and reasoning.

COMMENTS:

Professor Yogesh Tyagi, City University of Hong Kong, raised the question of the place of Shari'a law, which is applied in numerous countries. What is its role according to the European tradition? Advocacy of the separation of legal and political issues may result in ignoring religion.

Judge Stephen Schwebel, Former President of the ICJ, drew attention to the great tragedy that Sir Hersch Lauterpacht passed away during his first term as an ICJ judge, preventing him from commenting, eventually, on his experience at the Court. He stressed that Sir Hersch was not only concerned with the international judge but equally the national judge. His writings already reflected the reality that international law was more commonly interpreted and applied in national decisions than was previously appreciated.