INTERNATIONAL LAW

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'INTERNATIONAL LAW UNDER PRESSURE'

MONDAY 19th NOVEMBER 2018

at 6.30pm

Senate Room, University of Glasgow

The lecture follows a day-long workshop on the same theme (8.45am - 5.30pm).
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"International law under pressure: navigating a shifting landscape"

British International Studies Association International Law Working Group workshop and lecture.

Monday 19 November 2018, University of Glasgow

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It's a great honour to be here this evening. And it's a strange feeling: I'm not sure I've really been back at the Law Faculty here since I left it after my Diploma in Legal Practice in 1985. I studied for an LLB here from 1979 to 1983, and took a course in international law under Professor John Grant. I recall distinctly studying the law of treaties (using Brownlie's Basic Documents, first edition) with a bemused fascination. Treaties? Who on earth took these things seriously? They were the stuff of history not real law.

I also carefully avoided any European Communities law: my tutor Ian McGhee noted in my leaving interview that this was a potential gap in the CV. But the subject held no attraction whatever; and I was glad to leave the LLB without any significant exposure to the Four Freedoms and only the most cursory acquaintance with the Official Journal. Mine was the last generation for whom that was a possibility.

Instead I studied Private Law under David Walker. In his day, Professor Walker generated mixed reactions. He may well still do. He was a forbidding figure, whether striding down from Hillhead Street, gown flapping behind him, to deliver lectures in the old quadrangle or peering at you through the chilly gloom of his Spartan room at the top of No 63 Hillhead Street. The stories of his terse engagement with his students, and of the 25% pass rate for the Ordinary Contract class, were legendary. Some – maybe many – laughed up their sleeves at his published work: Principles of Scots Law, Civil Remedies, Delict and Contract. Not to mention his Scottish Legal System and his contributions to the Stair Encyclopaedia. They

[1] The views, thoughts and opinions expressed herein are of the author acting in a personal capacity, and should not be attributed to the Foreign and Commonwealth Office or to any other UK Government agency.

weren't – so it was said (especially by students of other institutions in the East of Scotland) – in the same bracket as the works of T B Smith and others.

But I salute the memory of David Walker and I do so with affection and the highest regard. David Walker's contribution to Scots law and Scottish legal literature will I am sure rank with the greats. He took and shaped it at a time when textbooks and writing were sparse and out of date. His was a massive contribution, achieved through a lifetime of monkish dedication and prodigious hard work. And if his style was not to everyone's taste, and if one had to puzzle hard over precisely how a footnote reference justified the text to which it attached, nevertheless, the logic and rigour of his approach and method were worthy of study and emulation. Certainly, he shaped my thinking and the way I approach law. I am deeply in his debt.

There is a certain irony therefore in the fact that almost all the law I have had to work on has been either the EU or international law. This certainly was not in the plan. As I say, the closest I got to EU law issues in the Private Law paper was the recurring question (I worked out it featured every other year): "Can the UK leave the European Communities?" Now, 30 years later, after the Single European Act, Maastricht, Lisbon and the rest, we all know the answer to that. Or maybe we don't.

As I say, it's an honour to be here. And it's been humbling and fascinating to sit through your seminars today. I haven't been here for all of them, but I have been at as many as I could. And I am really struck by the range of issues you have covered, and the depth of the expertise on display. It's been an extraordinary conference and I respectfully congratulate you all on the work and learning that has gone into this event. I am also struck by how little I know of so much of what you have discussed. A lot of this does not cross my desk or the desks of the legal team in the FCO. But that is not a problem. Although I feel very ignorant in this company, I think I can bring a perspective and context to your work that you may not have just as you surely can to mine. We have an immense amount to learn from each other as we continue to look at International Law Under Pressure.

My plan for the next half an hour or so is this.

I'll start by setting out how the UK government gets advice on international law. This is important to understand the context in which international law is understood and applied in the UK.

I'll sketch some of the context in which we currently work, but my central contention is that international law itself, as a system, is not under pressure or under threat from these events. On the contrary it is alive and well.

But I will conclude with some thoughts on the pressures that do exist on international law and order and on how we all should address them.

So let me begin by describing briefly how HMG gets its advice on international legal issues and the role the FCO legal team play in that.

We are the FCO's in-house legal advisers, members of the Diplomatic Service, working to the Foreign Secretary, his Ministers and officials. Other Government departments have their own legal teams too.

We cover whatever legal issues arise in the work of the FCO – from employment law and disciplinary issues through to major issues of foreign policy. Among our areas of expertise are the law of the Overseas Territories; law of the sea; immunities and privileges; international humanitarian law; human rights (Strasbourg and UN); sanctions; international tribunals (ICJ, ICC and the rest); development of the law through the ILC; treaty law and practice; consular work; and national security issues. (The FS is responsible for two of the intelligence agencies and although they have in-house lawyers too, we are regularly involved in that area of work).

We manage the FCO's litigation (which is surprisingly extensive) and its legislative programme, drafting the secondary legislation and employing Parliamentary counsel to draft Bills.

We work as part of the collective Whitehall effort: very few issues are uniquely and solely for us. Several other departments have extensive international law expertise in their own areas – DIT on trade, DEFRA on the environment; MoD on IHL; MoJ on judicial co-operation; the Home Office on extradition and mutual legal co-operation; DFT on aviation etc.

I would never claim that we are the only source of advice on international law. But I do think we see the most rounded picture and are involved in the main institutional and cross-cutting issues. We are for example always involved proceedings before the ICJ and other international tribunals such as the ICC.

We serve on posting in New York, Brussels, The Hague, Geneva and Strasbourg as well as at the Attorney General's office. We frequently meet with opposite numbers in other countries – bilaterally, in small groups (eg the P5), and in multilateral fora such as the Council of Europe, the EU and the UN.

All of us (ie the FCO and other departments) work under the auspices and control of the Attorney General of the day. His or her advice is the supreme source of advice to

Government. It is probably true that international legal issues feature most prominently and most searchingly on his agenda. Increasingly we draw on the advice of counsel – not just for the conduct of litigation but for advice on policy too.

The role of the Attorney is little understood and little commented on outside Government and it is worth a good PhD thesis. It is so far as I can tell a role near unique to the UK constitutional order. In the US, and in France, and in Germany, the ultimate advice on international law comes from the lead legal advisers in the State Department, or in the Quai d'Orsay or in the Auswaertiges Amt. In the UK, the ultimate advice is given by a Minister, the Attorney General.

But on a day to day basis, advice on the conduct of foreign policy is given by the small team in the FCO. It's inevitably a rapid-fire process: there is little time for lengthy pieces or long research. A former colleague described the process as "common sense informed - but not necessarily guided – by legal principle". And there is also an opportunity to feed into policy making – as another colleague put it, not legal advice but advice from a legal adviser.

The picture you should have is of a pretty busy team covering a wide range of issues, mostly relating to international law, but all giving a reasonably rounded perspective on UK foreign policy in practice.

So how does the world look to us? Is international law (as opposed to international lawyers) under pressure?

I must say I was struck by the title and theme of today's event, and by the titles of some of the seminars. I hope I am not over-interpreting if I say that one might pick up a note of uncertainty or even apprehension about the future of international law. The Tower Of Babel – a picture of which appears on your flyer – was not, after all, the happiest of episodes in a book (the Hebrew Scriptures) which frequently gives the reader pause for reflective thought about the more serious side of life.

You will I am sure remember the story. Mankind, full of hubris, decided to build a city and a tower reaching to heaven so that their name and their memorial might reach throughout the earth. The Almighty, curiously threatened by this venture, came down to inspect progress and decided that the construction had to cease. He did this by confounding speech, so that no-one could communicate with anyone else. The effect was as desired: building ceased and mankind was scattered.

I suppose the organisers are inviting us to consider parallels with the present day. And if this is how you see the future, it is indeed a gloomy scenario. Have we reached the limit of

co-operation among peoples and states? Is it now to be every State for itself? Has the building of civilisation come to an end? Is the rules based order at an end?

One can see plenty of reasons in the world outlook to justify that conclusion.

Starting at home, Brexit, whether one is for it or against it, has profound implications for the foreign policy and foreign relations of the UK and of its EU partners. Even on the best scenario, uncertainty and a lot of complexity and potential conflict lie ahead.

Whatever one makes of the results of the mid-term US elections, something seems to have changed, at least in the short term, in US foreign policy. And "America First" is echoed – it seems – in Brazil, and in Hungary, and in Italy, and in Poland.

Again, whether one thinks of China as a threat or an opportunity, it is hard to deny that it presents a major challenge to the existing world order. Assessing how to react to the Belt and Road Initiative preoccupies foreign policy experts round the world – nowhere more than in China's neighbourhood. China's technological development is of a different pace and order from what we in Europe are used to. How China accommodates itself to the international legal order is watched keenly

Russian foreign policy clearly presents a challenge to its European neighbours. There are threats to the world trade regime, partly from the US, partly endemic to the system itself. Nuclear disarmament as it has been understood and applied is also facing new challenges.

And at the geostrategic level, there are the global challenges of climate change and migration. And no doubt, sooner or later, there will be more "terrorism".

So how bad is it all?

There is certainly a lot of talk about the threats to the rules-based order, but it is not usually clear what is meant by that term. Sometimes it seems to mean the geostrategic order we have come to know and love – a sort of nostalgia for a heyday of global peace and security that is disappearing. Very hard to put a date on that period by the way: and if you watch (say) Ken Burns' series on Vietnam, or the mini-series Deutschland 83 you might conclude that things aren't actually so bad at the moment.

Or it could amount to a fretting about the growth of Chinese power and influence and the claimed baleful effects of that. Sometimes it seems to refer to what is seen as Russian aggression in Crimea and Salisbury. Sometimes it is about the US retreat from international organisations and treaties. Or about all of them together.

Poisoning people and invading countries is wrong. But withdrawing from treaties isn't necessarily unlawful. Nor is seeking to reform international organisations. Nor is it illegal to try to develop the law. So many of the perceived threats may actually operate within the system of international law: they make use of its frameworks and institutions. Certainly from where I sit, it's hard to say that law as such is under threat or irrelevant or even under pressure. After all, just because murders take place, one does not conclude that Scots law is under threat. Breaches of contract and a growth of litigation do not of themselves mean that the legal system is dysfunctional or about to collapse.

From the point of view of the Foreign Ministry legal adviser, the international legal system is in pretty robust shape. Let me explain.

For one thing, international law is a vigorous and energetic field of academic debate. That's obvious from today's seminar but one could multiply examples. It's obvious every day from where we sit in the FCO Legal Library: hardly a week goes past without some new volume appearing on the shelves, distilling and synthesising new areas of law and practice. To take one example: the existence of the ICC has fed a surge in intellectual output connected to international criminal law; my guess is that UK membership of the WTO will do the same. If you attend the Assembly of States parties of the ICC (for example) there is no shortage of young lawyers keen to enter and make their mark in the field.

Second international law is part of the public debate in the UK now in a way that it has not been in the past. Brexit is all about law. That is obvious from all the news coverage. The last two years have been about formulating legal rules: words and law shaping politics and lives. Brexit is about drafting treaties – about what is binding and what isn't. About how continuity of treaties can be secured consistently with the VCLT. I've already mentioned trade law. And it goes without saying that on issues such as the use of force by the UK, questions of legality are front and centre of the decision-making. This has been the case for many years – certainly since the Iraq War of 2003 but probably even since Kosovo. Parliament and the public demand a detailed explanation of international legality. And to take a recent and painful example: the UK's loss of its judge on the International Court of Justice is the subject of a specific inquiry by the Foreign Affairs Committee.

Third, international law is a thriving area of professional practice in the UK - both for law firms and for barristers. There is a huge growth in litigation at the international level or at the national level involving points of international law. A quick glance at the case lists of the superior courts will demonstrate that. Leaving aside the cases linked to Brexit (which raise international law issues), there are others such as Belhaj and Rahmatullah; Bashir (application of the Refugees Convention in Cyprus); Benkarbouche (customary law on immunities); Hegazy (special missions) and so on.

Even more profoundly, international law is at the heart of foreign policy making.

It has been at the heart of UK policy making since the creation of the post of FO legal adviser in the 1800s. You will see references to FO lawyers in Churchill's History of the Great War and in Stettin's book about the creation of the UN. On a day to day basis, law is at the heart of UK foreign policy making because there is a constitutional commitment in the UK to comply with the law, including international law. This appears in the Ministerial Code in the following terms:

> *The Ministerial Code should be read alongside the… background of the overarching duty on Ministers to comply with the law and to uphold the administration of justice and to protect the integrity of public life.*

The text has been amended to exclude a specific reference to international law, but the courts have held that that makes no difference. The commitment to international legality remains robust and is not seriously questioned by anyone Government – Minister or official.

It's probably hard for someone outside the system to realise how powerful and pervasive that commitment is. The UK could have chosen to comply with international law as a matter of policy and to live with the notion that some international acts might be unlawful and yet expedient or legitimate. Some states take that approach, but it is emphatically not the approach the UK has taken.

This commitment shapes all the work we do. It even applies to decisions about the use of force by the UK which always take place within a legal framework. The decision to use force always involves the Attorney General, advised by FCO and MoD lawyers. And the analysis is open to scrutiny. More than almost any decision taken by Government, a decision to use military force and the legal basis for that use of force is subject to public debate and a key element of that debate is whether the policy is lawful or not.

It is not just the decision to go to war that is subject to legal analysis. The day to day moment by moment conduct of the military operation – whatever its extent – also takes place within rules of engagement and directives which are cleared and monitored by legal advisers in MoD and in theatre. The detail with which decisions are scrutinised would, I am certain, surprise anyone who has not been involved. In his memoirs, Lord Morris of Aberavon writes of his role as Attorney General and the requirement on him to scrutinise specific targets at all hours of the day and night. The arrangements for obtaining legal advice vary from situation to situation, but the principle that all targets are vetted for their lawfulness, sometimes at the very highest levels, is absolutely the case in practice.

That policy is made under law has important consequences in all areas of policy. But in international policy making, and especially as regards the use of force, it means that it is not open to HMG to take the line that a course of military action is unlawful but desirable – or, as some said of the Kosovo action, that it is "illegal but legitimate". For HMG, the criterion is legality, not expediency. There has to be a sound legal basis for action taken.

One can argue about the soundness or not of some of the arguments used to justify UK military action – whether in Iraq or Syria. But for the moment, the point is not whether the legal arguments are right or not. The point is that HMG offers its policy for assessment against legal criteria. Take the idea of humanitarian intervention. HMG most emphatically does not assert that They will act when They feel like it or when things get so bad that Something Must Be Done. Instead, they have set out the criteria for such intervention and ask that their action is assessed against that. This is what it means to act under the rule of law.

And furthermore, this commitment to law and legality is not the sole preserve of the UK. I and colleagues meet our opposite numbers from other countries regularly for legal discussions. Always the discussion is a detailed analysis of law and legal principles. Our agendas include discussion of aggression, or humanitarian intervention, or state immunity, or deep-sea mining – all issues of law.

Whatever one makes of the Chinese claim in the South China Sea, or of its rejection of the UNCLOS Arbitral Tribunal ruling, the Chinese argumentation about the issue is couched in terms of law. Even in the midst of the Salisbury episode, Russia was asserting rights under the Consular and Diplomatic Conventions (and asking very good questions).

Two anecdotes to illustrate in more detail the impact of law.

One of the most memorable moments of my career has been appearing as agent for the UK in the case brought against us (and others) by the Marshall Islands in connection with nuclear disarmament. The parties were, in one sense, at opposite ends of the international legal order. One was a P5 nuclear weapons state with all the resources a major power could still throw at its diplomacy. India and Pakistan were likewise sizeable international actors. We sat on the left of the ICJ chamber. Over to our right were the representatives of the Marshall Islands – a tiny country of some 53 000. But both sovereign states equal before the law and the court, arguing before the Court about how the law applied.

And the law and the legal significance of words matter. You see it in the Security Council all the time: there is intense argument about words and law. Sometimes the text is vetoed – and this often happens on the most sensitive issues such as the Middle East and Syria. Often

this lack of Security Council action is held up as proof that the rules-based order is not working. But surely the opposite is the case. The use of the veto is an exercise of rights conferred by the UN constitution and international law. And more to the point: states veto texts precisely so that law is not created. If the text did not matter, or if law did not matter, they would not bother vetoing.

Another personal anecdote. Everyone remembers where they were on 11 September 2001. I had just arrived in New York to begin a three-year posting as legal counsellor in the UK Mission to the UN. In the immediate aftermath of the destruction of the attacks, there was a wave of shock, emotion and sympathy towards the US. Even old adversaries moved alongside to offer a common front and solid support. Everyone felt the UN had to react to reflect this feeling of solidarity. When the US brought forward a draft resolution for action in the Security Council, focussed on terrorist financing, there was a general willingness to make it work. What became Security Council resolution 1373 condemned and outlawed a whole series of actions, in particular financing. It set up a Committee to monitor State implementation. The negotiations were relatively speedy (even though resolution 1373 was a remarkable and innovative use of Security Council powers).

But one feature of these negotiations stayed with me. The original US text included the proposition that States were under an obligation to

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts receives justice.

With a foresight amply justified by the events of the years that followed, one of the members of the Council said that this last phrase had to change. Terrorists should be "brought to" justice. Courts had to be involved. The change was insisted on – even in that atmosphere of shock and urgency, diplomats and the states they represented were being careful to get the legal obligations right. A more subtle yet powerful demonstration of the power of the rule of law is hard to find.

To sum up then, although there are threats from outside the system, I certainly don't feel that the legal system itself is under pressure or on the point of collapse from events outside. The system is robust enough to provide a mechanism for states to manage the issues. And my contention is that, from what I see, for the most part and for huge areas of their business, states use law and legal structures to regulate their affairs.

There are, however, two threats which arise within the system which I think we all have to pay attention to, as those who share an interest in and who are engaged in international law.

I'd characterise these risks as over-reach and fragmentation.

By over-reach I mean the risk that we expect too much of international law. We set the standards too high and complain when they cannot be met. You see this in what we expect of Courts and what we expect of the Security Council.

Let me try to explain.

We in the UK - and our friends in Europe - have lived for many years under the rule of law. We live in stable democracies with functioning courts and legislatures. And we live in a wider legal context which involves external legal structures. We have become accustomed to the idea that our national courts and even legislatures do not have the final say over the content of our legal system or the decisions of our courts.

But we forget how unusual that situation is in the rest of the world. In most countries, the final say rests with their own legislatures and their own Supreme Court. And certainly, on any issue of vital national interest, or sovereignty, there would be no question of any non-national court or international court ordering the government to behave in a particular way.

Similarly, for the domestic lawyer, the national court is the last word and the ultimate route to dispute resolution. But for the international lawyers in most countries, international courts are one way of settling disputes peacefully, but far from the only way. And not even necessarily the most effective way. There are some issues which are not easily submitted to international adjudication, in the current state of the international order. Or, to put it another way, it takes a sophisticated legal order to use binding judicial resolution as its primary dispute settlement mechanism.

It follows, I suggest, that international courts – even European ones - have to move carefully and that we have to manage our expectations of them. Courts have to take care in interfering in national jurisdictions – the CJEU has provoked reactions from the German Constitutional Court as well as the UK Supreme Court. Strasbourg has been criticised by UK courts as well as by the Conseil d'Etat. Even Denmark has led demands for reform of the Strasbourg system. Issues of "legitimacy" are never far away.

There are I would suggest obvious lessons here for the ICC – I'm thinking of the recent judgment in relation to Burma. And even, dare I say, perhaps for the ICJ in its use of advisory opinions.

We also need to temper our expectation of what the Security Council can achieve. Some who really ought to know better talk as if the Council could solve the world's international problems. And they complain about its legitimacy when it doesn't succeed. But a moment's reflection will surely show how illusory that expectation is in a world of power politics. A

further moment's reflection would surely also show how difficult it would be to set up an alternative. Is there any realistic possibility of China, the US or Russia ever agreeing to a regime which could authorise military force to be used against them? The unfairness and oddity of this is evident. But what really are the alternatives?

The second danger or risk is of fragmentation of the international legal order – so that the universal becomes splintered and local. There is already a certain regional fragmentation in the European legal space, as we discussed. Europe and especially the EU has its own characteristics and ways of working. That is all well and good for those who have accepted it. But it is surely a serious error to expect that these standards should apply to those outside Europe who have not accepted them.

There is another kind of fragmentation which is perhaps more insidious and less apparent than the development of regional legal regimes. Regional regimes supplement but do not of themselves necessarily supplant the international legal rules. A much bigger threat comes from developments in the law which blur the international universal character of that law and create pockets of inward looking law, which though apparently international is in fact highly local.

All of you I'm sure will have read of be aware of Anthea Roberts excellent work "Is International Law International", so you will understand what I am driving at. Essentially - if students and practitioners of international law from one jurisdiction or locality or tradition (or language) only engage with those from the same jurisdiction, locality, tradition or language, the international character of our discipline will be lost. The result will be fragmentation and incomprehension: we will talk past, not to, each other. As in the Old Testament, at Babel, we will be scattered uselessly across the earth.

So finally, how to react to these challenges.

First, we need to keep the basics of our trade very much in mind. And whether we like it or not, the basic principles of the international order are still sovereign equality and consent. A state cannot be compelled to accept an obligation and it cannot be compelled to submit to a court. These are the ground norms of the system of international law and they have to be respected if order is to prevail. It makes no sense, and it is a threat to international order, to try to impose rules on states that they have not accepted or to claim that the law is what we say, when others assert the opposite. That way madness and anarchy lie, just as surely as they do from fragmentation and mutual misunderstanding. While always aiming to improve and enhance legal protection and structure, we should bear in mind that a generally accepted lower standard may be more effective in the long term than a higher, rejected, standard.

You can see this in the work of the ILC. Their agenda is ambitious to say the least. And some of the product clearly goes well beyond the state of the current law. Now one may argue about whether the ILC proposals are good or bad. But that is not the point. The point is that they are not of themselves law. And we do no-one any favours by claiming they are. So – to take an example: we need to ask not just what the Articles on State Responsibility mean, but whether they actually bear any relation to State practice. And we need to ask what the value is going to be of "rules" on official act immunity which the ILC itself has to vote on and which many states oppose. We surely have to pay close attention to the attitude of states in determining what the law is (whatever we might like it to be).

Second, and vitally, we must recognise that we international lawyers need each other. We need to hear and understand the views and reasoning of those from other systems traditions and approaches – Anthea Roberts' point. So – if at all possible – let us engage across language and across legal school. Your conference agenda and your speakers suggest that you are well aware of this and are already on the case.

And the academic and the practitioner need each other every bit as much. This is why "outreach" is a free-standing objective of the FCO legal team. We believe that our own view even as practitioners in Government is at best partial. We need to engage with and understand the world outside Government. We need to be challenged in our thinking so that we stay fresh and alert to what is going on. We need to draw on the deep expertise that you and your colleagues have.

But – and I say it with all respect – the academic view is also partial. You need to receive our challenge as well as offering your own. Academics with no knowledge of the practical dimension will quickly lose touch with reality and their product will become unworkable or even harmful. But the practitioner without academic anchors will lose rigour and become a creature of expediency. Neither will serve the greater cause we both seek to advance.

So, we need to be open to each other's point of view. And at the risk of pressing metaphors too far: if we engage in that way, we will truly hear the truth in our own language and understand each other. We will have Pentecost instead of the destruction of Babel.

Congratulations on your conference. I hope it's the first of many and I wish you every success in developing your work.

Public lecture given on 19 Nov 2018