

# THE ROLE OF AN INTERNATIONAL LEGAL ADVISER TO GOVERNMENT

**Abstract** At a time when globalization is driving greater connections between governments, this article examines a key facilitator of such connections, namely the international legal adviser. It elaborates on their role, how they are selected, how their offices are structured and what makes a good international legal adviser.

Key words: Department of Foreign Affairs, government law, international law, legal adviser, machinery of government, Ministry of Foreign Affairs, Office of the Legal Adviser.

## I. INTRODUCTION

The role of the international legal adviser to government is a role that has received sporadic attention in the literature over the years.<sup>1</sup> The topic has come into focus more recently with the release of a number of legal advices concerning interrogation methods in the United States<sup>2</sup> and the Chilcot inquiry<sup>3</sup> in the United Kingdom. This article takes a particular look at one type of legal adviser, namely the international legal adviser. That role has become more in demand as globalization drives greater connections between governments as they increasingly work together to solve international problems. At its simplest, the role of the international legal adviser might be characterized as providing advice on matters of international law.

This article provides a comparative look at the role of the international legal adviser as well as how their work and offices are structured and does so in six parts. Part II examines what is the function an international legal adviser; in particular it contrasts the 'conventional' view with two more policy-focussed views. Part III sets out the role that the international legal adviser typically plays in practice. Part IV examines what makes a good legal adviser and Part V examines what makes a well-functioning Office of the

<sup>1</sup> See eg, HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceana 1964); HCL Merillat (ed), *Legal Advisers and International Organizations* (Oceana 1966); United Nations, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (UN 1999); C Wickremasinghe (ed), *The International Lawyer as Practitioner* (BIICL 2000).

<sup>2</sup> See in particular US Department of Justice, *Office of Professional Responsibility Report: Investigating into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (2009) <<http://www.fas.org/irp/agency/doj/opr-1stdraft.pdf>>.

<sup>3</sup> The Iraq Inquiry <<http://www.iraqinquiry.org.uk/>> accessed 26 February 2012 (presently not expected to report until late 2013).

Legal Adviser. Part VI discusses where to locate the Office of the Legal Adviser. Part VII examines how these different aspects operate in practice by looking at the United States, the United Kingdom and Canada as examples. Although the focus is on such Western countries it is hoped that many of the aspects canvassed in the article have a broader application.

## II. WHAT IS THE FUNCTION OF AN INTERNATIONAL LEGAL ADVISER?

As they say in architecture, to assess the appropriate structure for an entity, you first need to assess its function.<sup>4</sup> Not surprisingly, there are a range of views on what the function of an international legal adviser is. To some extent the question will be determined by where one sits more broadly in the debate about the function of the law and function of lawyers in it. To a positivist, law is separate from morality. Austin perhaps best summed it up as follows:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.<sup>5</sup>

This theory is consistent with what is perhaps best termed the ‘conventional legal’ view; that the function of an international lawyer is to provide advice exactly as they assess the state of the law. Law and morality are different entities; a lawyer should provide advice on how they see the law, without being swayed in their response by questions of policy or morality. In short the international legal adviser should provide ‘independent advice’.<sup>6</sup> To cite from Steve Bradbury’s instruction to officers in the Office of Legal Counsel (OLC) in the United States, ‘OLC’s interest is simply to provide the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not.’<sup>7</sup>

Not surprisingly, not everyone shares the same view. One alternative view is that there is a duty on the international lawyer to work to ensure an outcome consistent with international law. As put by a former legal adviser in the Foreign and Commonwealth Office in the United Kingdom, Sir Franklin Berman, QC:

In the writer’s view the 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

<sup>4</sup> Adapted from L Sullivan, ‘The Tall Office Building Artistically Considered’, *Lippincott’s Monthly Magazine*, March 1896, 408.

<sup>5</sup> John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Robert Campbell (ed), 4th edn, OUP 1973) 220, note.

<sup>6</sup> J Goldsmith cited in D Margolis, *Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of the Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists* (2010) 18.

<sup>7</sup> SG Bradbury, ‘Memorandum for Attorneys of the Office: Re: Best Practices for OLC Opinions 16 May 2005’ <<http://www.fas.org/irp/agency/doj/olc/best-practices.pdf>>. See also DJ Barron, ‘Memorandum for Attorneys of the Office: Re: Best Practices for OLC Legal Advice and Written Opinions 16 July 2010’ <<http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>>.

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 the 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 legal 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.<sup>8</sup>

Sir Frank's view is that the function of an international legal adviser is not just to make decision makers aware of the requirements of international law, a view that many would subscribe to,<sup>9</sup> but to go further and try to bring about consistency between international law and policy.

In making the argument Sir Frank makes reference to the Ministerial Code in the United Kingdom which refers to 'the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life'.<sup>10</sup> Sir Frank also makes reference to the value in consistency between promoting the rule of law and a state's own compliance with international law.

Ensuring consistency with international law is indeed a valuable policy consideration. However, ensuring consistency with international law may be just one of many considerations to take into account.<sup>11</sup> Democratic theory favours decisions being made by elected persons; rather than their choices being obscured by legal advice which portrays the choices that are inconsistent with international law as being more difficult to take than is objectively the case.

Additionally, it is not clear why a legal adviser would think themselves in a better place to decide what is the best outcome.<sup>12</sup> For a start it is not likely that the international legal adviser will be in possession of all of the relevant facts that a government needs to consider. Rather they would generally have been asked about a specific aspect of the problem, namely the legal aspect. Further it is not clear why international law should be any different to any other branch of law. Should commercial lawyers similarly try to interpret the law consistently with market principles? That is not to say that the legal adviser can not have a personal view of a policy being pursued, or that the legal adviser should not express it. However, it is to say that the legal adviser advice should clearly distinguish their legal advice from their policy views.

<sup>8</sup> Sir F Berman, 'The Role of the International Lawyer in the Making of Foreign Policy' in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (BIICL 2000) 3–4.

<sup>9</sup> H Corell, 'Cooperation Among Legal Advisers on Public International Law' in United Nations, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (UN 1999) 97, 360.

<sup>10</sup> Cabinet Office Ministerial Code (2010) <<http://www.cabinetoffice.gov.uk/resource-library/ministerial-code>>.

<sup>11</sup> The rescue of nationals from conflict zones, whether or not with the consent of the government on whose territory they are located, might be one such example.

<sup>12</sup> T-H Cheng, *When International Law Works: Realistic Idealism After 9/11 and the Global Recession* (OUP 2011) 222–3.

The second alternative view is that the legal adviser should support the government of the day by writing advices favourable to their policy objectives; that the function of the legal adviser should be less in providing advice and more in offering justifications for the policies of the government of the day. One reason for shaping advice to comply with the policy objectives of the government might be so as to appear to be helpful by generally agreeing with the action proposed. This might avoid the legal adviser being seen in the role that many perceive of lawyers—as ‘no people’. As the Prime Minister of the United Kingdom at the time, Sir Anthony Eden, is reported to have said at the time of considering whether to intervene in the Suez Crisis: ‘The lawyers are always against our doing anything. For God’s sake keep them out of it.’<sup>13</sup> However, a good adviser has never been one willing to go along with a cause of action that they believe is ill-advised. Even where the answer is likely to be a definitive ‘no’, a good lawyer will look beyond the specific question to see whether there are any other legal options to achieve the same or at least a similar end.<sup>14</sup>

A further reason against shaping legal advice to comply with policy is that there is always the chance that it will be tested in one of the myriad of different international courts or arbitral tribunals or indeed in a domestic court. The advice, or action flowing from such advice, is also likely to be open to more general scrutiny, including scrutiny from the media and the academic community as well as scrutiny from the lawyers representing other governments.<sup>15</sup> Legal advisers can also find themselves the subject of disciplinary proceedings<sup>16</sup> or even possibly charged for complicity in crimes committed on the basis of such advice.<sup>17</sup>

Advocating for a policy role for lawyers may also result from confusion between internal and external advice. Whilst thankfully more the exception than the rule, there are times in the life of any legal adviser where they are likely to find themselves having to externally defend a position that they have advised against internally. For example, the legal adviser may have advised that the taking of some action would be likely to be held to breach international law but for other reasons their government has decided to proceed anyhow. This may go before an international court or arbitral body or may be raised by other governments in which case the legal adviser is then likely to find themselves defending such an action. However, performing such a role externally does not mean the legal adviser should not provide their actual view internally. Indeed to advise what one thinks that others want to hear undermines one’s own credibility, that of the profession, and the government that one serves.<sup>18</sup>

<sup>13</sup> R Jennings, ‘Introduction’ in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (BIICL 2000) xxiv.

<sup>14</sup> See JG Lammers, ‘The Role of the Legal Adviser of the Ministry of Foreign Affairs: The Dutch Approach and Experience’ (2009) 18 *TulJIntl&CompL* 187; W Riphagen, ‘The Netherlands’ in HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceania 1964) 83; *Principles to Guide the Office of Legal Counsel 21 December 2004* <[http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf)>.

<sup>15</sup> Corell (n 9) 110.

<sup>16</sup> See Department of Justice (n 2).

<sup>17</sup> See eg, P Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (Allen Lane 2008) esp 233–45.

<sup>18</sup> P Allott, ‘The International Lawyer in Government Service: Ontology and Deontology’ (2005) 23(1) *WisIntlLJ* 17–18. See also J Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (Norton 2007) 228–31.

Some may argue that to avoid such conflicts and maintain their personal integrity the lawyer should recuse themselves from arguing externally any view that they would not personally support. However, it would quickly become obvious what positions the legal adviser supported—or did not—and the question would remain about who then would put the view before the international court, tribunal or other entity. It is not clear why an international lawyer should be any different from a lawyer acting in domestic matters and only take the cases with which they personally agree.<sup>19</sup>

As argued by a number of former members of the Office of Legal Counsel (OLC) in the United States:

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.<sup>20</sup>

However, there does seem significant value in the argument that overlaying the role of advocate will diminish the credibility of the office.<sup>21</sup> That is obviously going to be a judgment call but if the legal adviser struggles to defend weakly based arguments both the credibility of the legal adviser and that of their government will be called into account.

### III. WHAT DOES THE ROLE OF AN INTERNATIONAL LEGAL ADVISER ENCOMPASS?

From the function of the legal adviser, as providing advice on matters of international law, it becomes apparent that there are a number of areas in which such advice is likely to be required. These seem primarily:

- legal relations between countries;
- negotiation with other countries;
- resolving international disagreements;
- advice on the implementation of international law into domestic law;
- advocacy before international fora;
- advice on the domestic laws of foreign countries; and
- shaping the development of international law.

<sup>19</sup> See H Corell, 'The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association' (1991) 85 AJIL 362–3.

<sup>20</sup> WE Dellinger et al, *Principles to Guide the Office of Legal Counsel, December 21 2004* <[http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf)>.

<sup>21</sup> DA Strauss, 'The Solicitor General and the Interests of the United States' (1998) 61 *Law&ContempProbs* 165.

*A. Legal Relations between Countries*

First and foremost the role of a legal adviser will include the provision of advice on legal relations between countries. The questions that arise can range widely but some of the principal areas in which they arise include:

- the rights and privileges of diplomats;
- the delimitation of boundaries, including seabed boundaries;
- the utilization of shared resources, from oil and gas fields, to migratory fish stocks, to transboundary pollution and climate change; and
- barriers to trade between nations, including border control measures and product standards.

*B. Negotiation with Other Countries*

Armed with advice on these matters, countries need to engage in a process of formalizing their understandings with other countries. Accordingly, a key part of the role of the legal adviser involves negotiation with other countries to formalize agreements and understandings to reflect these views. The skills of a legal adviser will usually be required in crafting such agreements or understandings. Lawyers also tend to have skills in language and an ability to find words and expressions to bridge differences. Philip Allott writes that one of the ‘special arts’ of international lawyers is ‘the drafting of the instrument known as a treaty, in which disagreement and misunderstandings and concealed intentions are gathered together in verbal formulas upon which all contracting parties are said to “have agreed”’.<sup>22</sup>

*C. Resolving International Disagreements*

Legal advice is also often required when other countries have a different understanding of what are their legal obligations. For example, there may be differences in view about how to interpret an ancient boundary map<sup>23</sup> or matters may have changed, such as where a river serving as a boundary diverts course.<sup>24</sup> The international legal adviser will be called upon to advise on the international law concerning these obligations and most often to either lead or support negotiations with the other state in resolving them.

*D. Advice on Implementation into Domestic Law*

Advice will also be required on how to implement international agreements into domestic law. In some countries this is a matter of drafting domestic legislation to reflect these new agreements or ensuring that the existing legal framework is already

<sup>22</sup> Allott (n 18) 19.

<sup>23</sup> See eg. *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Reports 1962, 6.

<sup>24</sup> See eg. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* ICJ Reports 1992, 351 and *Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* ICJ Reports 2003, 392.

compatible with them. This involves working with the legislative drafters to provide advice on the relevant international obligations and how they are translated into domestic law, the latter of which tends to be more precise than the often lofty aspirations in international agreements.<sup>25</sup>

For countries where there is direct incorporation—where international law is part of domestic law—there is still often work to be done to ensure that the scope of the international legal obligations are correctly translated into domestic law. In particular, many countries have a tradition of treating some obligations as directly applicable and others not. For example, in the United States only treaties that are sufficiently specific to be ‘self-executing’ can be directly incorporated into domestic law.<sup>26</sup>

Aside from the legislative process, international law can be an influence in the jurisprudence of domestic courts. Where there is ambiguity in the law some courts will favour consistency with international law and others will borrow principles from international law to assist their analysis of domestic law.<sup>27</sup> For example, in the landmark Australian decision of *Mabo v Queensland*,<sup>28</sup> Justice Brennan (as he was then was) stated:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.

### *E. Advocacy before International and Domestic Fora*

As the interpretations that governments adopt of international law may be contested, there is also a myriad of international fora where legal advisers can find themselves either taking action against another government or defending the interpretation of their own government. These fora include the International Court of Justice as well as the dispute panels and Appellate Body of the World Trade Organization. There is also the International Tribunal on the Law of the Sea and a range of claims tribunals. There is similarly quite a volume of investor-state arbitration claims brought under investment agreements, which provide corporations with an avenue to bring claims directly against foreign countries.<sup>29</sup> Countries also have a range of reporting requirements including to international human rights bodies.<sup>30</sup> The views taken on the implementation of international law into domestic law by the legal adviser may also be contested in domestic courts, particularly where international law is directly incorporated into domestic law.

<sup>25</sup> See eg, Allott (n 18) 15.

<sup>26</sup> American Law Institute, *Restatement of the Law: The Foreign Relations of the United States* (3rd edn, ALI 1987) section 111, particularly note h.

<sup>27</sup> See eg, Stephen Bouwhuis, ‘International law by the back door?’ (1998) 72 *AustLJ* 794.

<sup>28</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, para 42.

<sup>29</sup> See eg, UNCTAD, *IIA Issues Note No 1*, (2011), 2.

<sup>30</sup> See eg, United Nations, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents* UN Doc. HRI/MC/2005/3, 1 June 2005.

*F. Advice on the Domestic Laws of Foreign Countries*

Legal advisers also consider how the domestic laws that apply in another state affect the nationals and corporations that a state represents. In today's world of increasing international travel, countries can often have a great proportion of their own nationals outside their own borders. This has meant an increase in the number of consular cases which arise and the range of legal issues that go with them. Under Article 36 of the Vienna Convention on Consular Relations if a person is arrested, detained or taken into custody they may request the government concerned to inform the consular officials of their government.<sup>31</sup> This will often involve consular officials visiting their own nationals in local prisons and dealing with their (often wildly unrealistic) expectations of what these officials can achieve in the face of the spectrum of crimes which they may be facing.

A related example involves holiday travellers who happen to be in a state when a conflict breaks out. This will mean that the small number of diplomats at the post in that state will often find themselves entirely occupied with the task of managing the logistics of locating and evacuating what are often substantial numbers of their nationals trying to flee the country. This may be in substitution of their more traditional roles such as trying to resolve the conflict or at least shaping the outcome.

Many governments will also have their own deployments abroad.<sup>32</sup> Advice concerning such operations will frequently include advice on the legal framework that they are employed under as well as the rules of engagement of such forces and their interaction with local laws. Examples of the latter might include how local law applies where foreign forces detain a suspected militant during a peacekeeping operation or where a member of the foreign force allegedly commits an offence against the local law.

Corporations are another category of entities that can often run into difficulties abroad and seek the assistance of their home government. Although less frequent these days, one such problem has been nationalization. This is typically where a nation takes over the assets of a foreign corporation without the payment of compensation or where arbitrary action is taken by the local authorities to materially impair the its ability of the foreign corporation to function.

However, no longer does advising on foreign law concern its impact on one's own nationals and corporations abroad, but increasingly it also concerns how these nationals and corporations are affected by foreign laws at home. A number of key countries have enacted extraterritorial legislation which purports to extend their legislative reach beyond their shores into the internal workings of other countries. A good example is the reach of the antitrust laws of the United States.<sup>33</sup> Other similar legislation on which one can often be called upon to advise includes US Securities Legislation<sup>34</sup> and the US Alien Tort Statute.<sup>35</sup> For example, in the case of *Kiobel v Royal Dutch Petroleum*, concerning corporate liability under the US Alien Tort Statute, briefs were filed by the

<sup>31</sup> Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

<sup>32</sup> See eg, *Department of Defense: Active Duty Military Personnel Strengths by Regional Area and by Country (309A)* <<http://www.globalsecurity.org/military/library/report/2011/hst1103.pdf>> and *Army: Overseas deployments*, <<http://www.army.mod.uk/operations-deployments/22753.aspx>>.

<sup>33</sup> See in particular the *Sherman Antitrust Act*, 15 U.S.C. sections 1–7.

<sup>34</sup> *Securities Exchange Act* 15 U.S.C. section 78(j)(b) and see in particular *Morrison v National Australia Bank* 130 S.Ct. 2869 (2010).

<sup>35</sup> *Alien Tort Statute* 28 U.S.C. section 1350.



European Commission as well as by the Governments of Argentina, The Netherlands and the United Kingdom.<sup>36</sup>

There are also the international criminal tribunals such as the International Criminal Court and the specialist tribunals for Yugoslavia, Rwanda or Sierra Leone.<sup>37</sup> They may request assistance or documents or alternatively a suspect may be located in the jurisdiction of the state that one is advising.

Then there are a myriad of reciprocal rights and duties that operate between jurisdictions as well as 'one-off' requests for assistance. Such requests are likely to arise with matters such as property settlements, where different family members are based in different jurisdictions, or the jurisdictional implications of the taxation structure of multinational corporations.

### *G. Shaping the Development of International Law*

The role of an international legal adviser does not just encompass legal advice on what the law presently is. A considerable part of the role of an international legal adviser also involves advocating for developments in the law as the state would like it to be. This might involve work in international fora like the International Law Commission to codify or progressively advance the law or it might involve public advocacy towards some emerging principle. This might involve the publication of journal articles, speaking at international conferences, responding to media comments or increasingly an online international presence.<sup>38</sup> This role will also include nominating and supporting good candidates to international legal bodies such as to the international criminal tribunals, the International Court of Justice as well as to the panels and the Appellate Body of the World Trade Organization.<sup>39</sup>

## IV. WHAT MAKES A GOOD LEGAL ADVISER?

We next turn to the question of what makes a good legal adviser and the process for their selection. A threshold question here concerns exactly how to define a 'good' legal adviser. A key element must surely be their knowledge of international law. They will also need to be capable of performing all of the roles set out in Part III. In particular, they will require strong communication skills in presenting their advice in a clear and

<sup>36</sup> Supreme Court of the United States Blog: *Kiobel v Royal Dutch Petroleum* <<http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al/>>.

<sup>37</sup> See generally Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia <[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)>; Statute of the International Criminal Tribunal for Rwanda <<http://www.unictt.org/Portals/0/English/Legal/Statute/2010.pdf>>; and Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone <<http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>>.

<sup>38</sup> See eg, Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden* (2011) <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>>.

<sup>39</sup> See *Committee of Legal Advisers on Public International Law: Item 7: The Organisation and Functions of the Office of the Ministry of Foreign Affairs Legal Adviser: Document submitted by the Delegation of the United Kingdom*, 11 September 2006, CAHDI (2006) 27, 3.

concise manner, and, in line with the views set out in Part II, also be willing to do so, even where such advice may not align with the views of political decision makers.

In particular, for Philip Allott, ‘precision of expression and sensitivity to the effect of communicated speech’ is a key attribute,<sup>40</sup> as are ‘interpersonal skills’ and ‘a particular sensitivity to the mentalities and the behavioural expectations of people from different cultures and traditions’.<sup>41</sup>

A strong array of management skills and leadership ability will also be required; even in offices where the management function for running the Office of the Legal Adviser is separated from the role of the international legal adviser *per se*. To quote once again from Philip Allott, ‘the international lawyer in government service is liable to be seen as holding a position of special trust calling for an ability to take exceptional responsibility, and even a leadership role, in decision-making and in negotiation.’<sup>42</sup>

A good legal adviser should also be a person able to withstand pressure, even if they have no or questionable support from their superiors. Regrettably, it seems common these days for pressure to be applied on the legal adviser to approve some step in a process which an administration is keen to advance. This comes through in the personal accounts from some of the legal advisers. Patrick Philbin’s account of his exchange with David Addington over the memorandums concerning advices drafted in the Office of Legal Counsel in the United States is illustrative:

According to Philbin, in November 2004, he had a private conversation with Addington, who told him that, based on his participation in the withdrawal of Yoo’s NSA opinion and the withdrawal of the Bybee Memo, Addington believed that Philbin had violated his oath to uphold, protect, and defend the Constitution of the United States. Addington told Philbin that he would prevent Philbin from receiving any advancement to another job in the government and that he believed that it would be better for Philbin to resign immediately and return to private practice.<sup>43</sup>

Additionally the field of diplomacy is generally one where an individual faces a range of difficulties. To quote Philip Allott ‘[f]or the morally sensitive soul, diplomacy is a slough of despondency in which painful moral dilemmas flourish. . . In diplomacy’s parallel moral universe, honesty is a more or less random concordance between what is said and what is true’.<sup>44</sup> Mention should be made of the view that if the legal adviser personally disagrees with a decision taken by the government or that if their advice is not accepted on a matter that they should resign.<sup>45</sup> However, it is rare that anyone in government always gets their way and if that was the test then it is likely that the role of legal adviser would see a revolving door of occupants. To quote one government minister at a time of pressure: ‘The easy option would be to resign. The only thing that would happen if I resigned would be my quality of life might go up, but nothing else is [going to] be impacted by that.’<sup>46</sup> The view is also sometimes expressed that if the person in question resigned a more malleable replacement might be found. However, it seems a question of balance—at some point if one reaches the view that their advice is

<sup>40</sup> Allott (n 18) 14.

<sup>41</sup> *ibid* 15.

<sup>42</sup> *ibid* 15.

<sup>43</sup> Department of Justice (n 2) 143.

<sup>44</sup> Allott (n 18) 18–19.

<sup>45</sup> Cheng (n 12) 223.

<sup>46</sup> Chris Bowen, Australian Immigration Minister Transcript, Australian Broadcasting Corporation 1 September 2011 <<http://www.abc.net.au/7.30/content/2011/s3308075.htm>>.

not being taken into account—or worse still it is not being asked for—then there really is no point in continuing to serve in the position.<sup>47</sup>

*A. What Process Should Be Used To Select the Legal Adviser?*

All of which gives rise to the question of where to find such a person? The conventional legal view is that a selection process for the role of legal adviser is one solely concerned with the ability of the international legal adviser to provide international legal advice. However, this does not always seem to be the case in practice. As Jack Goldsmith recounts, one of the factors that he saw as important in his selection as the head of the Office of Legal Counsel in the United States was his prior views and philosophical framework.<sup>48</sup> Such a screening process seems designed to ensure that those selected for the position share similar views and philosophical framework to the administration of the day. To the extent that it may be practised in countries, such an approach of pre-screening candidates for their views and philosophical framework sits uncomfortably with the conventional legal view of an international legal adviser providing impartial advice. That is not to say the person appointed to the role should proceed as if in blissful ignorance of whatever might be the policies and priorities of the government of the day. For example, it would make sense for the Office of the Legal Adviser to concentrate resources in the Office in the areas of priority for the government, whether that is trade, security or some other matter.<sup>49</sup>

Such a selection process also seems to politicize the role. So if the legal adviser is expected to share the same views and philosophical framework as the administration of the day it would seem to make sense to change them with each and every change of administration. This creates difficulties with continuity of advice (discussed further in the next Part) which is further exacerbated if there is a widespread replacement of senior advisers.

V. WHAT MAKES FOR A GOOD OFFICE OF THE LEGAL ADVISER?

We next turn to the question of what makes a good Office of the Legal Adviser. The key questions in this regard concern:

- when to bring in the lawyers;
- the balance between expertise and experience;
- whether to bring in external legal advisers;
- should the Office make its advices publicly available; and
- how should the Office rationalize its resources?

<sup>47</sup> See eg, Goldsmith (n 18) 160–2; Elizabeth Wilmshurst, Deputy Legal Adviser at the time, letter dated 18 March 2003 <<http://www.iraqinquiry.org.uk/media/43719/document2010-01-27-100908.pdf>>. See also comments by the Attorney-General of the province of Hama in Syria, Mohammed Adnan al-Bakkour, reported in Bakri, Nada ‘Syrian Official in Hama Resigns to Protest Bloodshed’ *New York Times*, 1 September 2011.

<sup>48</sup> Goldsmith (n 18) 25–35.

<sup>49</sup> See eg, Strauss (n 21) 175.

*A. When to Bring in the Lawyers?*

Aside from being seen as 'no people', lawyers are often seen to be gatekeepers to whom one goes only when one has a final product to get the 'legal tick of approval'. However, that is often too late.

The earlier analysis of the role of an international legal adviser in Part III would suggest the early involvement of legal counsel. For example, the role of advising on the negotiation of international agreements would suggest early involvement to shape the language of the final document, in particular to ensure that the language used reflects the intent of the parties. Anyone who has spent some time working through the various provisions of the agreements of the World Trade Organization might wonder, for example, whether they could have been drafted more clearly. Similarly with international disputes, the international legal adviser can advise on what sorts of concessions or statements are likely to be prejudicial to the position taken by the government, should the matter later go to international dispute settlement proceedings.

Lawyers are also these days often trained in dispute resolution. This includes a range of skills including arbitration, mediation and negotiation. Lawyers can be particularly effective in negotiation given that they are trained in the nuances of language. It is often surprising how differences can be breached by finding an appropriate set of words to reflect agreement; although if the agreement is to stick it remains important to ensure that any real differences are resolved, not merely 'papered over'.

Of course there are cases where there are too many lawyers which can give rise to a risk-adverse culture. Jack Goldsmith noted the caution which he saw in operational agencies as resulting in 'a paralyzing culture of risk-adverse legalism in the military and, especially, intelligence establishments before 9/11'.<sup>50</sup>

*B. The Balance between Expertise and Experience*

The location of the international legal adviser in the Foreign Ministry can lead to some difficulties in maintaining expertise. To advance within the Ministry one would normally be expected to embark upon a range of diplomatic postings and assignments to build up a diversity of skills and experience. The value of an international lawyer by contrast comes primarily from their expertise in international legal matters built up over time. Difficulties are also likely to arise in the career path of the international lawyer as senior diplomatic postings and positions will no doubt tend to go to those who have developed the relevant diplomatic skills.<sup>51</sup>

These difficulties can be ameliorated somewhat by posting those with specialist international legal skills to foreign missions that require a specialist international legal function.<sup>52</sup> Additionally, it can assist if there is a dedicated career path for such lawyers including a higher employment grading to offset the lesser chances of

<sup>50</sup> Goldsmith (n 18) 94, further 163–4.

<sup>51</sup> See eg, HCL Merillat, 'Summary Report' in HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceania 1964) 26–7.

<sup>52</sup> This is the practice in the Foreign and Commonwealth Office in the United Kingdom which seconds officers to legal postings places such as New York, Geneva, Brussels and The Hague (see *Committee of Legal Advisers on Public International Law: The Organisation and Functions of the Office of the Ministry of Foreign Affairs Legal Adviser*, 19 June 2007 CAHDI (2007) 10 rev 87) and the United States which may assign Attorneys to Missions such as Geneva and the Hague.

promotion.<sup>53</sup> This is a technique employed by the Office of the Legal Adviser in the United States and also by the provider of domestic legal advice in Australia, the Australian Government Solicitor.<sup>54</sup>

A separate career path is also often reflected in the backgrounds of the lawyers who staff these offices. Most tend to be admitted to practice law as barristers although often also as solicitors.<sup>55</sup> They also tend to have postgraduate qualifications in international law. One consequence of their relative stability is that they often serve as a type of corporate memory for departments.<sup>56</sup> This is particularly the case as the staffing of many government agencies has become more fluid and good record-keeping practices more difficult to find.

A number of governments also staff their Office of Legal Adviser with a mixture of rotational and non-rotational staff. Both the Canadian and New Zealand Offices operate in this manner. This is seen as providing both the benefits of closer integration between diplomatic staff from the rotating legal advisers and the continuity and expertise from the non-rotational staff. An added advantage is seen to be that it 'disseminates amongst the foreign service officers with legal training and experience, with consequential benefits to the officers [and] the foreign service . . .'.<sup>57</sup> Conversely, the loss of corporate memory as well as the need to constantly recruit and train new staff has seen both of these Offices move to a higher proportion of non-rotational staff in more recent years. Canada's Office of Legal Adviser also benefits from being able to second a significant proportion of its staff from Justice Canada, which is the primary provider of legal advice in the Canadian Government and has a dedicated career structure for lawyers.

### *C. Whether to Bring in External Legal Advisers*

There seems to have been a strong tradition of having academics assist in the provision of international legal advice to governments.<sup>58</sup> This probably reflects the nature of such advice at the time, whereby the number of interactions between countries and the issues that arose tended to be much fewer and the time frames for dealing with them tended to be longer.

Today the provision of such advice is more typically provided by international lawyers employed full time to provide advice to their governments. Internal international legal advisers tend to be more familiar with the relevant precedents and able to provide more timely advice. Foreign policy crises do occur at any time and in the

<sup>53</sup> See eg, Gerald Fitzmaurice, 'Notes and Comments: Legal Advisers and Foreign Affairs (Review Article)' (1965) 59 AJIL 80–6.

<sup>54</sup> For the United States see Richard Bilder, 'The Office of the Legal Adviser: the State Department Lawyer and Foreign Affairs' (1962) 56(3) AJIL 635–6.

<sup>55</sup> For the United Kingdom see Merillat (n 51) 7.

<sup>56</sup> Bilder (n 54) 641, 655; Merillat (n 51) 7; Stanley Metzger, 'United States of America: Background Paper' in HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceania 1964) 154–5; Arthur Watts, 'International Law and International Relations: United Kingdom Practice' (1991) 2 EJIL 161; Michael Young 'The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives' (1998) 61(2) *Law&ContempProbs* 138, 143.

<sup>57</sup> Marcel Cadieux, 'Canada: Background Paper' in HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceania 1964) 34–35.

<sup>58</sup> For example, Sir Elihu Lauterpacht QC served as Legal Adviser of the Australian Department of Foreign Affairs and Trade from 1975 to 1977.

days of the 24 hour news cycle Ministers are expected to respond quickly and decisively. As His Excellency Judge Fitzmaurice of the International Court of Justice has observed 'in about nine cases out of ten, what is wanted is "on the spot" high-speed technical advice, rather than maturely considered advice at the law-officer level.'<sup>59</sup>

The general level of interaction between lawyers in government practice, those in the private sector and those in academia seems to vary substantially across countries. The highest level of interaction seems to take place in governments such as the United States and Japan,<sup>60</sup> not only in terms of the exchange of views but also in the case of the United States in terms of the exchange of personnel. This may reflect cultural and historical factors but at least in the United States it also reflects that many senior appointments are considered political appointments and change with changes in administration. This sees such officials cycle between government and private practice or academia, depending on the fortunes of the party with which they are aligned. For example, Harold Koh, the current legal adviser at the Department of State, assumed office under the Obama administration and was previously employed as Assistant Secretary of State for Democracy, Human Rights, and Labor under the Clinton administration. During the Bush administration he served as Dean of Yale Law School.<sup>61</sup>

That said governments, such as those of the United Kingdom and Australia, still often rely on outside counsel to assist in conducting their international litigation in fora such as the International Court of Justice and the International Tribunal for the Law of the Sea. There is less reliance on outside counsel as concerns the less formalistic dispute panels and Appellate Body of the World Trade Organization, although developing countries often make use of external counsel from specialist legal practices, rather than academia. Brazil's use of both domestic and foreign law firms to build its capacity in international trade law is a particularly notable example.<sup>62</sup>

#### *D. Should the Office Make Its Advices Publicly Available?*

Generally speaking the practice of most government legal offices and indeed lawyers in private practice is not to publish their legal advices. The reasons for this practice are varied but a key consideration is that it is generally unwise to set out your legal arguments publicly where there is a risk of litigation. Another key reason is that the publication of advices may be seen to place pressure on the legal adviser to be less candid than they otherwise might be.<sup>63</sup> In particular, one might be more inclined to be more positive and to emphasize less of the risk. For example, if a government had

<sup>59</sup> Fitzmaurice (n 53) 74.

<sup>60</sup> For Japan see Yuichi Takano, 'Japan: Background Paper' in HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceania 1964) 54–66. For the United States see CAHDI (n 52) 105.

<sup>61</sup> Harold Hongju Koh <<http://www.law.yale.edu/faculty/HKoh.htm>>.

<sup>62</sup> See eg, Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenbeg, *Winning at the WTO: The Development of a Trade Policy Community within Brazil: Documento de Trabajo No. 14 Area de Relaciones Internacionales FLACSO/Argentina* (2008).

<sup>63</sup> For example see then Prime Minister, Lord Palmerston, cited in KA Kyriakides 'The Advisory Functions of the Attorney-General' (2003) 1(1) *Hertfordshire Law Journal* 85. See also Lord Goldsmith cited in Kyriakides, 90.

decided to take an international legal case against another state over a boundary dispute it would be unhelpful if their legal adviser released their legal advice stating that the likelihood that the claim would be upheld was only slightly better than even. Despite this there are number of cases in the past where such advices have been released<sup>64</sup> and there is a growing tendency to do so.<sup>65</sup>

*E. How Should the Office Rationalize Its Resources?*

Competition leads to greater innovation and efficiency. With that view in mind many governments have looked for services that they can outsource or at least put on a competitive footing. Some governments have instituted a procedure whereby one government agency charges another for the provision of legal advice. The merits of a purchaser–provider split where the choices are limited to a single provider seem limited so such a practice may best apply where there is competition between providers. Market distortions will also result if some agencies charge for the provision of international legal advice but others do not.<sup>66</sup> Additionally, unlike general commercial products, the key criteria for legal advice may not always be price, or the quality of the advice, but the outcome reached.

There is also some danger in government practice of agencies ‘shopping’ for an advice that tells them what they want to hear.<sup>67</sup> For these reasons it might be thought that that there should be a single provider of international legal advice or at least that one agency should have oversight of all international legal matters.

A related concern is that charging for the provision of legal advice discourages the provision of such advice.<sup>68</sup> In response it might be said that this just reflects a previous over-servicing of clients; however, that in itself assumes that market principles predominate within the budget structures of government departments.

VI. HOW SHOULD A GOVERNMENT STRUCTURE THE PROVISION OF INTERNATIONAL LEGAL ADVICE?

Lastly, questions also arise concerning the place of the Office of the Legal Adviser in the broader government structure. In particular:

- how far to centralize the provision of international legal advice;
- where best to locate the Office of the Legal Adviser; and
- what elements should be in the Office of the Legal Adviser?

<sup>64</sup> The advices relied upon by countries taking action against Iraq in the Second Gulf War are one of the most notable examples. See eg, the advice of John Yoo, US Deputy Assistant Attorney General of 8 November 2002, <<http://www.justice.gov/olc/2002/iraq-unscr-final.pdf>>; the advice of the Attorney-General of the United Kingdom of 7 March 2003 <[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/notices/annex\\_a\\_-\\_attorney\\_general's\\_advice\\_070303.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_-_attorney_general's_advice_070303.pdf)> and the advice of Bill Campbell QC, First Assistant Secretary, Office of International Law and Chris Moraitis, Senior Legal Adviser, Department of Foreign Affairs and Trade in Australia <<http://mjil.law.unimelb.edu.au/go/issues/issue-archival/volume-4-1>>.

<sup>65</sup> See eg, the opinions section on the US Department of Justice <<http://www.justice.gov/olc/opinions.htm>>.

<sup>66</sup> Australia is perhaps the best example where the Office of International Law in the Attorney-General's Department bills for advice but the Department of Foreign Affairs and Trade does not.

<sup>67</sup> See Sands (n 17) 126.

<sup>68</sup> See eg, the Justice Canada (2008) *Audit of the Public Law Function* 8.

*A. How Far to Centralize the Provision of International Legal Advice?*

There seems to be recognition in the value of at least some centralization in the provision of international legal advice. To again quote Sir Frank Berman:

Yet a wide variety of experience suggests that, whether one is talking about a university teaching department, a set of barristers' chambers or a government ministry, a concentration of expertise can enhance the cumulative result in a way that isolated experts, however excellent, can never achieve.<sup>69</sup>

However, centralization also has disadvantages in terms of the legal advisers having less familiarity with the subject matter of the various line agencies as well as a likely decrease in the speed and relevance of the advice that these agencies are likely to obtain. Accordingly, there is a balance to be maintained between centralizing such advice to ensure consistency and the needs of other agencies. One way of attempting such a balance is to have a lead agency charged with ensuring such consistency.<sup>70</sup> Another way of attempting such a balance is to utilize secondments from the primary international legal adviser to line agencies. To quote Judge Fitzmaurice:

A much more sophisticated system which, while retaining general central government legal service, avoids most of its disadvantages, is that whereby the central government legal ministry or office, instead of receiving the legal work to do on its own premises, appoints officers to work in the various individual departments of state (including the foreign ministry) on a semi-permanent basis, to all intents and purposes as members of the department, but responsible to their own chief to whom they will refer, or consult with, as required, rather than the head of the ministry they work in.<sup>71</sup>

This approach of 'outposting' officers in other agencies is one used to some extent in the United States by the Office of the Legal Adviser and in Australia by the Office of International Law.

*B. Where to Locate the Office of the Legal Adviser?*

The next question that arises is where to locate such an office. Sir Frank makes the case for the Office of the Legal Adviser to be located in the relevant Foreign Ministry:

We are very familiar with fine and experienced centres of international law that have been put together in Attorney-General's departments or Law Ministries.<sup>72</sup> But there are important questions of trust and confidence between policy-maker and legal adviser that can be most readily built up within a close working relationship day by day. There is also the far from negligible matter of information and working assumptions, and speed of response in fast-moving international situations. It is of course as healthy as healthy can be for the

<sup>69</sup> Berman (n 8) 10. See also Staffan Canbäck, Phillip Samouel and David Price, 'Do Diseconomies of Scale Impact Firm Size and Performance? A Theoretical and Empirical Overview' (2006) 4(1) *Journal of Managerial Economics* 27.

<sup>70</sup> See Corell (n 9) 365–6.

<sup>71</sup> Fitzmaurice (n 53) 78.

<sup>72</sup> The Australian Attorney-General's Department and the French *Conseil d'État* are particularly notable examples.



policy-maker to be obligated to marshal his facts and display his assumptions, as if he were a solicitor formally instructing counsel, but nothing would be more inhibiting to his willingness to see guidance than the knowledge that he has to go through this on every occasion, without being able to take for granted a stock of common knowledge and a reasonable degree of common purpose.<sup>73</sup>

Sir Frank's argument is essentially that the shared culture and assumptions that will pervade the Foreign Ministry will lessen misunderstandings and speed the provision of international legal advice.<sup>74</sup> Such a location also provides the legal adviser with the ability to regularly attend meetings of senior officials of the Foreign Ministry and as such to be aware of and to advise on issues as they arise in the course of the operations of the Ministry.<sup>75</sup> This indeed does seem to be the common practice.

An alternative arrangement would be to locate the Office of the Legal Adviser in the Ministry generally responsible for legal matters. This might be seen to provide an 'arm's length' relationship to the provision of legal advice and this in turn might be seen to 'assure integrity and relative lack of bias in the legal advice offered'.<sup>76</sup> However, each agency has its own incentive structure and wherever located the temptation to provide advice favourable to the policy objectives sought in the hope of winning favour with senior policy makers remains. It is notable that the inquiry into the 'Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists' concerned the Office of Legal Counsel, which is located in the Department of Justice.<sup>77</sup>

### *C. What Elements Should Be in the Office of the Legal Adviser?*

A comparison between legal adviser's offices indicates considerable differences as to the scope of issues for which the offices are responsible as well as their working methods. The role of the Office of the Legal Adviser in the United States appears to be one of the widest. The Office spans a wide range of functions including ensuring 'compliance with applicable domestic law related to the foreign affairs function as well as the international legal obligations of the United States'.<sup>78</sup> The Office is responsible for advising on matters including drafting and negotiating treaties, privileges and immunities as well as private international law and litigation in US and foreign courts. As concerns 'applicable law related to the foreign affairs function' this includes freedom of information requests, acquisition and development of real property abroad, employment law and ethics.<sup>79</sup> The 'largest single component' of the Office consists of 'the Office of International Claims and Investment Disputes' which covers almost all investor-state disputes against the Government of the United States as well as claims by the United States and its nationals against foreign governments.<sup>80</sup>

<sup>73</sup> Berman (n 8) 9–10 (footnote included).

<sup>74</sup> See also Fitzmaurice (n 53) 78.

<sup>75</sup> Watts (n 56), 161.

<sup>76</sup> Merillat (n 51) 6.

<sup>77</sup> Department of Justice (n 2) and generally Goldsmith (n 18), although also see Margolis (n 6).<sup>78</sup> See CAHDI (n 52) 103.

<sup>79</sup> See eg, *Remarks by Harold Hongju Koh, Legal Adviser, State Department, at the Annual Meeting of the American Society of International Law (as Released by the State Department): The Obama Administration and International Law* <<http://www.state.gov/s/1/releases/remarks/139119.htm>>.<sup>80</sup> See CAHDI (n 52) 104.

Lawyers in the Office of the Legal Adviser in the United States appear more involved in the formulation and implementation of policies and programmes than say their counterparts in the United Kingdom.<sup>81</sup> Additionally, they also appear more involved in the corporate legal work of their department, such as advising on contracts or advising on internal staffing matters. To some extent, like all government departments, the Office of the Legal Adviser will be engaged in a range of corporate functions. These will include responding to public inquiries as well as those from members of Parliament and other members of government as well as participating in and appearing before Parliamentary committees. There will also be a range of corporate tasks such as staff performance assessments, updating web information, annual reporting requirements, budgets and a range of accountability matters such as freedom of information requests, which tend to absorb an ever-increasing proportion of the staff of the Office. However, a number of the legal adviser's offices, such as the Office of the Legal Adviser in the United States, have split the senior management role in the Office between the legal adviser and a head of office responsible for the corporate and other functions.

Offices also differ in terms of processes such as that for writing advices. In the United States a hierarchy operates whereby the advices of more junior officers are settled by those more senior to them.<sup>82</sup> In Australia the work of junior officers is 'second counselled' by a more senior officer, who reviews the advice and supporting materials in forming their own view. In the United Kingdom advices are generally prepared by officers acting as individuals,<sup>83</sup> although legal officers often do in practice often confer with their colleagues.

Predictably the higher the level of quality control the more staff and resources are needed to run the office. Second counselling is particularly labour-intensive as it involves reading and assessing the primary materials on which an advice has been based as well as the advice itself. This contrasts with more policy-based documents which can be assessed more quickly for content without necessarily a review of source material. This suggests a lower span of control and a higher number of senior advisers in the Office of the Legal Adviser as contrasted with say the remainder of the Foreign Ministry.

Similarly offices differ in the extent to which they adopt practices seen in the broader legal profession; such as a higher ratio of administrative staff to lawyers as compared to the lower ratios typically seen in Foreign Ministries. One particular area where this is presently playing out is in the debate concerning open-plan offices. Traditionally it had been recognized that in formulating legal advice a legal adviser would need an office or at least a quiet work environment to read legal materials and formulate their advice. However, in the days of ever-shrinking budgets, a number of legal offices have seen the move to open plan, which is arguably more suited to policy areas, although this phenomenon is not confined to the public sector.

One common element is that almost all offices maintain some sort of legal opinions and precedents database. The more sophisticated offices use databases to record requests for advice and due dates.<sup>84</sup> Most offices use electronic document management, although difficulties are noted with regard to more highly classified advices.<sup>85</sup> Consistency of

<sup>81</sup> M. Cohen, 'Canada: Background Paper' in HCL Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceania 1964) 46; See also Clive Parry, 'United Kingdom: Background Paper' in *ibid* 108.

<sup>82</sup> See Bradbury (n 7). See also Barron (n 7).

<sup>83</sup> See eg, CAHDI (n 52) 87.

<sup>84</sup> See eg, Treasury Board Secretariat (n 68).

<sup>85</sup> *ibid* 19–20.

advice and practice has been aided in the Foreign and Commonwealth Office by a practice whereby outgoing correspondence and cables which rely on legal advice are required to be reviewed by the legal adviser who prepared the advice.<sup>86</sup>

Some of the differences in the substantive matter covered by the various offices can be illustrated by the provision of advice on international trade law. Whilst in some governments the provision of advice on international trade law is the remit of the Office of Legal Adviser, in a number of other governments this function belongs to another agency. This may reflect the historical location of trade work in other Ministries or it may reflect the burgeoning volume of work in this area flowing from the volume of litigation before the World Trade Organization and the number of investor-state disputes.<sup>87</sup> Interestingly the difference may also stem from the different nature of the work; disputes conducted before the World Trade Organization have typically been conducted in a less formal manner than those before other institutions such as the International Court of Justice. Despite the initial less formal beginnings,<sup>88</sup> over time the benefits of stronger advocacy and drafting skills have led to an increasing formalization of the process before the World Trade Organization.<sup>89</sup>

In New Zealand, where advice on international trade law matters is provided by the Legal Division in the Ministry of Foreign Affairs and Trade, this work is estimated to constitute over 40 per cent of the work of the Office. In the United States this work is conducted by the Office of the Trade Representative,<sup>90</sup> which has approximately 200 staff.<sup>91</sup> Even in the Office of the Legal Adviser it is notable that the 'largest single component' of the Office consists of 'the Office of International Claims and Investment Disputes', which covers all investor-state disputes against the Government of the United States as well as claims by the United States and its nationals against foreign governments.<sup>92</sup>

In Canada, advice on international trade law is provided by the Trade Law Bureau which is staffed jointly by the Department of Justice and the Department of Foreign Affairs and International Trade. In Australia international trade law advice is provided primarily by the Department of Foreign Affairs and Trade, which also works closely with the Office of International Law in the Attorney-General's Department.

<sup>86</sup> FD Berman, 'The International Lawyer, inside and outside Foreign Ministries' in Christopher Hill and Pamela Beshoff (eds), *Two Worlds of International Relations: Academics, Practitioners and the Trade in Ideas* (Routledge 1994) 85.

<sup>87</sup> Interestingly the period between 2005 and 2010 showed a decrease in investor-state claims (see eg, UNCTAD *IIA Issues Note No 1* (2011) 2 and see also Department of Foreign Affairs and Trade *Gillard Government Trade Policy Statement: Trading our Way to More Jobs and Prosperity*, 14 April 2011, 14 <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html>>.

<sup>88</sup> See eg, Donald McRae, 'Arbitrating Trade Disputes' presentation at *60 Years in International Law: Seminar in Honour of Sir Elihu Lauterpacht*, 20 October 2011.

<sup>89</sup> This has in turn been viewed with considerable concern by those who could see the advantages of the less formal tradition.

<sup>90</sup> Office of the United States Trade Representative, 'About Us' <<http://www.ustr.gov/about-us>>.

<sup>91</sup> Although the majority of the former are trade policy experts rather than legal advisers.

<sup>92</sup> See CAHDI (n 52) 104, although it should be noted that a significant part of the work of this Office also covers cases being considered by the Iran-United States Claims Tribunal.

## VII. WHAT IS THE PRACTICE AMONGST MEMBER GOVERNMENTS?

The most common form for the structure of the Office of the Legal Adviser is as a specialist cadre in the Foreign Ministry.<sup>93</sup> For space reasons this Part focuses on the United States, the United Kingdom and Canada, as examples of such an approach; although Canada adopts more of a hybrid approach.

*A. The United States*

The primary adviser for international law matters in the Government of the United States is the Office of the Legal Adviser located in the Department of State. The head of the Office is employed as an Assistant Secretary; this is two levels below the Secretary of State and is a Presidential appointee subject to confirmation by the United States Senate.<sup>94</sup> The legal adviser reports directly to the Secretary of State and is supported by four deputy legal advisers and 22 assistant legal advisers. An executive director is responsible for overall management, budget and other administrative matters.<sup>95</sup>

The Office comprises some 250 full-time employees, including 180 attorneys formally admitted to the practice of law. Members of the Office serve as part of the civil rather than diplomatic service. Whilst members of the Office do not formally take up foreign postings, a number are assigned to the Missions in New York, Geneva and The Hague. Attorneys rotate assignments in the Office to broaden their experience and may also undertake assignments with other offices such as the National Security Council or the United States Congress.<sup>96</sup> As outlined earlier, the Office spans a wide range of functions including ensuring 'compliance with applicable domestic law related to the foreign affairs function as well as the international legal obligations of the United States'.<sup>97</sup>

The Office has a strong level of interaction with the academic community as well as with private practice, from which many of the attorneys in the Office are drawn and to which many also return.<sup>98</sup> Practitioners and academics also serve on the Secretary of State's Advisory Committees on Public and Private International Law, which function as consultative bodies on legal issues of current interest and debate under the guidance of the legal adviser.<sup>99</sup>

*B. The United Kingdom*

In the United Kingdom, the majority of international advice is provided by the Office of the Legal Adviser in the Foreign and Commonwealth Office. The legal advisers in the Office are part of the diplomatic service and most remain in the Office during their careers rather than rotate to other parts of the Foreign and Commonwealth Office. There are a limited number of 'legal posts' in places such as New York, Geneva, Brussels and The Hague to which a legal adviser in the Office can be posted.<sup>100</sup> An officer is also usually posted in the Attorney-General's Office.<sup>101</sup>

<sup>93</sup> See Berman (n 56) 82.

<sup>96</sup> *ibid* 103.

<sup>100</sup> *ibid* 87.

<sup>101</sup> Sir Michael Wood, 'The Role of the FCO in UK Government' (2011) in *House of Commons Foreign Affairs Committee: The Role of the FCO in UK Government: Seventh Report of Session 2010–12* vol II, 48–51.

<sup>94</sup> See CAHDI (n 52) 103.

<sup>97</sup> *ibid* 103.

<sup>98</sup> *ibid* 105.

<sup>95</sup> *ibid* 104.

<sup>99</sup> *ibid* 105.

The Office consists of around 30 lawyers including a legal adviser, 3 deputy legal advisers, legal counsellors and assistant legal advisers. Management of the Office is generally conducted by the legal adviser and the deputy legal advisers.<sup>102</sup> The legal adviser is appointed at the rank of Director General in the Foreign and Commonwealth Office, which is one level below that of the Permanent Under-Secretary.<sup>103</sup> The functions of the Office appear narrower than many of its counterparts, in particular the Office of the Legal Adviser in the United States.

There is no practice for billing for such advice, although notably the primary provider of domestic legal advice to the Government of the United Kingdom, the Treasury Solicitor, does bill for the provision of its legal advice.<sup>104</sup> There is also no formal mechanism for the coordination of legal advice, although the practice does seem to be that other Departments will consult the Office on matters of international law.<sup>105</sup> Cabinet Office Legal Advisers also have a role in coordinating across the Government and resolving issues between agencies, although 'the ultimate and authoritative source of legal advice on international law as well as English law to the British Government is the Attorney-General and [their] Ministerial colleagues, together known as the Law Officers of the Crown'.<sup>106</sup>

Outside consultants are sometimes used and private counsel are usually retained for international litigation.<sup>107</sup> For advice on the domestic law in other countries the Foreign and Commonwealth Office generally relies on local lawyers employed in the jurisdiction in question.<sup>108</sup>

### *C. Canada*

In the Canadian Government advice on matters of international law is provided primarily by the Office of the Legal Adviser in the Ministry of Foreign Affairs and International Trade, although the Public International Law Section in the Department of Justice also provides public international law advice.<sup>109</sup> The legal advisers in the Office of the Legal Adviser are part of the foreign service and generally rotate through other areas of the Ministry. The Office also has a tradition of having a visiting academic on staff who retains that position for one-to-two years.<sup>110</sup>

The Office has around 80 staff and most of the legal officers are members of at least one provincial bar association (entitling them to practice law in Canada).<sup>111</sup> The Office is divided into a Legal Affairs Bureau and Justice Legal Services. The Legal Affairs Bureau consists of three Divisions: the Criminal, Security and Treaty Law Division; the United Nations, Human Rights and Economic Law Division; and the Oceans and Environment Law Division. The work of the Office includes advising on matters of international criminal law, international human rights and international environmental law. Like the State Department, the Office also provides advice on domestic legal issues related to the management of the Ministry including property and commercial law,

<sup>102</sup> See CAHDI (n 52) 88.

<sup>103</sup> Data.gov.uk, 'Opening up government' <<http://data.gov.uk/organogram/foreign-and-commonwealth-office>>.

<sup>104</sup> House of Commons Written Answers 15 March 2011, vol 525, part 132.

<sup>105</sup> See CAHDI (n 52) 88.

<sup>107</sup> See CAHDI (n 52) 88.

<sup>109</sup> See eg, Treasury Board Secretariat (n 68) 32.

<sup>110</sup> See CAHDI (n 52) 92.

<sup>106</sup> Watts (n 56) 159.

<sup>108</sup> Watts (n 56) 160.

<sup>111</sup> *ibid* 90.

international child abduction and passport issues. Advice on international trade law issues is provided by the Trade Law Bureau which is staffed jointly by the Department of Justice and the Ministry of Foreign Affairs and International Trade. Advice on matters of private international law is provided by a specialist section in the Department of Justice.

#### VIII. CONCLUSION

As we can see from Part VII, the most common structure of the Office of the Legal Adviser is one whereby the office is located in the Foreign Ministry. Although each of these offices performs the core functions of the legal adviser identified in Part III, there are variations in the extent that they are responsible for particular subject areas such as international trade law, private international law and international criminal law.

This variation may reflect bureaucratic idiosyncrasies in particular Ministries; for example, whether a particular manager had a particular interest or expertise. However, as we saw in Part VI, there is value to be gained in drawing together these various functions in terms of providing consistency and developing expertise. A common element does seem to be the value in amalgamating this expertise and retaining corporate memory. This favours a centralized advising function and a degree of continuity in staffing. How far to consolidate and what particular functions will depend to a fair degree on what other functions the office administers and the structure of the remainder of the Foreign and Justice Ministries in particular. Conversely, over a certain size a question may arise as to whether to hive off some of the more corporate aspects of the office as opposed to the more substantive work. There may also be a need to draw in external expertise and a need to second or otherwise reach out to line agencies.

For those countries with little current institutional capacity in this regard much can be gained nowadays from the private sector and there has been an increasing use of private sector law firms to provide such expertise. There are a number of private sector firms with sizable international law practices. The skills and training provided to their employees in advice writing and advocacy as well as the resources at the disposal of the major firms make them significant players in international law nowadays. Additionally, there are also non-profit advisory services like the Advisory Centre on WTO Law,<sup>112</sup> which Governments can make use of.

Aside from the structure of the Offices themselves, there were also core similarities in the role expected of the international legal adviser. These are primarily skills in advising on matters of international law, but also communication skills, an ability to lead and an ability to withstand pressure. This is never more so than today when legal advice can not only invite the ire and attention of Prime Ministers and Presidents but also the harsh and unforgiving media spotlight of the world's international press.

STEPHEN BOUWHUIS\*

<sup>112</sup> Advisory Centre on WTO LAW <<http://www.acwl.ch/e/index.html>>.

\* Former Assistant Secretary, Office of International Law, Commonwealth of Australia. Currently Legal Counsel with the Commonwealth Secretariat, [stephen.bouwhuis@gmail.com](mailto:stephen.bouwhuis@gmail.com). The views expressed in their article are those of the author and do not necessarily reflect those of current or past employers. Thanks to Christopher Wilkinson and the anonymous reviewers for their suggestions.