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Speaking notes

Remarks on the importance of 'teachings' in international law, with particular reference to the Melland Schill Lecture Series

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At the outset I wish to congratulate the University Library, together with Manchester University Press (MUP) and the Manchester International Law Centre (MILC), on the initiative they have taken to make available online the full set of the Melland Schill lectures delivered at the University between 1961 and 1974 by a series of most distinguished lecturers. Let us hope that this 'digitization' project will be repeated with other important international law texts that are no longer readily available.

I propose to cover three things in these brief remarks: the importance of the Melland Schill Lecture Series; the role of writings in international law; and the current work of the International Law Commission touching on this subject.

Alongside the Lecture Series MUP also publish the Melland Schill Studies in International Law. These contain such classic titles as Churchill and Lowe on *The Law of the Sea* and Nigel White on *The United Nations and the Maintenance of International Peace and Security*.

The Melland Schill Lectures

I am particularly pleased to see that the Melland Schill lectures continue, with John Dugard speaking last year on the question "Are Existing States Sacrosanct?"; and Judge Xue, as I am told, coming in a few weeks. These lectures will also be made publicly available on the Centre's website. One of the advantages that a published lecture series offers by comparison with a book series is that it may stimulate those who might not otherwise do so to put their thoughts down in a permanent form. You can entice people to give a lecture or a couple of lectures, then you persuade them to convert their notes into a more permanent publication, either online or even better as an article or a book. I

doubt very much if all of the valuable works that have just been put online and which we are celebrating this evening would have seen the light of day had not been for the Melland Schill Lecture Series.

Sixteen volumes in the Lecture Series have now been made available online. I do not have time to comment on all of them, though they all deserve it. I shall touch on those I am most familiar with. All in all, the Lecture Series represents a remarkable body of learning. Some were among the first books on international law that I read. Quite a number have gone into new editions (which have now been put online), a sure sign of their value and quality. Some I still turn to quite regularly, like Clive Parry's masterly lectures on *The Sources and Evidences of International Law*, Robbie Jennings' book on *The Acquisition of Territory in International Law*, and Ian Sinclair's insider's analysis of the Vienna Convention on the Law of Treaties (both the first and second edition are online, which is useful because it means you can see the developments between 1973 and 1984). Others are more dated, but are nevertheless essential reading for understanding the history of a subject. As we know, history is often important for understanding the current law.

Re-reading some of the lectures indicates how much the world, and international law, has changed over the last 50 years or so, but also how much has remained the same. Francis Vallat's lectures read as though they were addressed to UK legal practitioners for whom international law was a strange and rarefied world, largely confined it seems to the Foreign Office (as it was then called) and a few professors. He states as his aim: "to explain some of the points of contact between international law and the practitioner". He covered a rather limited field: there is one chapter on international law and municipal law; two chapters on international claims; a fourth on Foreign Office certificates; and a final chapter on the reciprocal enforcement of judgments. It does not seem that Vallat expected the great issues of international law to trouble those in private practice in the UK. Things are very different today, as may be seen by a glance at the 'International Relations' title of *Halsbury's Laws of England*. That now covers a large part of international law.

Another Foreign Office legal adviser, Joyce Gutteridge, gave a stimulating series of lectures entitled *The United Nations in a Changing World*. Miss Gutteridge knew of what she wrote. She had recently returned from a few years at the UK Mission to the United Nations in New York. The lectures are a time capsule of the United Nations in the 1960s. As Ms Gutteridge points out, the UN Charter is a living document, and - within certain limits - its meaning develops over time. To understand it, you have to know how it has developed. But you may also need to know what the position was at a particular time in the past. In the recent *Chagos Archipelago* arbitration, between Mauritius and the

United Kingdom, the Parties debated at some length the status of the right of self-determination in 1965. 8 November 1965 was the critical date, the date of the detachment of the British Indian Ocean Territory (BIOT) from Mauritius. The UK argued that the principle of self-determination did not become a right under international law until some years later or in the alternative, that the UK had the status of a persistent objector. Miss Gutteridge's chapter on non-self-governing territories/self-determination would have been a useful source of information, being virtually contemporaneous, though I must confess I did not think to look at it at the time! In any event, the arbitral tribunal did not find it necessary to decide the matter.

The international law of the sea was obviously a very important area in the 1960s and 70s, as it had been for centuries and still is. Derek Bowett's short, but very perceptive, volume on the law of the sea presents a snapshot of the position at the beginning of the early 1960s, at a time when the changes in the law were beginning to accelerate. He foreshadows the pressures that were to lead, within a very few years, to general acceptance of 12 mile territorial seas and 200 mile economic zones.

On one point, however, Bowett was not wholly perceptive. In his introduction he announces that he has decided not to deal with the law of the sea in time of war. His explanation is that "it is an aspect of the law which may be of limited relevance for the future – and it is a somewhat depressing for the lawyer." O'Connell clearly did not agree. Some 12 years later, his masterpiece – which I think has still not been surpassed - on *The Influence of Law on Sea Power* explained how important international law was for the navies of the world, and what a variety of roles (for good or ill) they performed. Events since he gave the lectures, in 1975, right up to the present, show just how true this is.

O'Connell was not the only one to lecture on a use of force topic. There is Quincy Wright on *The Role of International Law in the Elimination of War* (a rather optimistic title, some might think); Leslie Green on *The Law of Armed Conflict*; and Tony Rogers on *Law on the Battlefield*. This focus on armed conflict was is appropriate for a series dedicated to the memory of a young soldier, Lieutenant Edward Melland Schill, who died aged 25, in Flanders, in 1916, exactly one hundred years ago.

One thing you will note when looking at the lecture series is that a good many of the authors were both writers and practitioners. That goes back to a long tradition in international law, and indeed law generally. Gentili advised Queen Elizabeth I, Grotius advised the Dutch East India Company, and so on.

In looking as the series as a whole, we can see that not only substance, but also style, has changed over the last 50 years. In these older books we find a number of admirable qualities that are perhaps less commonly found these days – though I need to be a bit careful in present company. I shall mention just three: Brevity: most are scarcely longer than long article these days. Bowett's book, for example, has just over 60 pages of text. Clarity: the books are well written, easy to read, devoid of jargon; they are even stylish in places. And restraint with footnotes. In a word, like other writings of the period, these books are readable.

The role of writings in public international law

I shall now say a word on the role of writings in public international law. As is well known, the International Court of justice hardly ever refers to writers by name, but that certainly does not mean that the judges have not read what writers have written, or are not interested in it. Other international courts, such as the European Court of Human Rights, and national courts do so rather more frequently; the English courts, it seems to me, sometimes give undue weight to authors, whether highly qualified or not. Counsel in both international and domestic courts frequently refer to writers (particularly where there is nothing else). In any event, it needs to be recalled that the role played by writings is one important way in which the discipline of international law differs from other legal systems.

Writings play a role in the determination of international law generally: in the interpretation of treaties, the identification of general principles of law, and especially in the identification of rules of customary international law. The starting point - some would say the end-point too – is in Article 38.1(*d*) of the Statute of the International Court of Justice. This, as you know, was actually drafted in 1920, almost 100 years ago. It provides that teachings may be resorted to as a 'subsidiary means' for determining rules of law. As with court decisions, also referred to in Article 38.1(*d*), writings are not themselves a source of law but may offer guidance for the determination of the law. As Professor d'Asprement has written, with unusual clarity, "scholars … are not law-makers". This auxiliary role recognizes the value that teachings may have when it comes to identifying, or ascertaining the law, for example in analysing the preparatory work of a treaty, or in compiling State practice and synthesizing it to deduce a rule allegedly evidenced by it.

I should like to read a further quotation from Jean's book on *Formalism and the Sources of International Law*, because he can more easily say things about academics that I cannot:

> "Although international legal scholars themselves may be tempted to see their offerings as more influential than they really are, and even though their contribution is more modest today than it used to be a century ago – for States have grown weary [or perhaps 'wary'] of the influence that scholars can have – their writings, their opinions, and their decisions also influence law-making and international legal adjudication." (p. 210).

This point was well understood by the courts a century or more ago. And they expressed it very well. For example, the United States Supreme Court in the *Paquete Habana Case*, seeking to identify whether a rule of customary international law exempting fishing vessels from prize capture in times of war existed, referred to

> "the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".

In the same case, Chief Justice Fuller (dissenting) said of writers, "Their lucubrations may be persuasive, but not authoritative." (Lucubration, as I am sure you all know, means "laborious work, study, thought, etc., especially at night"; and comes from the Latin *lucubrare*, which apparently means 'to work by lamplight'.)

My favorite citation is from *The Renard*, a case decided in England in 1778: "A pedantic man in his closet dictates the law of nations; and who shall decide, when doctors disagree? Bynkershoek, as is natural for every writer or speaker who comes after another, is delighted to contradict Grotius."

These judges were right. There is a need for caution when drawing upon writings. Their value may vary markedly. Writers may aim not merely to record the state of the law as it is (*lex lata*) but also to advocate for its development (*lex ferenda*). In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. And writings may reflect the national or other personal perspectives of their authors. And, of course, they differ greatly in quality.

There is also a broader and perhaps more important function played by the most eminent writers. Even more than in most areas of law, international law owes its framework to writers. They give shape to the disparate strands that make up international law. For example, I doubt if anyone would approach a question of territorial acquisition without considering the structure set out in Jennings's lectures.

The International Law Commission and teachings

I shall conclude with a few words about the UN International Law Commission and its current topic on *Identification of customary international law*. It took up this matter because there was felt to be a need for some authoritative guidance on the process of identifying customary international law, for all those who are called upon to apply it – not least given the considerable differences of approach amongst writers. This was especially the case at a time when, to quote from the syllabus prepared before the ILC took up the topic,

> "questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government Ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations".

Members of the Commission agreed that the outcome of the project should be of an essentially practical nature. It was not our aim to seek to resolve largely theoretical controversies. We could leave that to others.

In July 2015, the ILC's Drafting Committee adopted a set of 16 draft conclusions, one of which is devoted to teachings. As the Special Rapporteur for this topic, I proposed a text based loosely on article 38 of the ICJ Statute. This would have read: "Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law."

The debate in the Commission led, as it usually does, to considerable changes, and to considerable improvements. First, separate draft conclusions were adopted for judicial decisions and for writings. They were not considered to be on the same level. As regards writings, the text as adopted by the Drafting Committee reads:

> "Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law."

This text is very close to that drafted almost 100 years ago for the PCIJ. The debate in the Commission, and especially in its Drafting Committee, changed what I thought was a rather modern and inclusive, and certainly brief, text, referring simply to 'writings', back to the language of the ICJ Statute. The old language is almost quaint: 'teachings' of 'the most highly qualified publicists' of 'the various nations'.

But there were good reasons for reverting to the old language. The word 'teachings' was preferred to 'writings' because it more clearly referred to scholarly work, and it could also cover teachings in non-written form, such as lectures and audio-visual materials. The term 'publicists' ('*publicistes*' in French) is a perhaps a curious one to a common lawyer. I believe that in France, and perhaps elsewhere, it refers to those who are qualified in public law. (It sounds to me more like media people). But nowadays it surely refers to all those whose lucubrations shed light on questions of international law. While most will be specialists in public international law, they may include others.

The reference to 'the most highly qualified' publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field and carry authority, like the Melland Schill authors. At the same time, it is the quality of the particular writing that matters, not the reputation of the author. The reference to publicists 'of the various nations' highlights the need to have regard, so far as possible, to writings representative of the principal legal systems and regions of the world (including in various languages).

One thing that the Commission is still grappling with is how to refer to its own output. The products of a variety of other collective bodies engaged in the codification and development of international law undoubtedly represent a useful resource in this regard. They include the Institute of International Law and the International Law Association, as well as publications of international expert bodies, such as the International Committee of the Red Cross and ad hoc groups of experts in particular fields. However, the value of each output needs to be assessed with care: much depends upon the mandate of the body concerned, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.

The work of the International Law Commission, which is often discussed in the context of writings of highly qualified publicists, bears mention in the present context. Abundant practice attests to the fact that a determination by the

Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by the Commission that no rule exists. This value is explained by the Commission's unique mandate from States, the thoroughness of the procedures utilized by it (including the consideration of extensive surveys of State practice), and its close institutionalized relationship with States (including receiving their oral and written comments as it proceeds with its work). With the Commission as well, however, the weight to be given to its determinations may depend on the stage reached in its work, and above all upon its reception by States.

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In conclusion, let me repeat my congratulations to the University of Manchester Library, in conjunction with Manchester University Press and the Manchester International Law Centre, for presenting us with access to a wonderful resource, the Melland Schill Lecture Series. You have done a service to international law, and to international lawyers around the world, because of course one of the great merits of e-resources is that they are available to students, researchers and practitioners around the world, in every continent. That is I am sure very much in the spirit of Miss Olive Schill when she left a generous bequest to the University.