

Sir Eli Lauterpacht QC Memorial Seminar

13 October 2017

As one who has felt for long years close to Eli and to Cathy Lauterpacht, I am honoured and pleased to be speaking at this Opening Session of this seminar.

The task has not been easy, because both today, and again tomorrow at the Memorial Service in Trinity College, we will hear so much about Eli's contribution to international law including in contributions by Stephen Schwebel and by Christopher Greenwood who will give Memorial addresses. I certainly don't wish, prematurely, to tread the very same ground as I imagine they will wish to traverse. I have also been mindful of the rather full obituaries which appeared in the *Telegraph*, *Times*, *Guardian* and *Independent*, which Christopher Greenwood, Philippe Sands, Daniel Bethlehem and I prepared.

So we must certainly be reminded of Eli and the Centre; Eli and the ILR; Eli and the many other Law Reports we owe to him; Eli and the Australian years. What a life!

Pondering this dilemma, and reviewing Eli's life in international law, I was struck by something never particularly noticed, I think, and thought it merited attention here.

Eli's career was of course a glittering one. But I think we fail to notice how very unusual his career path was.

In the United Kingdom, those international lawyers we regard as at the top of their profession will usually have written heavy books, been a favourite choice by government to

advise and represented them in international litigation, been selected to serve on the International Law Commission or another senior UN body, have been a leading actor at the *Institut de droit international*.

This was not Eli's career path. He was counsel in 11 cases at the International Court of Justice (and many, many others in different fora). But in the 5 cases involving the United Kingdom during Eli's working life,¹ he was not counsel for the United Kingdom. He did not serve on the International Law Commission and for that, and other reasons, we do not associate him with major and comprehensive projects of International Law, such as the codification on the law of treaties, state responsibility, the drafting of a statute for an International Criminal Court. The reality is that Eli would probably not much have enjoyed being a member of the ILC. Certainly Sir Hersch Lauterpacht had not much appreciated the experience. We know from Eli's magnificent *Life of Hersch Lauterpacht* that Hersch wrote to Rachel, his wife, saying "I am not sure whether I will wish to remain with them. I am much respected and people are very friendly ...[but] the majority do not know any international law; and the method of work is bad". Eli, like his father, preferred to work alone, or with a small team of his choice. Hours and hours in set meeting formats, listening to the views of others, was not Eli's thing.

Indeed, if truth be told, Eli was not so interested in listening to lectures given by others. And I remember him advising me that the best way to cope with the stream of books so kindly sent by generous authors was to adopt his letter in reply "Thank you so much. I shall lose no time in reading your book". He was not a stalwart of the peripatetic lecture audience. He preferred to be immersed in the practical matters that were filling and illuminating his days.

¹ *Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria)*; *Northern Cameroons*; *Fisheries Jurisdiction (United Kingdom v. Iceland)*; *Lockerbie*; *Legality of the Use of Force*.

Advocacy

Eli was, of course, one of the leading advocates of the last half-century. He started very early, assisting his father behind the scenes, in cases in which Sir Hersch was instructed. He was, alongside Sir Hersch and Lord McNair, a member of Chambers at 3 Essex Court. For long years he kept a flat in Essex Court, where he met clients and welcomed friends. Thus in the early 1950s, Eli was assisting – though not directly instructed in the famous *Nottebohm* case.

The views of Sir Hersch were keenly sought, especially by the UK Government, for his remarkable knowledge and ability. But his role was not that of the front line advocate. By contrast, Eli rapidly became appreciated by governments very specially for his skills as an advocate. He was in a stream of cases before the International Court of Justice. These included the *North Sea Continental Shelf* cases, the *Barcelona Traction* case, *Nuclear Tests cases*, *Pakistan v India*, *El Salvador v Honduras*, *Botswana v Namibia*, the *Avena case (Mexico v US)*, *Qatar v Bahrain*, *Indonesia/Malaysia*, and in 2013, *Timor-Leste v Australia*.

Sometimes Eli was brought into a case that was thought to be foundering. Such was his stature that he did not need to confine himself to positions and arguments already taken. In *Indonesia/Malaysia*, for example, where his help was sought somewhat late in the day by Malaysia, he found an elegant way effectively to present the Court with an entirely new set of pleadings and arguments.

I had the pleasure of hearing Eli, from the Bench, in some of these cases, which confirmed his standing as one of the counsel most appreciated by the Court. His knowledge of

the law was taken as a given. Of the English speaking counsel who regularly appeared before the Court, Eli, Derek Bowett and Arthur Watts were very particularly enjoyed by the Court. Derek Bowett's style was feisty. With Arthur Watts, the Court knew it would systematically and quietly be taken from points A to B, then logically onwards to the end of the argument. With Eli, it was different again. Behind his relaxed and cheerful style lay a sharpness of mind and an ability to use his great knowledge of the Courts' case law – and of international law generally – in a most creative way. Novel and persuasive arguments were built, with the Bench invited to immerse themselves in this creative thinking.

Eli's celebrated style of advocacy – cheerful, engaging, with malice towards none – fits with the general pattern of his life in International Law: the evidencing of enthusiasm for the subject and pleasure in tackling its problems. He was never negative, never disagreeable to his opponents, never contemptuous of others or their arguments. This was a man of enormous skills who simply loved his subject.

Judge ad hoc

Different views about the desirability of the concept of *ad hoc* judge at the ICJ may legitimately be held. We have among us those who have occasionally sat as an ad hoc judge and those who have almost made a career of being an ad hoc judge! Eli sat only once as an ad hoc judge, though it was clear that it was a role he relished and which he fulfilled with immense care and total command of the pleadings. But this occurred at a time, the early 2000s, when the Court was embarking, through Practice Direction VII, on putting space between the role of counsel and the role of ad hoc judge.

So we did not have the benefit of seeing more of Eli as an ad hoc judge. But, fortunately, sufficient time had run since his role as an ad hoc judge in the *Bosnia and Herzegovina v Serbia and Montenegro* case for him to be able to once again be counsel in *Certain Documents case* between Timor-Leste and Australia in 2013.

It is commonplace to say that an ad hoc judge is meant to be impartial and not an extra-counsel for his/her appointing State in the Court's Deliberation Chamber. Some ad hoc judges achieve this more than others. Some make more weighty points of law than do others. But in the entire history of the PCIJ and the ICJ there has never been a deep analysis of the role of the ad hoc judge, so impressive that it will be referred to and cited through the ages. What Eli did there was really exceptional and – unlike the usual task of the ad hoc judge – will not pass with the conclusion of the case.

I refer, of course, to what he had to say on this subject in the so-called *Genocide case*, in his Separate Opinion. He there recalls that an ad hoc judge makes his solemn declaration under Article 20 of the Statute that he will exercise his powers impartially and conscientiously. But, as Eli immediately puts in counter point, the institution of “ad hoc judge” was created for the purpose of giving a party, not otherwise having upon the Bench a judge of its nationality, an opportunity to join in the work of the Court. “This has led many to assume that an ad hoc judge must be regarded as a representative of the State that appoints him and, therefore, as necessarily pre-committed to the position that the State may adopt”. He then goes to the heart of the issue:

Nonetheless, consistently with the duty of impartiality by which the ad hoc judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is measurable, every relevant argument in favour of the party that has appointed him has been fully appreciated in

the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write.

How carefully have these words been chosen, how admirable is the drafting. What appears to be a simple proposition was in fact so thoughtfully crafted those very short passages are already essential reading on the subject, for scholars and practitioners alike. It cannot be better said and they will remain the place to go to through all that is to come.

Institut de droit international

He loved the Institut and the Institut members loved him. His hospitality was boundless, the countless dinners he offered were enormously enjoyed not only because of the food and wine, but because of Eli's joie de vivre. This outgoing enthusiasm – matched in all respects of Eli's working life – we should also perceive as a contribution to international law.

Eli – like many others of his generation in the United Kingdom – was not much interested in the theory of international law. For him, it was practical matters that caught his attention. And thus it was at the Institut.

In the Institut de droit international, world leaders in international law write long and scholarly reports on assigned topics, which are then subjected to the scrutiny of other members or associés. And when not themselves such a Rapporteur, they are member of one or more Commissions, answering in writing questionnaires from the Rapporteur. Eli was elected to the Institut in 1979. There is no substantive Report or Resolution authored by him. And I can say from experience that if Eli volunteered for membership of a Commission, it was not to be expected that he would send in written answers to the Rapporteur's questionnaire, or regularly

attend Commission meetings. This collegial method of abstract drafting did not appeal to him. But, individually, he did all he could to make the Institut more efficient - that was where his interest lay.

All venerable institutions, with a less-than-youthful membership, are open to the claim that they need to improve their efficiency. This is not the place to rehearse substantive details as to what, in the Institut's rules, procedures and work methods, worked well and did not work well. And we are talking about Eli, rather than the workings of the many, many bodies he was associated with.

But to maximise the efficient working of the Institut was Eli's great interest and a matter on which he, above all, took a decisive lead. In 1999, he proposed in Berlin a resolution to establish a Constitutional Committee "to review the Constitution of the Institut, its objects, structure, membership, functioning, methods of work and finances, and to make such recommendations for the amendments of its Statute, Rules and Practices as it seems appropriate".

Such a Committee was established under the chairmanship of Karl Zemanek and with Eli as its Rapporteur, and in May 2001, there was ready a First Report, which made – makes – very, very interesting reading. A Resolution was adopted by consensus. The thorough analysis and many recommendations met with some resistance, however, even though the proposals formulated by Eli and his colleagues entailed no need for formal amendments to the Institut's Statute and Rules.

The reality is that he was interested in practice, in practical things. And he did doggedly try to make the Institut a more efficient place, and made proposals to this end. This effort was outside the scope of the normal work of the Institut, but commanded considerable support and appreciation among the membership.

When Eli fell ill, and was no longer able to work in this Committee, a joint Rapporteur (Tomuschat) was coopted. But Eli continued to make his voice heard and further discussions were held in 2005.

This and that matter was debated. But Eli said he felt somewhat disappointed at the outcome of the work on constitutional reform. He had had in mind a broader range of proposals, which would have enhanced the work of the Institut – the proposals that remained were limited in their reach and substance.

One proposal – that the Institut in the future hold a joint session on an appropriate international law topic with local universities – has been fully implemented, and has fared well. And I like to think that one day someone will pick up Eli's mantle and come back to the broader issues of efficiency for which he fought so hard.

Eli will be hugely missed at the Institut, not least by the members of the UK Group who were the beneficiaries of his generosity.

It is a mark of the affection and appreciation for Eli that, even after his death, the UK Group application, which had been made for him to be afforded Honorary Membership went

ahead. This voting was a posthumous expression of admiration for their recently deceased colleague. And it was the more special as Cathy was there in Hyderabad to witness it.

Life of Sir Hersch

We think of Eli above all as a practitioner. The articles that he published were often about particular cases, or were tributes to colleagues, or were about nationalisation of property. They were valuable, but it is not for these that Eli will be remembered.

But his long Hague Academy contribution on “The development of the law of international organizations by the decisions of international tribunals” (HR 1976, 377-478) remains an important point of reference. In 1991 he himself gave the Hersch Lauterpacht Memorial Lecture, choosing the theme of “Administration of International Justice”. I remember him telling me that the material he there traverses reveals how much happens in international law that is not dependent upon consent. Silent practicalities, he told me, were the engines of development in international law.

Those of us who had the good fortune to be taught by Eli will never forget that he was a superb teacher. His friendly and accessible lecturing style was extremely attractive, making the subject (International Institutions, LLM, in my case) exciting and interesting. He made his students really interested in the subject, longing to find out more and yet more. Thanks to Eli, international law was not a chore but a delight. And, as one of the obituaries in the UK newspapers put it: “He had the whiff of cordite about him” – in other words, the students knew that he was involved in this case or that, and that what he would tell them in his lectures reflected this reality. Of course, they loved it!

Eli's *Life of Hersch Lauterpacht* is a superb work of scholarship. At the outside, Eli writes: "I have hesitated to call this work a 'biography', as in some sections it is little more than a bare recitation of facts in the nature almost of a deposition. I claim neither the skills nor the experience, beyond a half century of preparing legal arguments and opinions, to write a text that by its presentation, ideas, imagination, vocabulary, and general style can be called 'literature' or, more precisely, 'biography'".

But that is exactly what Eli did. We may well imagine the daunting issues facing Eli when working his way through the letters in the cabin trunk and contemplating how to tell in detail the story of Hersch's life and the difficult decisions to be made: Would it best to approach the issues by reference to the subject matter? How could brief references in letters to work in which Hersch was engaged be made intelligible to the reader? How much should Eli help things along by commentary of his own?

Eli solved these problems in various ways, including by providing an informative, unobtrusive and balanced commentary. His task in this work of filial devotion was much, much more than editorial. It was Eli's editorial decisions, and his own writing, that have turned raw materials into a remarkable book. If I may briefly quote from the conclusion of my review in the 105 *American Journal of International Law* 204: "It is a vastly impressive homage to his father. But it also stands, by the enormity of the job undertaken and by the skill with which it has been carried out, as a monument to another great international lawyer, Eli Lauterpacht".

This exceptional book was awarded an LLD by the University of Cambridge.

We know how much we owe Eli, the great practitioner.

But I have found it interesting to realise how very unusual was his career path. I so much wish I could today ask Eli, “Was this a deliberate choice, to do what you wanted to do - or did it just happen?”. We can only be grateful that this beloved giant of our field followed these special roads.