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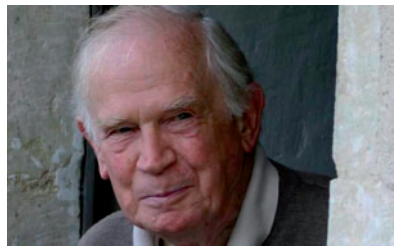
Sir John Freeland, KCMG, QC (1927-2014)



John Redvers Freeland was born on 16 July 1927 and died on 29 June 2014, at the age of 86. He was educated at Stowe School and at Corpus Christi College, Cambridge. He served for 34 years in the Diplomatic Service, from 1954 to 1987, both in the Foreign Office (later Foreign and Commonwealth Office (FCO)) and abroad. He was the Legal Adviser to the FCO between 1984 and 1987 and a judge of the European Court of Human Rights between 1991 and 1998. He was appointed CMG in 1973, and KCMG in 1984. He became a Bencher of Lincoln's Inn in 1985, and was awarded Silk in 1987.

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The steps in John Freeland's official career give an impression of orderly predictability: early years in the Foreign Office learning the trade; experience at international conferences and the UN; service *en poste* in Germany as Legal Adviser to the British Embassy in Bonn; promotion to Counsellor; a tour of duty as the Legal Adviser to the UK Mission to the UN; promotion on return to Second Legal Adviser, and then in due course to the Legal Adviser post when Sir Ian Sinclair retired. But there were many features that made it atypical. When Freeland went up to Cambridge after the War, it was to read Classics, not Law – to which he shifted only for Part II of his Tripos. Unlike his Cambridge contemporaries in the FO (of whom there were many),[1] he did not take the LLB or

[1] Cf. more generally, WE Beckett, 'Sir Cecil Hurst's Services to International Law', (1949) 26 BYIL 1-5; GG Fitzmaurice and FA Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966) An appreciation', (1968) 17 ICLQ 267-326; RY Jennings, 'Gerald Gray Fitzmaurice', (1984) 55 BYIL 1-64; F Berman, 'Sir Vincent Evans (1915-2008)', (2007) 78 BYIL 1-6; M Mendelson, 'Sir Francis Vallat GBE, KCMG, QC (1912-2008)', (2008) 79 BYIL 3-6; F Berman and M Wood, 'Sir Ian Sinclair (1926-2013)',

specialise in international law, and did not therefore fall under the influence of the great figures of the time at the University: Lauterpacht, Jennings, Bowett, Parry. So his early contact with international law was slight. Nor was that a field he went into immediately after going down, when he freed himself from the obligation to ordinary National Service by choosing to take a Short Service Commission in the Royal Navy, encouraged by the fleeting period he had spent there between leaving school and the end of the War. His three years were spent as an Instructor Officer, at first from pillar to post, but then for two years at the Royal Naval College in Greenwich, where he taught the Lieutenants and Sub-Lieutenants and lived in bachelor quarters 'above the shop'. This was a period he loved, and it was no doubt what gave him his first taste for law in an international context. It was also by his own account not a notably taxing set of duties, which left him time, therefore, to read privately for the Bar, in comfortable conditions and on London's doorstep. Called to the Bar in 1952, he went into Chancery Chambers in Lincoln's Inn, but soon found neither the law involved nor the Court work much to his liking, and put in for the competition when two posts were advertised in the Foreign Office (as it then still was). By happy chance a more favoured candidate dropped out, and in 1954 Freeland joined the FO Legal Advisers, a close-knit group of six under Sir Eric Beckett which the two newcomers expanded to eight.

Part of the reason for the increase was the sizeable burden of negotiation, especially in international conferences and meetings with a heavy legal component. Freeland was part of the UK delegation to the conference in 1958 which led to the four Geneva Conventions of 1958 on the Law of the Sea, which he remembered later as one of the most enjoyable and creative experiences of his career. In 1959 he was at the Geneva Conference of Foreign Ministers on Germany and Berlin and in 1962 at the Geneva Conference on Laos; later that year he was sent out as a reinforcement to the UK Delegation to the Session of the UN General Assembly, and played a key part in securing the balancing references to international law and the observance of agreements with foreign investors in GA resolution 1803 (XVII) on 'Permanent Sovereignty over Natural Resources', which Stephen Schwebel (then Assistant Legal Adviser to the US Department of State) remembers as a remarkable demonstration of acuity, drafting skill, and negotiating flair.

The following year he moved to international problems of a different kind on his posting to the British Embassy in Bonn, situs of the 'Bonn Group', the mechanism through which the three Western Allies maintained standing contact with one another and with the Federal Republic of Germany (at that stage in existence for only 14 years) over the status of

(2012) 83 BYIL 1-12. For a distinguished successor, see E Lauterpacht, 'Sir Arthur Watts (1931-2007)', (2007) 78 BYIL 7-16.

Berlin and Germany as a whole, and a series of other issues left over from the War.[2] On his return to what was shortly to become, after Departmental amalgamations, the Foreign & Commonwealth Office, he was promoted to Counsellor and not long afterwards was back in New York on a posting to the UK Mission to the UN between 1970 and 1973, a period of considerable tension in both East-West and North-South relations, but which nevertheless saw the adoption of the Friendly Relations Declaration, the Declaration on the Peaceful Uses of the Seabed beyond national jurisdiction, and one of the series of Outer Space Treaties; it saw as well much of the hardest negotiation on the highly controversial Charter of Economic Rights and Duties of States, eventually adopted on a divided vote in 1974, and on the Definition of Aggression adopted the same year. It was also a time at which the international aftermath was still being felt of the Rhodesian Unilateral Declaration of Independence, which led to Britain being continually in the dock at the UN at the instance of the African Group egged on by the Communist bloc. All these circumstances placed a premium, not merely on Freeland's acutely shrewd drafting skill, but more particularly on his special gift of lucid presentation, without ostentation, and illuminated by thoughtfulness and reasonableness. One colleague recalls an occasion a few years later, when the Africans thought they had the UK on the hip over the lifting of Rhodesian sanctions, and Freeland, visiting from London, was whisked straight into a meeting of the Rhodesia Sanctions Committee, chaired by an African President of the Security Council. Freeland gave an account, impromptu, of the purely enabling nature of the British legislation with such clarity and fair-mindedness that the head of indignation simply collapsed. Another foreign counterpart remembers with admiration his ability to speak in complete sentences, 'with punctuation'!

By that time Freeland was already occupying the position of Second Legal Adviser to the FCO, to which shortly after his return, on Sir Ian Sinclair's accession to the Legal Adviser post, he had been promoted in preference to the claims of others of equal or greater seniority, leapfrogging the intermediate position of Deputy Legal Adviser. He was then not yet 50. Given, however, Ian Sinclair's own relative youth in the top post, there ensued an unprecedently long period of partnership between them at the top of the legal structure of the FCO, which lasted for eight years until Sinclair took early retirement – in part at least as a gesture of generosity in order to ensure that (at a time of mandatory retirement ages) Freeland would have time enough to serve as Legal Adviser in his own right. The Sinclair/Freeland collaboration was a particularly harmonious

[2] Until shortly after German unification in 1990/91 there was a legal adviser at the Embassy in Bonn and another at the British Military Government in Berlin, each dealing mainly with the retained rights and responsibilities of the Four Powers in relation to Berlin and Germany as a whole. See M Wood, 'The United Kingdom and the divided Germany: the role of British lawyers', in JA Frowein et al (eds), *Verhandeln für den Frieden – Negotiating for Peace. Liber Amicorum Tono Eitel* (Springer 2003), 847-857.

and fruitful one. They were temperamentally different but entirely complementary, and had enormous respect for one another's honesty, kindness and professional standards.

Where Sinclair relished theoretical analysis and academic disputation, Freeland did not, regarding his task as being the essentially practical one of bringing negotiation to a successful conclusion or giving legal advice internally in a way that made it count. That disposition may have had something to do with his lack of formal grounding in international law, which as indicated above he learned by doing, not by book study, but it was rooted also in the modesty of his temperament. He could be as embarrassed, in a thoroughly English way, by academic praise of a successful outcome as he could be irritated by academic picking at it. It may explain, at all events, why he chose not to write or to engage in academic activities either as Legal Adviser or after his retirement. To interpret that as a disdain for academic endeavour would however not be accurate; what he disliked was academism for its own sake. His pragmatism may have eschewed theory, but it remained highly principled, and the recipe was very successful indeed in practice.

During his lengthy period as Second Legal Adviser, Freeland led the UK delegation for the final sessions of the diplomatic conference which negotiated the two Additional Protocols of 1977 to the Geneva Red Cross Conventions, the foundation of modern humanitarian law in armed conflict. He is remembered as the perfect delegation head: supportive, encouraging, engaged, perceptive in suggesting solutions to intractable problems and unfailingly tactful and good-humoured, even when managing a team which included such larger than life and strong-minded personalities as Professor Gerald Draper and Brigadier Sir David Hughes-Morgan, both long-standing experts in this field. In the negotiating room he was low-key, discreet, respectful yet persuasive, a combination which made him an effective negotiator, widely trusted and respected, even by those who did not share the British view.

At the Conference, Freeland represented the UK on the first committee, which tackled the most sensitive political issues, especially that of how to deal with "national liberation movements": whether they could or should be treated as parties to the conflict, and if so how they could engage themselves to the obligations of Protocol I. Once the former issue was settled (though controversially) by the inclusion of Article 1(4), he was part of the unofficial group which negotiated the compromise on the latter, which appears as Article 96(3). Freeland played a key role but, typically, without fanfare or public credit. It did not trouble him that it also meant that his contribution went largely unacknowledged in academic commentaries; a result that paved the way to the adoption of the Protocols was reward enough.[3]

[3] On eventual ratification, in 1998, the UK made a limited reservation to the two provisions: 'The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in

Freeland served as Legal Adviser for a short period only, from 1984 to 1987. He moved into the post in the immediate aftermath of the shocking murder of police constable Yvonne Fletcher by shots fired from the windows of the Libyan 'Peoples Bureau' in St. James's Square, and the outrageous attempt to smuggle a Nigerian oppositionist, Umaru Dikko, out of Stansted airport concealed in a crate. Although Freeland had not been dealing with either matter personally, Sir Geoffrey Howe, then Foreign Secretary, insisted at short notice that he appear as one of the principal Government witnesses before the subsequent Parliamentary enquiry, given the gravity of the matters at issue and the public and Parliamentary mood. To all appearances, Freeland's measured advice went home, and helped discourage the Foreign Affairs Committee from any thought of despatching the Government on what would have been a Quixotic mission to seek amendment of the provisions of the Vienna Convention on Diplomatic Relations governing the inviolability either of embassy premises or of the diplomatic bag.[4]

Two years later, after the terrorist attack on the La Belle discotheque in Berlin, the determination of the Reagan Administration to strike back by bombing Tripoli led to a request to stage the US bombers through RAF Lakenheath, Suffolk. Irrespective of the awkward issues of policy posed by this request, whether the US riposte could be justified, both on the facts and on the law, as a legitimate exercise of the right of self-defence was far from self-evident, and led to anxious discussion within government. The Thatcher administration was predisposed to fall in with US wishes, but ran the risk of engaging its own secondary international responsibility.[5] Freeland negotiated this difficult terrain with skill, if not always with comfort, drawing on the feel he had acquired first in the negotiation of the two Additional Protocols to the 1949 Geneva Conventions, and later in the Falklands conflict (where the Government had tried, not always successfully, to apply self-defence criteria to *ius in bello* decisions).

The outcome of the Tripoli bombing was not without tension within the FCO itself, which Freeland managed with his customary adroitness and human sympathy. Perhaps with Fitzmaurice's Suez note of 20 years earlier in mind,[6] he addressed a note to all FCO Legal Advisers, summarizing the background and the advice given (largely orally) to the

consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.'

[4] See the Committee's Report of 12 December 1984: Foreign Affairs Committee, *The abuse of diplomatic immunities and privileges* (HC 1984-85, 127).

[5] Article 16 of the Articles on State Responsibility, ILC Ybk 2001/II, Part Two, 26-30, the work on which was at the time heavily in progress in the International Law Commission. See also C Greenwood, 'International Law and the United States' Air Operation against Libya', (1987) 80 *West Virginia Law Review* 933-960, reprinted in C Greenwood, *Essays on War in International Law* (Cameron May 2006), 483-516.

[6] G Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', (1988) 37 ICLQ 773-817.

effect that there would be no valid legal justification for the airstrikes against Libya on the basis that they were punitive or retaliatory in nature. He recalled that the UK had traditionally, and for sound legal reasons, not favoured an extensive application of self-defence justifications, and added that there was every reason to suppose that Ministers would not want the episode to lead to a slackening of the UK's traditionally cautious attitudes on the right of self-defence.[7]

These sympathetic qualities were the ones that characterized his internal style as the Legal Adviser. No fan of 'management' for its own sake, he resisted the notion that his legal colleagues, responsible professionals all, should be subjected to annual appraisal of their performance, until he realised that regular staff reports were positively welcomed by the more junior legal advisers as a guide to their progress. He fashioned a strong *esprit de corps* among the Legal Advisers, still quite small in number both at home and abroad, and made that extend to fellow feeling with other Foreign Ministry lawyers of the same temperament, with a firm inclination towards close collaboration with the Americans, who he felt were fighting (often successfully) the same battles internally as well as externally. All of his former colleagues, at all levels from the ambassadorial to the secretarial, remember his ready accessibility, his personal warmth, his irrepressible sense of humour, and the sheer pleasure of working alongside him, for example during his regular annual visit to the UN General Assembly. They remember also his gentle way of showing them that work, vital as it was, was not all there was to life.

After retirement from the Diplomatic Service in 1987, Freeland did not feel the same inclination as some of his predecessors to reinvent himself as a practitioner/academic. He was however for several years a member of the Board of Governors of the British Institute of Human Rights, and acted as consultant to certain UK overseas territories on the application of United Nations human rights instruments. In 1989 he was chosen jointly by the USA and Chile as one of the three non-national members of a so-called 'International Commission of Investigation', called into being under an old bilateral treaty as an elegant way to reach final resolution of the dispute that had arisen out of the assassination in Washington by Chilean State agents of Letelier and Moffitt, which had come to an impasse in litigation in both Chilean and US courts.[8] The Commission, under the chairmanship of the highly respected Andrés Aguilar of Venezuela, and counting among its members also the ex-President of Uruguay, Julio Sanguinetti, was given the

[7] One of the present authors, with both Fitzmaurice and Freeland in mind, spoke individually to each of the Legal Advisers in the FCO after the March 2003 attack on Iraq: see Iraq Inquiry, Third Statement of Sir Michael Wood, section 7(i), available at http://www.iraqinquiry.org.uk/media/55252/2011-03-15%20Statement%20Wood%203.pdf.

[8] Dispute concerning responsibility for the deaths of Letelier and Moffitt (United States, Chile), Decision of 11 January 1992, XXV RIIA 1; (1992) 31 ILM 1; S Schmahl, 'Letelier and Moffitt Claim', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2012)

delicate task of determining – but without admission of liability – an assessment of compensation to the families of the victims. Freeland, with his moderation and legal shrewdness, is said to have contributed materially to an outcome that was accepted by both sides as fair and just.

These were the same qualities that came to the fore in Freeland's term of office as a Judge on the European Court of Human Rights in the seven years from 1991 until the amalgamation of the Court and the European Commission of Human Rights by Protocol No. 11 in 1998. He had earlier (between 1966 and 1970) been the UK Agent before the Commission and the Court, responsible for the coordination of the handling of cases brought against the United Kingdom, and from 1980 to 1984 was a member of the Council of Europe's Steering Committee on Human Rights. On the basis of this experience he was approached some years after his retirement from the FCO to accept nomination for election as British Judge on the Court on the retirement of Sir Vincent Evans. He hesitated initially to accept the request, lest his nomination be regarded as a case of insider favouritism or cast doubt on his impartiality. This anxiety was not entirely imaginary, as a degree of mean-minded muttering over the point did make itself heard for a while in certain NGO circles. But there was never the slightest justification for it either in prospect or in actuality.

Fairness and common sense were the hallmark qualities that he brought to bear in his work on the Court. The insider's view was that his clarity, careful attention to the evidence, calm intelligence and rigorous independence (with an added touch of personal charm and diplomacy!) made him a model of how a Strasbourg judge should behave, especially but not exclusively in controversial cases where he was the 'national judge'. It was in keeping with his style that he saw no need to intervene frequently and at length on everything, but that when he spoke his analysis was balanced and perceptive, never aggressive or polemical.

It soon became clear that he was fascinated by the Court as an institution and pleased to be part of it, and a great supporter too of the Registry, always willing to show his appreciation of the work done. The President of the Court at the time of Freeland's arrival was Rolv Ryssdal, and the two struck up a strong working relationship – once again on the strength of differing personalities, Ryssdal charismatic, Freeland quietly persuasive. It is said that Ryssdal would often invite Freeland to take the floor at the crucial moment in the course of a difficult discussion, sensing that he would be able to frame the issues in a more moderate or acceptable manner. It was also said that it soon became a talking point amongst the judges that Freeland could do no wrong in the President's eyes, who would always solicit his view with marked politeness and respect. His understated but extensive influence was marked as well in drafting committees for his gift for coming up with the right formula when the other members were struggling and failing.

All this meant that he possessed the power of persuasion, in an institution where the power to persuade others is the ultimate skill.

This would however have been evident only to an insider, for Freeland observed complete discretion about the inner workings of the Court, in the same way as he maintained a formal distance from his former official colleagues, in keeping with his strictly principled view of the independence of the Court and of its judges. The same discretion can be seen in the rarity of his dissenting opinions. He preferred always to work with the grain towards an acceptable judgment by the majority than to parade his own individual views, a measured approach which came under the greatest strain with the *McCann* case, brought by the relatives of an IRA bomb squad who had been shot dead by British soldiers in Gibraltar. The Court's attempt to achieve a judgment of Solomon[9] by finding for the UK on the main complaint of a breach of the right to life, while finding (by the narrowest of possible majorities) defects in the planning of the defensive operation but conversely awarding no damages on that account, must have met with Freeland's profound disapproval; though, if so, it was not made evident but channelled rather into a joint opinion of all nine of the dissenting judges.[10] That said, Freeland's voice can be heard in passages like the following, surgically dissecting the inadequacies of the majority's analysis of the circumstances of the case:

> First, in undertaking any evaluation of the way in which the operation was organised and controlled, the Court should studiously resist the temptations offered by the benefit of hindsight. The authorities had at the time to plan and make decisions on the basis of incomplete information. Only the suspects knew precisely what they intended: and it was part of their purpose, as it had no doubt been part of their training, to ensure that as little as possible of their intentions was revealed. It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an on-going anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken. It should not be so regarded unless it is established that in the circumstances as they were known at the time another course should have been preferred.[11]

Freeland's service on the Court came to an end in 1998,[12] but not before he had been charged by the Council of Europe, along with his colleague Gaukur Jörundsson of the Commission, to conduct a study of developing legislation, human rights and the rule of law in the former Yugoslav Republic of Macedonia,[13] which paved the way for Macedonia's admission as a Member State in November 1995.

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[9] *McCann v UK* App no 18984/91 (EHRR 21, 1997).

[10] Including, be it noted, both the President and Vice-President.

[11] *McCann v UK*, Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek, para 8.

[12] Unwilling to court a repetition of the captious criticism that had followed Freeland's own nomination, the British Government adopted a notably open system for the choice of his successor. But even that, though widely praised, was not proof against attempted mischief-making within the European Parliament.

[13] Eminent Persons' Report of 27 April 1995, doc AS/Bur/Macedonia (1995) 1.

Following his retirement from the Court, Freeland disengaged from active participation in international law, dividing his time between France and England where his two children, Nicholas and Petra, were established. His long and happy marriage to Sarah, the daughter of his original Head of Chambers in Lincoln's Inn, who survives him, lasted for over 60 years.

Sir Franklin Berman, KCMG, QC
Sir Michael Wood, KCMG