

Interest Group Discussion Session Papers
Moderator Comments

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

*Remarks of Professor Christine Gray*²

The Moderator, Professor Christine Gray, Professor of International Law at the University of Cambridge made the following remarks:

The title for this Interest Group Discussion Session comes from Hersch Lauterpacht's *The Function of Law in the International Community* (New York: OUP, 1933), p. 166: the question is whether legal tribunals are capable of settling politically-charged questions, notably concerning international law and the use of force. Issues raised included whether the ICJ, as principal judicial organ of the United Nations, has a duty to elaborate or clarify the law regarding the use of force. In the midst of the debates leading up to the invasion of Iraq in 2003, the ICJ pronounced itself on issues of self-defence in its *Oil Platforms* decision [*Iran v United States* ICJ Rep 2003 p.161], even though the Court was split as to whether it had competence to do so, as indicated by the Separate Opinions of Judges Higgins and Owada in that case. In *D.R.C. v. Uganda* [ICJ Rep 2005 p.168], the Court did not go so far as to hold Uganda responsible for aggression, suggesting that the Court's reluctance might have resulted from a sense of deference to the Security Council. The Court had been much criticized in respect of its judgments in *D.R.C. v. Uganda* and the *Wall Advisory Opinion* [ICJ Rep 2004 p.136] because it had avoided issues regarding the use of force in self-defence against non-state actors. A further issue was the role of other bodies than the ICJ. Both the Eritrea-Ethiopia Claims Commission and the Guyana-Suriname tribunal [47 ILM (2008) 166] had plunged into issues regarding the use of force, despite the uncertain basis of their jurisdiction to do so.

An alternative meaning of *praetor*, aside from judge or arbitrator, is that of government official or military commander. How far are such persons influenced by international law on the use of

¹ Cite as: Christine Gray, 'The Use of Force: *de maximis non curat praetor?*' 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.

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

force? For example to what extent were legal factors being considered in the situation regarding Iran's development of nuclear capacity, Israel's potential response thereto (including its military exercises, which have been interpreted by commentators as a rehearsal for an attack of pre-emptive self-defence), and Iran's own response to Israeli manoeuvres. The UK had shifted its position on this front since Jack Straw was Foreign Secretary. He had said that an attack on Iran was inconceivable; but the UK position was now more aligned with the US position in considering force as a possibility.

A further issue was that of pre-emptive self-defence, notably in reference to support for non-State groups committed to terrorism. Israel had offered no legal justification for its use of force against Syria (in contrast to its justifications for force against the Iraqi nuclear reactor in 1981 and its attack against a terrorist base in Syria in 2003, both of which were debated in the Security Council in legal terms). Perhaps a trend might be developing in which states no longer consider it necessary to justify uses of force in the context of the war on terror. Another example was Turkey's failure to offer a legal justification for its use of force in Iraqi territory against the PKK and Ethiopia's failure to offer extensive legal justifications for its operations in Somalia. Any such trend might be evidence that states no longer consider international law as a constraint on the use of force – was that worse than manipulating international law for the purpose of justifying the use of force?.