

open to such a degree that any gross breach of international law immediately causes great irritation in every civilized country.⁷ Yet, Treitschke was careful to add a crucial caveat: 'It is mere mockery, however, to apply these principles [of international law] to warfare against savages. A Negro tribe must be punished by the burning of their villages, for it is the only kind of example which will avail. If the German Empire has abandoned this principle to-day it has done so out of disgraceful weakness, and for no reasons of humanity or high respect for law.'⁸

It was precisely this underlying logic of civilization and barbarism that broke down in World War II. The Holocaust was only the most egregious—and to the minds of most of the Allies in the immediate postwar years, not the most important—example. The Nuremberg trials were not only part of a broader effort by the Americans to reconfigure international society along multilateral, 'New Deal' lines; they were an effort to reconstitute civilization, with at least an implicit eye on the threat that European barbarism posed for European imperialism.⁹ The coming age of decolonization would, of course, bring this project to ruin. But no one could yet know that at Nuremberg.

Thus the origins and the legacy of the Nuremberg Military Tribunals need to be understood, not only with respect to the Cold War, but also in relation to the coming of the 'American century' and the last-gasp of the age of European imperialism. Kevin Heller's impressive book gives us the tools with which to begin such a historical contextualization.

DEVIN O. PENDAS*

Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser by MICHAEL P SCHARF and PAUL R WILLIAMS [Cambridge University Press, Cambridge, 2010, 332pp, ISBN 978-0521167703, £18.99 (p/bk)]

To (mis)quote Robert H Jackson, international law is practised by men, not by abstract entities. It is to these men whom the authors, both former Attorney-Advisers in the United States Department of State, have turned in producing the present book. By reviewing the role of the State Department Legal Adviser and the place of international law in the making of foreign policy decisions, Scharf and Williams have sought to 'shed some light into this black box of decision making'. They also endeavour to bring to life the inner workings of this office through consulting the individual personalities who have held this post. All ten surviving former State Department Legal Advisers met with the authors and have contributed to the book's creation. Ranging from the Carter administration's Herbert J Hansell, via John. B Bellinger (the Bush administration 2005–2009) to the present incumbent under President Obama, Harold. H Koh (who writes a foreword), 30 years of first-hand perspective is thus provided.

The book begins by providing a brief history of the Office of the Legal Adviser. Known and referred to only as 'L', the office was created under statute by the United States Congress in 1931. The Legal Adviser sits at the apex of an office, now staffed by over 170 Attorney Advisers, the responsibility of which is to provide legal advice to the Department of State, on both domestic and international issues. Beginning with the presidency of Franklin D. Roosevelt, 22 men (but as yet no women) have held the position of Legal Adviser.

Chapter 3 of the book ('The Path to L') then details the personal journeys of each man to their eventual appointment as Legal Adviser. Two overall impressions from that chapter strongly stand out. First, while all of the candidates respected the work of L, a number did not necessarily aspire

⁷ Heinrich von Treitschke, *Politics* edited by Hans Kohn (Harcourt, Brace & World, New York, 1963 [1898]) 300–301.

⁸ *ibid* 306.

⁹ Christiane Wilke, 'Reconsecrating the Temple of Justice: Invocations of Civilization, Humanity, and Justice at the Nuremberg Justice Trial', (2009) 24 *CanJL&Society* 181–201.

* Boston College. E-mail: pendas@bc.edu.

to, or expect the appointment. Indeed, Conrad K Harper, Legal Adviser during the first term of the Clinton administration (1993–1996), actually turned the job down initially, before being asked to reconsider (p 29). Secondly, a number of Legal Advisers took the position without previously possessing any significant public international law experience. For example, Roberts B. Owen, Legal Adviser during the Carter Administration (1979–1981), explains: ‘I knew the post to be one of the world’s most interesting legal jobs . . . but I also felt compelled to acknowledge at the outset that I was hardly a scholar in the field of international law’ (p. 21).

Chapters 4 through to 13 detail the respective experiences of each Legal Adviser in chronological order, ranging from the 1979 Iranian hostages crisis to the implementation of the International Court of Justice’s 2004 *Avena* decision. Chapters 14 and 15 contain separate Roundtable discussions. The former brings together the State Department Legal Advisers, the latter a group discussion among foreign legal advisers (including, for example, Sir Franklin Berman, former Legal Adviser to the British Foreign and Commonwealth Office).

The book concludes by providing answers to five primary questions posed by the authors to frame the discussions. First, the former Legal Advisers were asked whether they considered international law to be binding. Second, they were asked whether the rules of international law were clear enough in a particular crisis to shape policy options. Third, the Legal Advisers were asked whether they believed they possessed a duty to oppose suggested actions that breached international law. Fourth, they were asked whether the position adopted by a Legal Adviser was seen as influential in cases where he advised against a course of action on the basis that it breached international law. Fifth and finally, Legal Advisers were asked to provide their view on whether international law was a help or hindrance to their government’s interests in times of crisis.

All of those Legal Advisers consulted regarded international law as binding upon their government but agreed that the rules of international law were often vague and therefore open to interpretation. Harold H. Koh also regarded the role as requiring advisers to act as the government’s conscience, not just as its legal counsellor and to therefore recommend avoidance of the ‘awful, even if it may be lawful’ (xiv, Foreword). Put another way, that the duty of the Legal Adviser extends far beyond the immediate interests of their ‘client’ and whether an action is lawful, to the interests of the wider society as a whole and to carefully consider how the proposed action may be publicly perceived and defended, if necessary. In the words of Michael J Matheson, Legal Adviser to George H. W. Bush, ‘a government lawyer has a duty to the entire body of the public even though he obviously has direct working relationships with a hierarchy in his own agency’ (p 153).

In terms of the Legal Adviser’s influence on decision-making, perspectives varied depending on the strength of the legal position and the ability to make his voice heard above others. Indeed, on some crucial occasions ‘L’ was deliberately removed from the decision-making process altogether. This occurred most notably during the 1984 mining of Nicaraguan harbours, and more recently, regarding the treatment of detainees in the so-called ‘war on terror’. As Davis R Robinson, Legal Adviser to the Reagan administration (1981–1985), remarks: ‘If the U.S. government is to realise the full benefit of the potential contribution of its international lawyers, the lawyers need to participate from the beginning of a take-off in policy and not just in a crash landing whenever things go wrong.’ (p 55) Finally, the Legal Advisers were united in their view of international law as a help, not a hindrance, in fulfilling foreign policy goals, citing, for example, the innovative creation of the International Criminal Tribunal for the Former Yugoslavia through Security Council Resolution 827, rather than by conventional and more cumbersome treaty negotiation.

Filled with ‘lessons learned in the crucible’ (Foreword, xvii), this book is a fascinating insight into the role and experiences of several generations of the State Department Legal Adviser. Whilst the perspective is perhaps US-centric, the valuable lessons contained at the heart of the book are of universal application for policymakers and international lawyers alike.

CHRIS STEPHEN*

* Associate at Volterra Fietta. Email: chris_stephen@hotmail.co.uk