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LAUTERPACHT CENTRE
FOR INTERNATIONAL LAW

THE USE OF FORCE: *DE MAXIMIS NON CURAT PRAETOR*?[1]

Group Discussion[2]

The Rapporteur, Professor Philippe Sands QC, UCL and Matrix Chambers, suggested several other issues for discussion. The first concerned the role of courts, both national and international, as there had been several cases in which questions regarding the use of force have been put before courts at the highest level. These have included, for example, cases dealing with the crime of aggression and the role of domestic courts in determining whether a state has lawfully used force. Since the 1930s – when Hersch Lauterpacht's book was written – both individual criminal responsibility and international human rights had developed: these may create issues in the context of the use of force. In *D.R.C. v. Uganda,* the International Court was invited to determine that Uganda's use of force against the DRC amounted to an act of aggression. Questions remain regarding the appropriate relationship between international humanitarian law, international criminal law and international human rights law.

Another issue concerned the public discourse surrounding the use of force in the US and the UK. He was struck by the extent of the difference in public discourse on the use of force between the two countries. In the UK it is possible to have a public debate about these issues: in the United States the mainstream media avoids them, treating them as esoteric.

Dr Abdulai Conteh, Supreme Court of Belize, recalled that some thirty-four years ago, he was supervised by Eli Lauterpacht for a doctoral thesis on the UN and the use of force. Then as now there were two fundamentally opposing positions on the UN Charter and the permissibility of the use of force. The first view was that those gathered at Dumbarton Oaks had drafted Articles 2(4) and 51 of the Charter in a way which preserved that right to pre-emptive self-defence. The second view was that these articles set out the only permissible circumstances under which one state could use force against another state. It seemed to Dr Conteh then, and seems now, that the approach adopted by many states and commentators is that the words mean what the interpreter desires them to mean. Despite – or perhaps because of – this, the Court's role in

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[2] Reported by: Mr Conor McCarthy and Ms Kimberley N. Trapp.

respect of issues regarding the use of force is very important. Borrowing from the title of a different interest group session, he suggested the law on the use of force has now become "a wilderness of single instances".

Professor Mary Ellen O'Connell, University of Notre Dame, commented that Professor Gray's suggestion that states no longer offer legal justifications for the uses of force might be overdrawn. Some form of legal justification had been offered in various situations where force had been used recently, particularly in respect of the Iraq invasion where extensive legal justifications were offered by Australia, the United Kingdom and the United States. Israel's recent attack on Syria was perhaps a counter-example, but may be *sui generis*. In the case of Kosovo, the then United States government said that it would not offer a legal justification for the intervention, which, at the time, was taken to mean that the US administration believed that no such justification could be offered.

Nor was it the case that there was no substantial debate in the United States about the legality of the use of force. In the build-up to the Iraq invasion, Anne Marie Slaughter had an influential op-ed piece published in the Washington Post, but the New York Times had refused to publish op-ed pieces with opposing views. It was true that the discussion on Iran is framed more in terms of policy than law, but this is because there is a widespread belief that, if Iran were in the process of acquiring nuclear weapons, it would be lawful to use force against it. If Israel were to attack Iran, its military campaign would enjoy widespread support in the United States from both presidential candidates and in terms of public opinion. This led Professor O'Connell to frame the question that ought to be discussed: how did we get so far as believing that surgical strikes to prevent the acquisition of WMD are legal?

Dr Bartram Brown, Chicago-Kent College of Law, suggested the reason for the limited public debate in the United States is that there is a view, held by many there, about the different bases of legitimacy. In the United States, many people base their view of the legitimacy of the use of force on whether it is permitted by the United States Constitution. There is a vast public debate about war powers under the Constitution and the separation of power between the President and Congress on this issue. The debate about the legality of the use of force is internally perceived, and is not based on external legitimacy. This may not be a good thing, but reflects the reality.

Mr. Robert Layton, Layton Law Offices LLP, argued that the Bush administration had adopted the concept of pre-emptive war, without having fleshed it out in legal terms, because it knew the concept did not hold water. The issue of pre-emptive self-defence was closely tied to party politics, and reflected a serious political problem. Liberal opinion in the US was putting all its eggs in the basket of the Democratic Party – in the expectation that the doctrine of pre-emption would be rejected by a Democrat administration. If an attack on Iran were to happen prior to the November presidential elections, it might make the US public more reluctant to change political direction.

Professor Sands clarified his position: he had not suggested there was no debate in the United States, but rather that the debate was rather confined. This may have practical consequences: in the recent Guyana-Suriname maritime dispute, in which the Arbitral Tribunal gave an award holding that the use of a small vessel against an oil rig could violate the rules of international law governing the use of force. Was this a symptom of frustration born of the limited debate on the use of force in the United States? In the particular case of *Guyana-Suriname*, the far-reaching nature of the decision was then invoked as an argument against ratifying the Law of the Sea Convention by certain Republican Senators, who argued that the Convention could be misused to draw the United States into compulsory adjudication on controversial areas of international law, including issues related to its essential security interests.

Professor Yogesh Tyagi, City University of Hong Kong, thought the discussion on the pre-emptive use of force was out of place in the context of terrorism. He argued that once war is declared, the concept no longer plays a useful role.

Sir Lawrence Collins, Lord Justice of Appeal, raised the question whether current American attitudes on the legality of the use of force in international law, and the lack of discourse thereon, had been influenced by a perversion of the view of Professor Myres McDougal that international law is a process and simply a tool in international relations.

Dr Hans Blix, Weapons of Mass Destruction Commission, agreed that there is no doubt that public opinion in the United States, and the US National Security Strategy, favours pre-emptive action. He therefore considered it striking that the events of 2003 were not justified as pre-emptive self-defence but on the basis of Security Council resolutions, and noted that in practice, the states involved shied away from the doctrine of pre-emptive self-defence as a justification for the use of force in Iraq – because to assert the doctrine would invite other states

to make similar assertions in relation to their own uses of force. Dr Blix considered statements made by the Presidential candidates in the United States to be of interest. He noted in particular that Barack Obama had talked about imminent threats, but does not seem to have endorsed the doctrine of pre-emptive force beyond that, which is welcome.

Professor O'Connell said that McDougal's role should not be overstated. Hans Morgenthau played a more important role in the development of modern attitudes to international law in the United States, in particular because he took a very sceptical approach to international law – and many of his students took an even stronger position. Professor O'Connell characterised Morgenthau as of the view that international law was useful for small matters but not for questions affecting fundamental interests and noted that every political science student in the country had reads his book. Indeed McDougal's work had largely attempted to respond to Morgenthau's critique of international law by setting out the policy implications of international law. Because his answer to the question 'what is international law' is not very satisfying, focus in the US had shifted to constitutional law and civil rights. We needed to go back and try and answer Morgenthau's critique of international law.

Dr Blix recalled a conversation he had had with an official of the United State government who was instrumental in drafting the letter from the United States to the Security Council which sought to justify the invasion of Iraq. He had been told that the legal justification in the letter had been carefully formulated to preserve the power to respond to terrorism using pre-emptive force.

Dr Roger O'Keefe, LRCIL, Cambridge University, said that what he found troubling about Tom Frank's book on the use of force is that it privileges process over rules. Franck's approach suggests that a failure by states to clearly condemn a particular use of force amounts to an assessment of legality, and that – as a result –what is a politically tolerable level of illegality becomes legality. Thus a Security Council failure to criticise a particular use of force as unlawful is seen as evidence that the use of force is lawful and that the legal standards become watered down. The effect of this approach is that, in the end, as long as a state has sufficient friends to avoid condemnation, its behaviour is likely to be seen as lawful.

Dr Bartram Brown noted that respect for the legitimacy of international law had become so weakened in the United States that if a Supreme Court judge relied on an international law argument in a case, it would be seen as weakening the strength of his or her overall argument.

This deficit of respect seems to stem from a process of the delegitimization of international law. What might have happened is that the prolonged series of criticisms (which were, to some extent, justified) of certain international institutions had the effect of delegitimizing not merely those but all international institutions, and indeed international law itself.

Ambassador Matthew Neuhaus, Commonwealth Secretariat said that when he first joined the Australian Office of Foreign Affairs, he was handed Hans Morgenthau's book about the conduct of international affairs to provide an insight into the system. He agreed with earlier discussants who argued that the public sense of the legitimacy of the UN had declined. As to the question of humanitarian intervention, a lot had been made of the success of humanitarian intervention in Sierra Leone in subsequent discussions about intervention in other places, notably Iraq. The big difference between Sierra Leone and many other possible interventions is that in Sierra Leone, the United Kingdom was acting to support the government against the acts of rebel forces. The wrong lessons had been learned from this episode; the debate should consider how force could best be used to support legitimate governments.

Sir Nigel Rodley, Professor, University of Essex; Member, Human Rights Committee, recalled a piece that Thomas Frank and he had jointly published in AJIL on the Indian intervention in Bangladesh. He considered the position adopted in the article to be reasonably classical: normative, in essence the classical Brownlie approach of taking a set of norms, recognizing a violation of those norms, but accepting that there were mitigating circumstances. The underlying rationale for this approach stemmed from a belief that the more exceptions there are built into a rule, the less likely the rule is to be respected; there was only so much international law could sustain in terms of exceptions and subtlety. He considered it better to have a rule which is more of a blunderbuss than a fine instrument and to accept mitigating circumstances where these arise. He thought this would still be Thomas Frank's position, although he may not frame it in precisely those terms.

As to the American discussants, he expressed surprise at their pessimism. To him, it seemed that public officials and public opinion in the United States was becoming more conscious of how the country and its policies and attitudes to the international community were perceived globally. International perceptions of the United States had been part of the discourse in the presidential primaries, and would continue to be an issue in the Presidential race. Of course, the discussion was not framed in legal terms – but underlying the discussion was a sense that the United States

may have gone beyond what institutional expectations permit. In substance, this could be described as a discussion about "law".

Professor Sands suggested that an underlying theme in the conversation was whether, once a leading academic becomes an arbitrator or judge, he or she adopts a more nuanced approach to the law or whether, by contrast, uses it as a platform to promote their scholarly views. Professor Sands referenced Professor Thomas Franck's important academic writings and the Award in the *Guyana-Suriname* arbitration, and noted also the ICJ case of *DRC v. Uganda*, in particular Judge Simma's opinion.

He noted that Barack Obama has a group of international lawyers advising him, and wondered whether someone knew whether John McCain was in the same position?

Dr Tom Grant, US Institute for Peace, on leave from LCIL, said that the McCain Campaign would shortly be making an announcement in this regard and should publish a list of legal scholars who would be advising McCain.

Professor Mortimer Sellers, University of Baltimore, picked up upon the question of US attitudes to international law. He considered the issue in the United States not to be whether international law should be accepted or be complied with, but rather the question of who should be *praetor*? Who should get to determine what international law is? Public opinion in the United States did not have a particularly high regard for law professors and did not think that they should have a role in advising the administration on the content of international law. In terms of international tribunals, Professor Sellers considered the problem to be that international law institutions do not have the kind of democratic legitimacy which people in the United States expect from a court of law. He argued that what is needed is a more authoritative system for making statements about the content of international law.

Dr Robbie Sabel, Hebrew University Jerusalem felt that the actions of the United States in Iraq had actually strengthened international law. He argued that people now see that even the actions of a superpower can be held up to scrutiny against the standards set out in international law, and that even a superpower can be seen to have violated international law. On the issue of the pre-emptive use of force in self-defence, Dr Sabel recalled that the Israeli attack on Iraq's nuclear reactor was condemned, even though Israel was widely supported by members of the Security Council, and thought that both the advantage and the disadvantage of international law

is that the rules must be made for everyone. He wondered whether the answer was to leave the rule as it is, but to take into account mitigating circumstances.

Mr Sam Daws, **Director of the United Nations Association of the United Kingdom,** reflected on the link between the deligitimization of international institutions and the deligitimization of international law itself – and the need to break the link. He considered, however, that it would be very difficult to decouple the two issues – particularly as regards the options to expand the Security Council and the effect such expansion would have on the Security Council's ability to carry out its functions.

There had also been a lot of discussion in the interest group about bringing the United States back into the international law and UN framework. In the short term, such a concern has salience – but the discussion had not looked sufficiently at the movement of power in the world, in particular, to India and China. Given this movement of power to the East, we may have reached the high point of support for humanitarian intervention and the responsibility to protect. One of the key challenges for the United States and the United Kingdom was to keep China within the international law framework.

Professor Charles Garraway, British Red Cross, referenced the discussion about attitudes to international law in the United States and Professor O'Connell's point about the emphasis which had been placed, within the United States, on the Constitution and the legal parameters set by it. John Bolton had said that he recognized no higher source of law than the United State Constitution, and thought that for many in the United State, this would also be the case.

Ambassador Juan Antonio, Representative of Spain to the United Nations, recalled that the support of a previous Spanish government for the United States invasion of Iraq was eventually an important factor in the fall of that government. Thereafter, the new government brought in stricter controls on the circumstances under which Spain could use force in circumstances other than self-defence. Under this new law, the Spanish Parliament must approve the use of force, which can only be used outside the context of self-defence when authorized by the Security Council. He considered that the Spanish example offered a different perspective on how a democratic process could facilitate respect for international law.