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The Role of International Lawyers in Government

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THIS CONTRIBUTION FOCUSES on some aspects of the role of lawyers in the field of foreign affairs.[1] I am no longer a government lawyer, having left the Foreign and Commonwealth Office (FCO) at the end of February 2006. I was the FCO Legal Adviser for just over six years before that. I had hoped for five or six years of peace, and what came was Kosovo, 9/11 and Afghanistan, and the invasion of Iraq, plus one or two other interventions elsewhere.

When I first joined the FCO, back in 1970, Whitehall seemed a rather divided place. Each department had its own culture and there seemed to be some distrust of other departments. This even applied to the lawyers. For example, the Home Office had very good domestic lawyers. The Foreign Office lawyers were mainly international lawyers, and in the eyes of the Home Office did not really understand true law. We tended to interpret statutes as though they were treaties. The Home Office would run rings round us on domestic legal arguments. Things have changed radically over the years. Whitehall is now necessarily much more collegial than before, including – perhaps especially – among the lawyers. Public international law is mainstreamed in many government departments, though I would still like to think that the FCO is a centre of excellence on this within government. This is one among many reasons why the FCO legal advisers are, and should remain, a separate cadre, not directly part of the general Government Legal Service but within the FCO and members of the Diplomatic Service.[2]

[1] Much has been written on Foreign Ministry legal advisers, including those in the FCO. See M Wood, 'Legal Advisers' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, with bibliography http://opil.ouplaw.com/home/EPIL. For recent writings see, eg, MP Scharf, PR Williams, *Shaping Foreign Policy in Times of Crises: The Role of International Law and the State Department Legal Adviser* (Cambridge, Cambridge University Press, 2010); D Bethlehem, 'The Secret Life of International Law' (2012) 1 *Cambridge Journal of International and Comparative Law* 23; S Bouthuis, 'The Role of a Legal Adviser to Government' (2012) 61 *International and Comparative Law Quarterly* 939.

[2] On the different ways of organising advice on international law within government, see Wood ibid. For a useful database, see Council of Europe, 'Database on the Office of the Legal Adviser of the Ministry of Foreign Affairs' (18 March 2013) CAHDI (2013) Inf.3, also available online at www.coe.int/t/dlapil/cahdi/office_legal_affairs.asp.

I PRIVATE PRACTICE VERSUS FCO LEGAL ADVISER

I now spend some of my time practising as a barrister, almost always for governments, no longer just the British Government. It is interesting to compare the experience of being a Foreign Ministry lawyer with that of being an international lawyer in private practice, part of what is sometimes, misleadingly called the 'international bar'.[3] They are very different jobs, needing somewhat different skills. A former FCO Legal Adviser has written:

> [T]he main role of the Governmental legal adviser is to 'make' his Government comply with international law. One must of course put the word 'make' in mental inverted commas. It would be a rare case indeed if a Governmental legal adviser were in a position to compel the Government he serves to act in one way or another. But it cannot by the same token be the limit of the function of even someone whose role is that of 'adviser' simply to ascertain what the law is, to explain it to the best of his ability to his client, and leave it at that. Of course, when it comes to action the final decision may not be his. It is a truism to say that the question whether or not to comply with what international law requires is always a question of policy. But even the meanest definition of the role of the international law adviser in government cannot treat that policy question as if it were an entirely neutral one. It must be assumed to be a necessary part of the role that the international law adviser should be expected to use his gifts of exposition and persuasion to bring those with whom the power of decision lies to use this power to the right result.[4]

A government public international law adviser may well regard, and be expected by his or her client (the Government) to regard support for the international legal system as an important part of his or her functions. Given the specificities of that system (for example, the absence, generally speaking, of any court or tribunal with compulsory jurisdiction), this may be so to an even greater degree than a lawyer in private practice, or an in-house lawyer for a corporation, or indeed a government lawyer acting in the field of domestic law. It remains, however, the case that all lawyers, especially all government lawyers, have a duty to the law going beyond a duty merely to advise on what the law is.

In a Foreign Ministry you often have to deal with big issues, and you are given perhaps five minutes to come up with advice – in fact that's quite a lot of time. I remember when I was very new in the office, James Callaghan was the Foreign Secretary, and I was the only lawyer in at lunchtime. (I never made that mistake again.) I was summoned to his grand office, and he said, 'Turkey's invaded Cyprus. There's obligation to consult under the Treaty of Guarantee with Greece and with Turkey. If I telephone them separately, will that be consultation?' So I said, 'Well, I'll have to look at the Treaty of Guarantee.' He replied, 'Fine. You can sit over there', and threw me a copy of the Treaty. The volume was several hundred pages long. I quickly decided that the only thing to do was to give a clear answer, if possible the answer he wanted. He obviously wanted to be able to say to Parliament that he had fulfilled this obligation to consult, and I thought that was indeed the right answer: separate telephone calls would suffice. I hoped I was right.

I recall, by way of complete contrast, the first thing I did in private practice. It was a matter of little importance. I was asked by an embassy about some point of law relating to a

[3] E Sthoeger, M Wood, 'The International Bar' in C Romano, K Alter, Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford, Oxford University Press, 2013).

[4] FD Berman, 'The Role of the International Lawyer in the Making of Foreign Policy' in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (London, British Institute of International and Comparative Law, 2000) 3–17.

diplomatic mission. I read the papers, and thought, 'This is hopeless.' Back in the FCO, I would just have said, 'No, you can't do it.' But as a barrister in private practice, when giving advice you are normally expected to write a long opinion, saying, 'I have been asked about the following problem' setting it out in detail, then you set out relevant legal provisions and authorities, and spend two, three or more pages analysing them before concluding that the answer is no, and then you charge for it.

Now, I think it is obvious from what I said that in the FCO one's advice is often quite superficial, necessarily superficial because there is no time. So you have to give advice almost instinctively, and with little or no explanation. You often just say 'yes' or 'no'. That is not how it is in private practice. Much of a barrister's practice, at least in the field of public international law, will concern litigation. That is not the case for most FCO lawyers, even with the great increase in litigation of concern to the FCO over recent years.

Another major difference is that, within government, law and policy are very closely linked and handled together; this is certainly so in foreign affairs, but I think the same is true of the rest of government. Much of the time when you are sitting around in meetings you are actually advising on policy, and certainly contributing directly to policy advice; policy with perhaps a high legal content, but still policy. Ministers and officials often want your views on policy; they may sometimes even want the lawyers to decide a matter because they cannot make up their minds. That is particularly true, I would say, at the lower levels within the FCO. For example, the Protocol Division of the FCO deals with privileges and immunities, on which they are the experts; but when in doubt they really want to be told what the policy should be, they want to be told what to *do*, not just what the *law* is. That is fine when it is run of the mill stuff. But it is different when they ask you whether a former head of state has immunity for acts done while he was head of state. If you give the wrong answer it leads to litigation.

Having said that, it is of course very important to know in your own mind what law is and what policy is – indeed, that is essential. Even if you are being asked for policy advice, or giving it, you have to know that, at the end of the day, that is not really your job. Your job is the law, and the higher up in the office you are operating, the more likely it is that you will be dealing purely with the law, setting out the legal options and leaving the policy to others.

Another very important difference between working in government and in private practice is that as a FCO Legal Adviser you have a single client, and that client is the Foreign Secretary/British Government. Your client may well already have taken a position on the law. You might look at the law and know that it is highly controversial among international lawyers. For example, in relation to the use of force there is a dispute as to whether a state can engage in 'anticipatory self-defence' where you defend yourself if somebody is about to attack you or must wait for the attack to be set in train before using force in self-defence. Well, you may have your own views on that, but the British Government has its views, which have been established over the years, through practice, and at the highest level. You cannot just turn up and say, 'Well, that's wrong. I think that there's no such thing as "anticipatory self-defence".' You have to follow the party line. If you are going to try to persuade the Government to depart from that, you will need to argue very thoroughly as to why the Government should change its traditional position on the law.

The other thing, of course, is that governments on the whole have to be consistent in their view of international law, because what they say is the law becomes, to a degree, part of state practice, and can be held against them. That leads to caution. You become quite good at not answering questions (in public anyway), and trying to avoid expressing a view

as to what is the law. You can, for example, say that you are acting in accordance with law, without actually saying what it is. One of the reasons for doing that is that, in the field of international law, you may not want to commit your government more than you have to. Nevertheless, the *British Yearbook of International Law* currently has some 300 to 500 pages every year of United Kingdom materials on international law.[5] It is, in principle, good for governments to ensure that their practice is published. It ensures that it is taken into account in the development of international law; though of course what you do or say on one occasion can come back to haunt you.

Of course, a government can always change its mind, and more than once. One of the big changes the Government made in recent years was to decide that it was no longer going to recognise foreign governments, but only states. This happened following Samuel Doe's coup in Liberia in 1980. We had just told ministers that the UK Government would have to recognise the new government, and I think they they did; but the new government promptly started shooting people on the beach. Our Government said, 'This doesn't look good.' We pointed out that, fortunately, recognition of a government does not mean blessing it. It is just an acknowledgement that the government exists. But our Government said, 'No, we've got to stop recognising governments.' Of course, for practical reasons they still have to decide which persons are the government and which are not. That seemed very convenient in 1980. It did not apparently seem so convenient in 2011. As I read the press, the British Government reverted to the recognition of governments in the context of the overthrowing of the Gaddafi Government in Libya. On 27 July 2011 they explicitly said that they recognised the National Transitional Council of Libya as the sole governmental authority in Libya. The British Arab Commercial Bank Plc, which held the assets of the Libyan Embassy in London, had received conflicting instructions from the Gaddafi Government and the National Transitional Council as to how they were to deal with those assets. They applied to the High Court for instructions. Mr Justice Blair held that the Foreign Secretary's certificate precluded any argument in British courts that the Gaddafi regime could give directions as to dealings with Libya's governmental assets. The Government thus clearly departed from their policy of not recognising governments.[6] If you asked them, I suspect they would say that it was an exceptional case.

II ADVISING ON INTERNATIONAL LITIGATION

I'll now say a word about some practical aspects of advising a particular government in a court case. The government in question was the Government of Kosovo, in relation to the advisory proceedings initiated by Serbia, on 8 October 2008 at the International Court of Justice, over Kosovo's Declaration of Independence.[7] First of all, how do you become involved as their lawyer? Someone obviously suggests your name to them. Then you have to form a team. Kosovo obviously could not afford to pay a great deal, so we formed a very lean team, three foreign lawyers and an assistant (together with two excellent Kosovar

[5] *The British Yearbook of International Law*, Oxford University Press. The section 'United Kingdom Materials on International Law' has appeared in each volume since 1978.

[6] *British Arab Commercial Bank Plc v National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm), 26 August 2011.

[7] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010*, p 403. (The case was later renamed *Accordance with international law of the unilateral declaration of independence in respect of Kosovo.*)

lawyers). That is, on the whole, a good thing: international litigation tends to produce teams that are far too large.

The next thing is that you have really got to set off on the right course. Decisions taken in the first few days of a case may be crucial. In the Kosovo case, I went to see the Pristina authorities within a couple of days, and said,

> We've got to write to the Court immediately, and demand that they allow you to take part on an equal footing with Serbia, even though the whole question might be whether or not you're a State, and in principle only States can take part. We should say that it will be contrary to natural law if they don't let you take part, so if they decide you can't take part they shouldn't hear the case.

The Kosovo authorities immediately agreed to such a letter,[8] and it seemed to have the right effect, for a couple of days later the Court made an order inviting Kosovo (or rather 'the authors of the unilateral declaration of independence') to take part.[9]

Next, it is very important to have clear lines of instruction from the client. In the case of Kosovo there was a coalition government, the President was from Rugova's party, the Prime Minister from the party of the former Kosovo Liberation Army (*UÇK*). There was talk of setting up some sort of a commission to oversee the case. So the first thing I did when I met the Kosovar leadership was to say, 'I've got to take instructions from one person, who should be the Foreign Minister.' That was swiftly agreed. In the event everone worked very well together on the case, and there was no difficulty in securing clear instructions.

Lastly, relations with the media need to be carefully handled. This is, in my view, best not done directly by the lawyers. Again, the Kosovar authorities were very sensible. The Kosovar media were very responsible too, as soon as I told them that I couldn't tell them anything they stopped asking. That wouldn't happen here.

III LEGAL ADVICE ON THE USE OF FORCE

If you compare being a practitioner in the field of international law in government with being an academic, the one big difference I would say is that in government you do not really have the luxury of saying 'on the one hand, on the other hand', and giving no steer. In this connection I shall say a word about legal advice and the use of force. At the end of the day, you need to say whether the invasion of Iraq is lawful or unlawful. But I shall not go into that as it is a matter before the Chilcot Inquiry.[10] Instead, I shall mention four practical points that government lawyers advising on the use of force are aware of but which are not often discussed.[11]

[8] Letter from the Minister of Foreign Affairs of the Republic of Kosovo, HE Mr Skender Hyseni, to the Registrar of the International Court of Justice, 15 October 2008, *Kosovo in the International Court of Justice/Kosova në Gjykatën Ndërkombëtare të Drejtësisë*, Ministry of Foreign Affairs of the Republic of Kosovo (2010), pp 17–20.

[9] For the Court's Order, see *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order of 17 October 2008, ICJ Reports 2008*, p 409. Paragraph 4 of the Order read: '*Decides* further that, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration are considered likely to be able to furnish information on the question; and *decides* therefore to invite them to make written contributions to the Court within the above time-limits'.

[10] The Inquiry's website contains a wealth of material shedding light on the relationship between legal advice and foreign policy: see www.iraqinquiry.org.uk/.

[11] See, more generally, M Wood, 'The Law on the Use of Force: Current Challenges' (2007) 11 *Singapore Year Book of International Law* 1–14.

First, it is important to distinguish between the international law rules on the use of force and rules of constitutional law determining when a government may deploy the state's armed forces or otherwise become involved in a conflict situation. For many states, though not for the United Kingdom, the crucial legal issues in this field often arise in the context of constitutional law rather than public international law as such. To the extent that it is considered, international law seems to play only an indirect or even a secondary role. Thus, for Germany and for Japan, the key issues are the limits on the use of force set out in their constitutions, which may or may not correspond to international law, as well as the role of the legislature in authorising the deployment of armed forces outside the national territory. For Ireland, Switzerland, and some other states, a key issue will be the conformity of any action (such as allowing over-flight or refueling) with constitutional or other commitments to neutrality. Even in the United States, domestic 'war powers' issues – the respective roles of the Commander-in-Chief and the Congress – loom large. Occasionally I would have bilateral discussions with other Foreign Ministry Legal Advisers to compare views on the rules of public international law on the use of force, only to find the conversation dominated by constitutional concerns.

Of course, domestic law concerns are by no means absent in the UK. What should the role of the courts be in relation to the use of force? In the *Campaign for Nuclear Disarmament v Prime Minister* case in late 2002, prior to the invasion of Iraq in March 2003, the Divisional Court was asked to interpret Security Council Resolution 1441 (2002) and the UN Charter, but declined to do so, for good reason.[12] What should the role of Parliament be? The Blair and Brown Governments engaged in a wide consultation on this and other constitutional issues. They eventually seemed to decide against legislation, but to be planning to proceed by way of a Parliamentary resolution that would introduce a presumption that Parliament would be consulted before the UK went to war (as did indeed happen before the invasion of Iraq in 2003). This idea, which raises some difficult legal and policy issues, seems to be on the back burner.

A second general point is this. It is important to bear in mind that the legal issues arise not only when a state uses force itself, but also when it aids or assists another state to use force. In the words of Article 16 of the International Law Commission's 2001 Articles on State Responsibility, 'A State which aids or assists another State in the commission of an internationally wrongful act . . . is internationally responsible for doing so'.[13] The Commission's Commentary to this Article gives the following example: 'The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State'. Given the fact of American air bases on United Kingdom territory (in the United Kingdom itself, but also in British overseas territories, in particular the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, and Diego Garcia in the British Indian Ocean Territory) this is an issue that must presumably arise with some frequency. An example from the past is the use of United Kingdom territory by the US air force to carry out the bombing raids on Tripoli and Benghazi in 1986.

[12] *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin) (17 December 2002).

[13] For doing so if (a) it does so with knowledge; and (b) the act would be unlawful if done by it. See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002); J Crawford, *State Responsibility. The General Part* (Cambridge, Cambridge University Press, 2013), pp 399–412.

A third general point is how strong the legal basis has to be before a state embarks upon the use of armed force – or assists another state to use force. This can be a crucial issue. It is an issue that is not often discussed, but it was raised squarely in the Attorney General's secret Iraq advice of 7 March 2003, now published.[14] The Attorney General said:

> 27. [. . .] I remain of the opinion that the safest legal course would be to secure the adoption of a further [Security Council] resolution to authorise the use of force. [. . .]
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> 28. Nevertheless, [. . .] I accept that a reasonable case can be made out that [Security Council] resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution. [. . .]
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> 30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 [that was an intensive bombing operation in and around Baghdad, that lasted just a few days] and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than **reasonably arguable**. But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view.
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> How strong a legal basis is required before a state resorts to armed force is, in my view, ultimately a policy question rather than one for government lawyers. But lawyers can and should advise on the risks of acting on the basis of a 'reasonable', or 'arguable' or 'reasonably arguable' case, for example the risk of domestic and international proceedings, including criminal proceedings. What is the relevance, if any, of the Kampala definition of the crime of aggression? Article 8 bis, paragraph 1 reads:
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> > 1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[15]

It is important to be clear that the definition of the crime of aggression for the purposes of the Rome Statute is not intended to have any effect on the *ius ad bellum*. This is clear from Article 10 of the Rome Statute,[16] and was repeated in an 'understanding' adopted at the Kampala Conference.[17]

A fourth general point is also little discussed: the issue of proof of the relevant facts. At least after the event, a state which has used armed force may be required to demonstrate that the facts as known to it prior to the use of force were such as to justify, as a matter of international law, the resort to force under the circumstances.[18] This can raise difficult issues where proof relies on intelligence.[19]

[14] (2006) 77 *British Year Book of International Law* 819.

[15] Article 8 *bis* of the Statute of the International Criminal Court (the Rome Statute), added by the 2010 Review Conference of the ICC held in Kampala (emphasis added).

[16] 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'

[17] RC/Res 6, Annex III, Understanding No 4.

[18] As Sir Frank Berman has explained, '[. . .] only the State itself can assess the threat it faces and how to respond. This is, however, emphatically not to say that the State's own assessment is, as it were, final and binding; nor is it to say that, just because it is self-defence, it somehow escapes the possibility of objective judgement after the event [. . .]': F Berman, 'The UN Charter and the Use of Force' (2006) 10 *Singapore Year Book of International Law* 9, 14.

[19] The same difficulty may arise when a state seeks to persuade the Security Council to act. These issues have been addressed in S Chesterman, 'Shared Secrets: Intelligence and Collective Security' (Lowy Institute Paper No 10, Lowy Institute for International Policy, 2006).

IV CONCLUSION

The task of those who advise on matters of public international law is not always straightforward, given the nature of international law and the delicate relationship between law and policy in international relations. In addition, they are often seen as having special responsibilities to the legal system in which they practice. As Kofi Annan, when still United Nations Secretary General, put it, 'Legal advisers of States and international organizations, as well as practitioners in the field of international law, are among those individuals most committed to promoting respect for international law.'[20]

[20] United Nations Office of Legal Affairs (ed), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York, United Nations, 1999), Preface ix. See also ch 8 in this volume by Matthew Windsor.