

PART 2

Comparative Perspectives



Legal Advisers

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I Scope

Legal advisers in the field of public international law play different roles. There are those who advise governments, in particular legal advisers in foreign ministries/Attorney General's offices (about whom a good deal has been written). Legal advisers within international organizations are an increasingly important group. It should also be recalled that the legal departments of specialized bodies, such as the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies often play a central role. And that there is also a growing number of legal advisers to non-governmental organizations and interest groups in the field of public international law, such as Amnesty International (AI) and the Coalition for the International Criminal Court. Finally, there is an increasing number of private practitioners working in the field: many bodies seek outside legal advice on questions of public international law, especially where litigation arises, as it increasingly does nowadays.

The present entry concentrates on legal advisers within foreign ministries/Attorney General's offices and international organizations, though much that is said applies, at least in some measure, to all those advising on public international law. It should, however, be noted that the position and role of foreign ministry and other international law advisers varies from State to State and organization to organization. Generalizations can be misleading.

II Organization of Foreign Ministry/Attorney General Legal Advisers

States have different traditions in the organization and functions of their government legal advisers in the field of public international law. At risk of

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oversimplification, it may be said that there are three principal models. Some combine elements of each.

First, there is the system, as in the United Kingdom and the United States of America, where the lawyers in the office of the legal adviser at the foreign ministry are all professional lawyers, whose career is wholly or largely spent within the legal office rather than on regular diplomatic assignments. This is not to say that legal advisers do not sometimes transfer to the regular diplomatic service; even if they do not, they do from time to time have a policy role, especially when on posting to a mission to an international organization or as head or member of a delegation to an international conference.

Second, there is the system, as in Germany, where the legal adviser's office within the foreign ministry consists largely, if not entirely, of regular diplomats with a legal background or even professional legal training. These first two systems may be combined, as in France, where some members of the *Quai's* *Direction des Affaires Juridiques* are regular diplomats, for whom a period in the legal office is more or less like any other posting in Paris, and some are recruited specifically as legal advisers, for example, on secondment from the judiciary.

Third, in some countries the foreign ministry receives legal advice from outside sources, typically from an Attorney General's Office/Ministry of Justice. This is the position, for example, in Cyprus, Malaysia, Malta and Singapore, and used to be, and to some extent remains, the Australian system.¹

The Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe (COE) has on its website a useful database describing the position in each of its Member and Observer States.

Foreign ministry legal advisers may aspire to advise all departments of government on questions of public international law, but with the enormous growth in the field this is becoming increasingly impractical. In specialized areas of the law, each department is likely to have its own experts. For example, international trade law may be in the hands of a ministry of trade, or even in the hands of a regional organization, such as the EU. There is a risk of fragmentation. The third model described above may have advantages in this regard, since an Attorney General's Office has responsibilities across government, though a disadvantage is that those based in such offices are likely to have less diplomatic experience.

issues have been amended to fit the style of the present publication. No substantive changes have been made. The bibliography has been omitted.

- 1 On the particular role of the UK Attorney General, who is the most senior legal adviser to the government, see UK House of Commons Report of a Committee of Privy Counsellors 'Review of Intelligence on Weapons of Mass Destruction' (14 July 2004) HC 898.

III Various Functions of Foreign Ministry Legal Advisers

A *Advising on International Law*

The term 'foreign ministry legal advisers' will be used hereafter interchangeably with 'public international law adviser' and include other Government legal advisers specializing in public international law. It is often remarked that foreign ministry legal advisers have two main tasks: to give advice to the government while policy is being developed and before decisions are taken; and to act as advocate for the government's position once decisions have been taken. In addition, as described below, they may perform important roles within the international legal system itself. A former Legal Adviser to the UK Foreign and Commonwealth Office has written that:

[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.²

For a public international law adviser to seek to 'make' his or her State comply with international law is no simple task. The State, for these purposes, includes government at all levels, central, regional and local. A legal adviser's role beyond central government is likely to be indirect at best. The acts of the legislature and the courts are likewise those of the State for the purposes of State responsibility, but here the legal adviser's role, if any, will be even more indirect.

2 FD Berman, 'The Role of the International Lawyer in the Making of Foreign Policy' in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (BIICL 2000) 3–17.

It must also be the role of the legal adviser to seek to ensure that international organizations of which his or her State is a member comply with international law. It is also important to seek to ensure that those with whom the State is acting also comply with international law, at least to the extent that the State may bear international responsibility under the law on State responsibility – eg where it may be aiding and assisting in the commission of an internationally wrongful act. Important though this is, it may not always be practical, particularly when States are acting together within a military coalition or alliance.

An important question in practice is whether foreign ministry legal advisers wait to be asked for legal advice; or whether they take the initiative and offer it ('aggressive legal advising').³ The latter is surely essential if legal advisers are to carry out their responsibilities effectively.

B *Advising on Practice*

The role of foreign ministry legal advisers is sometimes described as advising on 'law and practice'. The reference to practice reflects the fact that, at least under the first of the models described above, the legal advisers often act as a collective memory within the foreign ministry, including (but not confined to) what might be termed the legal policy of the State, for example as to the rules on the use of force. They tend to have been dealing with certain matters longer than most, such as the law of the sea and immunities. And, particularly in a litigious age – and rapid changes in diplomatic personnel and perpetual re-organization of ministries – they often find themselves dealing with issues long after their policy colleagues have moved on. Such a role is less likely – though not impossible – under the other models.

C **Functions Outside the Area of International Law**

Foreign ministry legal advisers often deal with legal matters other than public international law, such as all foreign relations law affecting the government. They may also, in the case of some States, have to cover the manifold legal issues arising in connection with the State's overseas territories. And areas of domestic law, such as freedom of information, increasingly impinge upon their work.

3 SM Schwebel, 'Remarks on the Role of the Legal Adviser of the US State Department' (1991) 2 *EJIL* 132–35, 133.

Foreign ministry legal advisers are frequently also responsible for certain policy areas with a high legal content, such as treaty matters, consular affairs, polar regions, and law of the sea. In this event, they need to take special care to preserve the integrity of their legal advice, notwithstanding their policy responsibilities.⁴

D Special Aspects of the Role of Legal Advisers

The role of any lawyer depends in large measure on the nature of the legal system in which he or she is operating. The special nature of public international law, and of the international legal system, suggests that the role of the public international law adviser will itself be somewhat special. As has been written:

[I]n reaching a view in difficult cases, the legal adviser should reflect a responsibility to the international legal system as a whole, if that system is to be sustainable: this is perhaps a particular function of the international law adviser, and results in part from the horizontal nature of the system (without legislature and with limited recourse to judicial settlement), and in part from the open texture of many of its rules.⁵

Some might make more far-reaching claims:

International lawyers are not the servants of governments but of international society. As lawyers they are servants not of power but of justice. It is thus the duty of international lawyers, even lawyers employed by governments, to consider not merely what is in the interest of this or that state but what is in the long-term interest of international society.⁶

Whether or not there is such a “duty”, a public international law adviser may well regard, and be expected by the client to regard, support for the international legal system as an important part of his or her functions. Given the specificities of the system (see below), 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,

4 Berman, (n 2), 9–12.

5 E Wilmschurst, ‘Disciplining the Discipline: Roles and Responsibilities of International Lawyers: Remarks’ (2006) 100 ASIL PROC 449–50.

6 P Allott, ‘The International Lawyer in Government Service: Ontology and Deontology’ (2005) 23 Wisconsin International Law Journal 13–23.

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.

The international legal system has some special features:

- ‘Customary international law develops through State practice, which includes “what foreign ministries do and what foreign ministry legal advisers advise their ministers it is lawful for them to do”.⁷ This places a special onus on the foreign ministry legal adviser’⁸
- ‘There is, for the most part, no court or tribunal with compulsory jurisdiction in the international legal system. This remains so in most cases, despite the “proliferation” of international courts and tribunals.’⁹ That does not mean, however, that issues of accountability do not arise, including the personal accountability of government legal advisers.¹⁰
- Public international law may be less clear than domestic law. This is especially true of customary international law.
- ‘There is no legislature in the international legal system to develop or correct the law if it is inadequate or unsatisfactory’.¹¹

These special features may impact on the role of the legal adviser in various ways. First, as explained above, the legal adviser has a special role of ‘making’ his or her government comply with the law:

[G]overnment attorneys involved in international law issues have special responsibilities that go beyond those of private attorneys.... [I]n practice, there is little likelihood of impartial review of government lawyers’ advice on international law questions. Consequently, they have a particular duty to formulate such opinions with care, integrity and in good faith. This means, in particular, that there are limits to the legal arguments that government lawyers can ethically offer. Where government lawyers exceed the bounds of honest and responsible argument – functioning

7 AD Watts, ‘International Law and International Relations: United Kingdom Practice’ (1991) 2 *EJIL* 157–164, 164.

8 Council of Europe, Committee of Legal Advisers on Public International Law ‘Organisation and Functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs’ (CAHDI (2006) 27) 2.

9 *Ibid.*, 2.

10 See Wilmschurst, (n 5), 449–50; D Kaye, ‘The Legal Bureaucracy and the Law of War’ (2006) 38 *George Washington Journal of International Law* 589–98, 597’.

11 CAHDI, (n 8), 2.

purely as apologists or 'hired guns' ... they betray not only their responsibilities but their vocation.¹²

The absence of a court may be particularly felt where governments may be tempted to stretch the law in what they see as essential national interests. Giving advice on the international law on the use of force may be particularly delicate.¹³

Second, while the primary obligation of a legal adviser is to the government (the client), the government is likely to expect the legal adviser to show a lead in supporting, and ensuring proper cooperation with, international legal institutions. This often requires a long-term perspective. Support should include ensuring the nomination of good candidates for international legal posts, and working for the election of good candidates (of whatever nationality), though this may seem a counsel of perfection.¹⁴ Support also involves taking international judicial proceedings seriously: 'foreign ministry legal advisers often act as Agents' in international proceedings, 'coordinating positions across government and within the government's legal team, in which capacity they owe a duty to the international tribunal as well as to their State'.¹⁵ 'There is also an important role in ensuring adequate financial support' for international courts and tribunals, appropriate visits to them, respect for their judgments and orders (even when the government does not like them); and ensuring that appropriate input is made to the work of such bodies as the International Law Commission (ILC).¹⁶

Third, 'there is a role in developing public international law and its institutions in a healthy direction', including through 'active participation in conferences in which treaties are drafted, reviewed or implemented, such as the law of the sea conferences and the Antarctic Treaty Consultative Meetings'.

Given the nature of customary international law, an international lawyer in government service has some responsibility in relation to the development of international law. International law must be deemed, like all law, to be in the common interest, an interest that includes the interest of the State that the international lawyer is paid to serve. A government's actions may often

12 RB Bilder, 'The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs' (1962) 56 *AJIL* 633–84.

13 TA Bailey, 'Presidential Plenary Panel: An Exchange with Former Legal Advisors of the US Department of State' (2004) 98 *ASIL PROC* 131–34, 133.

14 CAHDI, (n 8), 3.

15 *Ibid.*

16 *Ibid.*

contribute to the development of international law, and an in-house government lawyer should 'have a view of what would be the desirable direction for the law to develop'.¹⁷

A related point is that States and international organizations are expected to act consistently, and what they argue one day may be argued against them the next. When taking a particular position, a government international lawyer must always bear in mind the possibility that the government may well one day wish they had not said it, or said it somewhat differently.

Fourthly, 'foreign ministry legal advisers tend to work together within the international legal community', both bilaterally and in multilateral settings.¹⁸ Their role is more 'cooperative than is sometimes appreciated. International life is not only about disputes'.¹⁹ It is also about negotiation, bilateral, regional and multilateral, and other forms of cooperation. One should not underestimate the importance of regular contacts among legal advisers, often lasting over many years. There is, in a real sense, a community of government international legal advisers.

Within the European Union (EU), the Comité Juridique (COJUR), which meets at least four times a year, brings together the legal advisers of the 27 Member States, together with the Commission and Council Legal Services. They hold regular discussions on questions of public international law, whether arising for the EU or more generally.

The COE's Committee of Legal Advisers on Public International Law (CAHDI) consists of the legal advisers from the 47 Member States, plus a number of observers, including Canada, Japan, Mexico and the US. It meets twice a year, and most participants are represented by their most senior government legal advisers in the field of public international law. Other regional organizations have similar bodies, e.g. the Asian-African Legal Consultative Organization (AALCO). The Inter-American Juridical Committee of the Organization of American States (OAS) and the African Union Commission on International Law (AUCIL), on the other hand, consist of elected individual members; they are more like the ILC.

At the United Nations (UN), during the 'International Law Week', which takes place at the end of October each year, there are informal meetings of legal advisers from all over the world in the margins of the Sixth (Legal) Committee of the UN General Assembly.

17 FD Berman, 'What Do We Expect of Lawyers in Armed Conflict?' (2006) 38 *George Washington Journal of International Law* 627–636, 631.

18 CAHDI, (n 8), 4.

19 Ibid.

Fifth, foreign ministry legal advisers often work closely with those outside government, such as the International Committee of the Red Cross and civil society, as well as within learned institutions such as the Institute of International Law, the International Law Association, the European Society for International Law, the American Society of International Law, and other international law societies. They also often have close contacts with the ILC, of which some are indeed members. Contacts with the academic world, and with lawyers in private practice, are important.

Sixth, foreign ministry legal advisers often contribute to knowledge and understanding of international law by writing articles and books, and lecturing. Sir Gerald Fitzmaurice, 'it has been said, "regarded being a good scholar as part of the job of a good legal adviser"',²⁰

Finally, 'it should be noted that within the national legal system a lawyer is bound by clear – and enforceable – rules of professional conduct'. Codes of professional conduct have been adopted for counsel appearing before international criminal courts. But this apart, '[l]awyers operating in the field of public international law, including before international courts and tribunals, are' at present 'subject to no such formal code of ethics, except to the extent that national rules may be applicable', though there have been proposals in this regard.²¹

IV Legal Advisers and International Humanitarian Law

The importance of legal advice on international humanitarian law is obvious. Indeed, Article 82 of Additional Protocol I (1977) requires the parties to the Protocol at all times, and the parties to the conflict in times of armed conflict, to ensure that legal advisers in international armed conflict are available, when necessary, to advise military commanders at the appropriate level on the application of the Geneva Conventions I–IV (1949) and the Protocol and on the appropriate instruction to be given to the armed forces on this subject. In addition, the role of legal advisers in the central government – whether in the defence ministry, foreign ministry, or Attorney General's Office – is vital in ensuring the necessary legal oversight of such issues as targeted killing, and the proper treatment of detainees.²² The role of lawyers in relation to

20 R Jennings, 'Gerald Gray Fitzmaurice' (1984) LV BYIL 1

21 CAHDI, (n 8); see also Berman, (n 17).

22 For some thoughts on the position in the UK and the US see T Boyle 'Proportionality in Decision Making and Combat Actions' in M Hector and M Jellema (eds) *Protecting*

the law of armed conflict extends beyond the battlefield itself to such matters as the negotiation of treaties, the writing of military manuals, and the instruction of the armed forces in peacetime.

V Legal Advisers in the European Union, the United Nations and other International Organizations

The position of legal advisers within international organizations varies greatly depending on the powers and functions, and practices, of the particular organization. The position is also likely to vary over time, depending in part on how particular legal advisers see their role. Some legal advisers have been particularly influential. An example is Wilfred Jenks at the International Labour Organization (ILO). Generalizations are not possible.²³

There are a considerable number of lawyers within each of the EU's major institutions, namely the Council, the Commission, the European Parliament, the Court of Justice and General Court, and the European Central Bank. For the most part the work of legal advisers within the EU is in the field of EU law rather than public international law as such. But as the EU itself is increasingly an actor in international relations, and not only in such traditional fields as trade law (for example, World Trade Organization dispute settlement), there is now more than ever a need to have expertise not only in EU law but also in public international law, for matters such as sanctions, peace-keeping and international humanitarian law. Both the Council and the Commission Legal Service operate a specialized unit dealing with the EU's external relations whose members are called upon to give advice on international law matters and to represent the EU as agents in international negotiations and litigation.

The Legal Counsel to the United Nations has the rank of Under Secretary-General, and is one of the most senior officials in the organization. He or she is the head of the Office of Legal Affairs, which is the central legal service of the Organization.²⁴ Given the central political role of the UN within the common

Civilians in 21st Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice (Wolf Legal Productions Nijmegen 2001) 33–42. Kaye, (n 10).

23 See HCL Merillat, *Legal Advisers and International Organizations* (Oceana Publications 1966). For studies of particular aspects of the role of legal advisers within international organizations, see O Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat' (1948) 25 BYIL 91–132 and R Zacklin, *The United Nations Secretariat and the Use of Force in a Unipolar World* (Cambridge University Press 2008).

24 Secretary-General's Bulletin (1 August 2008) Organisation of the Office of Legal Affairs' (2008) (UN Doc ST/SGB/2008/13).

system of the UN and specialized agencies, the UN Office of Legal Affairs tends to exercise a co-ordinating function among the legal advisers of international organizations regarding questions of a constitutional nature and issues relating to privileges and immunities. In recent years this co-ordination function has been systematized and annual meetings of the legal advisers within the common system are held to address common problems. In addition, in an effort to avoid fragmentation of legal advice, the UN Legal Counsel now organizes regular meetings of the legal officers of the UN Funds and Programmes such as the United Nations Children's Fund (UNICEF), United Nations Development Programme (UNDP), and United Nations High Commissioner for Refugees as well as the legal advisers of UN peacekeeping missions. Selected legal opinions of the UN Secretariat are published annually in the UN Juridical Yearbook.

VI 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 UN Secretary-General, wrote:

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.²⁵

25 United Nations Office of Legal Affairs (ed), K. Annan in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations New York 1999), ix.