

RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

BOOK REVIEWS

The Role of Legal Advisers in International Law. Edited by Andraž Zidar and Jean-Pierre Gauci. Leiden: Brill Nijhoff, 2017. Pp. xviii, 390. Index. doi:10.1017/ajil.2018.44

The theme of the 2018 American Society of International Law Annual Meeting was *International Law in Practice*, a useful reminder that, as the meeting organizers put it, “international law cannot be separate from its practice. Practice reifies and animates international law, shaping what it means, how it is applied, and how effectively it achieves the diverse goals of those who invoke it.”¹

The volume under review contains twenty-six contributions by a diverse group of authors exploring the roles of some of the most important practitioners of international law. These primarily address the roles of foreign ministry Legal Advisers, but also consider legal advisers’ work in other settings, including international organizations, armed forces, and rule of law missions.² The assembled chapters flow from an initiative by the British Institute of International and Comparative Law (BIICL) which, together with the Foreign and Commonwealth Office (FCO), convened a conference on the profession of Legal Adviser in 2005. The collection is ably edited and introduced by Andraž Zidar of the University of

Bologna, Slovenia’s former Legal Adviser, and Jean-Pierre Gauci of BIICL.

In describing his role as director of the International Law Department of the Czech Ministry of Foreign Affairs, Petr Válek recalls what many view as the best (or perhaps the only) novel on international law, Jaan Kross’s *Professor Martens’ Departure*. In the novel’s closing pages and the closing hours of his life, Professor Martens (of Martens Clause fame) unhappily concludes that he, like the waiter serving him in a train station restaurant, has “just served the powerful and told them what they wanted to hear” (p. 148). The authors represented here would disagree. Instead, as Sir Franklin Berman, former FCO Legal Adviser, observes in his conclusion, the book’s contents reveal a “striking convergence” that “the Legal Adviser’s role was anything other than that of a mere apologist” (p. 380). Instead, “Legal Advisers owed duties that were wider than simply towards policy-makers in the foreign ministry” (*id.*).

There is a good deal of writing on Legal Advisers’ work, much of it cited by the authors. It is not possible to recount it here, except to recall one oft-cited 1962 article written by a young lawyer then laboring in the U.S. State Department’s Office of the Legal Adviser.³ For those interested, the UN Office of Legal Affairs hosts a bibliography of writing on legal advisers.⁴ The Council of Europe’s Committee of Legal Advisers on Public International Law (CAHDI) has also recently updated its database of states’ and international organizations’ responses to a

¹ 112th American Society of International Law Annual Meeting Program 1 (2018).

² This review adopts the convention adopted by the editors of the volume under review, referring to the person who heads a foreign ministry legal department as the “Legal Adviser,” while referring to the attorneys working under the Legal Adviser and others providing international advice as “legal advisers.”

³ Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AJIL 633 (1962).

⁴ UN Office of Legal Affairs, *The Role of the Legal Adviser*, at http://legal.un.org/ola/role_legal_advisor.aspx.

detailed questionnaire probing the organization and function of Legal Advisers' offices.⁵

Following an introduction by the editors, the volume contains six sections, followed by Jean-Pierre Gaudi's and Kate Jones's report of the 2005 conference and a thoughtful concluding essay by Franklin Berman. The six sections address the United Kingdom's practice, comparative perspectives, the personal reflections of four prominent national Legal Advisers, functional developments, professional requirements, and evolving fields of practice. The number and diversity of the twenty-six contributions precludes detailed individual discussion. All of them address, from varying viewpoints, important recurring issues in the practice of international law in the fast-paced, and often incompletely informed, world of foreign ministries.

Legal Advisers as "the Visible College"

Several writers explore the notion of Legal Advisers as a self-conscious epistemic community, highlighting the role of their formal and informal interactions in creating a vibrant and valuable "visible college" of international lawyers. Drawing on his experience as Sweden's Legal Adviser, Hans Corell recalls the "special importance" of "contacts and interaction with colleagues in many countries" (p. 187, again p. 190). Lucio Gussetti, Director and Principal Legal Adviser to the European Commission for Foreign Policy and External Relations, notes the scope and value of the interface among EU states' Legal Advisers (p. 212). In this regard, Sir Michael Wood, former FCO Legal Adviser reminds that

"[i]nternational life is not only about disputes." 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

⁵ Council of Europe, Database on the Organization and Functions of the Office of the Legal Adviser in the Ministry of Foreign Affairs, at <https://www.coe.int/en/web/cahdi/organisation-and-functions-of-the-office-of-legal-counsel>.

years. There is, in a real sense, a community of government international legal advisers. (P. 66)

(The reviewer can attest to the value of personal connections among foreign ministry lawyers across borders as channels for communication, coordination, and managing disputes.)

These patterns of connection are reinforced through regional and global mechanisms in which many Legal Advisers participate. These include the Council of Europe's CAHDI, the European Union's Public International Law Working Group (COJUR), and the Asian-African Legal Consultative Committee. The most extensive such gathering is the annual global gathering of Legal Advisers in New York in late October during International Law Week (p. 190). As James Kingston, Legal Adviser of Ireland's Department of Foreign Affairs and Trade suggests, such networks and contacts provide channels through which Legal Advisers can assure "awareness of, and sensitivity to, the broader international context" in which they operate (p. 79).

What Do They Do?

The core of Legal Advisers' work seems similar across continents and institutions, subject to warnings against too easy generalizations. Sir Michael Wood cautions that Legal Advisers' roles and institutional setting vary, so that "[g]eneralizations can be misleading" (p. 59). Sarah McCosker of the ICRC's Legal Division similarly warns against unwarranted regional generalizations in her essay on legal advisers in Australia, India, and Malaysia (p. 98).

Nevertheless, several Legal Advisers identify a common core of familiar legal tasks: advising, litigation, and negotiation. François Alabrune, France's Legal Advisor,⁶ views the main elements of his work, and that of his foreign ministry colleagues, to be "advising, litigating and conducting negotiations at an international level" (p. 179). David Anderson draws on his rich experience at

⁶ Note: Spelling ("Advisor") in original.

the FCO in describing these same three tasks. The work can involve questions both great and small. As François Alabrune observes, “[w]e are faced with questions of great importance as well as minor ones” (p. 180). Petr Válek concurs, noting that while some issues garner media headlines, “it would be incorrect to suggest that I deal with these questions daily” (p. 149).

Some countries place additional responsibilities on their Legal Advisers. Sarah McCosker describes how in Australia, authority for advising on international law rests in several places, requiring that Australia’s Legal Adviser devote significant effort to coordination among multiple actors. As Costa Rican Legal Adviser Eugenia Gutiérrez Ruiz and Yasuo Kita of Tokyo’s Yasuo Kita University explain, Legal Advisers in monist states like Costa Rica and Japan play significant roles in assuring appropriate fit between new international legal obligations and the domestic internal legal order. For Petr Válek, a major role in the Czech Republic is “the oversight over the process leading to the conclusion of treaties” (p. 150), in a system where multiple government entities can conclude international agreements in their areas of responsibility. This leaves the foreign ministry’s lawyers with what must surely be a challenging task of pursuing consistency with domestic and international law and reasonable uniformity in treaty practice.

Another important, if little noticed, role is Legal Advisers’ (and legal advisers’) frequent function as repositories of institutional and historical memory in bureaucratic settings where diplomats may come and go, but lawyers and their files remain. Several writers, including Hans Corell, Sara McCosker, Petr Válek, and Franklin Berman, note this function.

Margaret Purdasy, an FCO lawyer serving at the UK Mission to the UN in Geneva analyzes a somewhat intimidating range of competencies thought to be necessary for a well-rounded foreign ministry lawyer.

Giving Advice

A central role for all Legal Advisers is—as their title suggests—giving legal advice. Several writers explore the challenges of providing such advice in

the fast-moving and often uncertain world of international relations. François Alabrune observes that he and his colleagues “are often requested to provide advice at very short notice” (p. 180). The challenge can be compounded, as Hans Corell notes, by international law’s sometime ambiguity or uncertainty: “in many situations the law may not be as clear as one would wish” (p. 198).

Several writers examine the elusive line between law and policy. The line seems clear enough in theory: Hans Corell finds “a very clear distinction between law and policy” (p. 192). Yet, as David Anderson notes, “[l]aw and policy are intertwined” (p. 18). Dire Tladi, South Africa’s former Deputy Legal Adviser, agrees, finding that separating the duty of giving legal advice “from the politically charged environment of international relations . . . is daunting” (p. 167). Yasuo Kita recalls that “international law mainly works in a muddle of diplomacy and politics” (p. 146).

At the least, the nature of international law requires that effective Legal Advisers (and legal advisers) have, as James Kingston observes, “an awareness of, and sensitivity to, policy that may not normally be considered necessary or even desirable in other areas of the law” (p. 85). Domestic policy concerns often figure in this mix; as Eugenia Gutiérrez Ruiz notes, “Legal Advisers operate at the juncture between international and domestic settings and their role often involves facilitating a balance between the competing priorities of these two legal spheres” (p. 95).

Writers point out that keys to effective legal advice are lawyers’ ability to keep abreast of the policy process, to be sensitive to the variables and interests at play, to be proactive, and to have access to decision makers. Thus, for Hans Corell, “[t]he main challenge for the [Swedish] Legal Adviser and the team of experts is to keep track of situations where matters of international law may arise and provide timely advice” (p. 184). Effective legal advice may require “being part of the team,” which can be both a blessing and a curse; James Kingston warns that “being part of a team leads to a blurring of the specific role of the Legal Adviser” (p. 83).

What objectives or standards apply to providing advice in a state-centric policy-driven context where events move rapidly, important facts are missing (or where “facts” turn out to be wrong), and where principals demand rapid answers? David Anderson suggests that legal advisers’ advice regarding international legal questions should reflect their best professional judgment of how the International Court of Justice (ICJ) would answer a question (p. 19). Some countries look to institutional arrangements to provide quality control; Sarah McCosker describes how Australia looks to the Attorney-General’s Department, and not the foreign ministry’s lawyers, for “an ostensibly more neutral approach to the interpretation and application of international law” (p. 106).

But who is the client to whom the Legal Adviser is responsible for his or her advice? The answer may not be simple; indeed, James Kingston wonders if the concept of attorney-client is even appropriate to describe the relationship between government lawyers and their employer (p. 78), a point echoed by Franklin Berman in his examination of the different circumstances in which lawyers operate (pp. 380–81). For Andraž Zidar, while Legal Advisers have duties towards the parties they represent, “their highest duty is a loyalty that runs to the integrity of the legal and governance processes, which are essential for the successful functioning of the international community” (p. 314). Indeed, for Zidar, legal advisers “serve as the conscience of the institution they are working for,” including arguing against policies that are “lawful, but awful” in Harold Koh’s phrase (p. 321). While some writers would not take things so far, Franklin Berman’s concluding essay observes that several Legal Advisers “define[d] their client more broadly than just the policy-maker in the foreign ministry, to include, possibly, other branches of the State . . . or the domestic public more widely, or the international community in some sense or another” (p. 382).

Writers consistently affirm the need to give straightforward legal advice and to advocate international legality in state conduct. For Hans Corell, “the Legal Adviser’s duty to assist in

ensuring that the rule of law is observed” (p. 199). Michael Wood quotes his predecessor, Franklin Berman 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 . . . 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 the right result.” (P. 61)⁷

Across the Channel, for François Alabrune, the “Legal Adviser is expected to express their opinion freely, even under political pressure, provided that secrecy is guaranteed and that they accept that the legal opinion given might not be followed” (p. 181).

The last part of Alabrune’s comment raises a troublesome issue. Legal Advisers do not always win their fights. In some countries, this may not happen frequently. For Hans Corell,

[i]n a government like mine, which defines and considers international law as a cornerstone of our foreign policy, the role is not so much to argue that international law should be the basis for policy but to advise on how international law should guide our policy. (P. 185)

On the other hand, Dire Tladi’s chapter describes the personal challenges of offering “honest and policy-relevant legal advice” (p. 169) in cases where government policies are judged legally unsound.

Launching from his experiences on Finland’s Security Council delegation when the Council adopted its landmark resolutions after the 1990 invasion of Kuwait, Martti Koskenniemi adds a further perspective. His chapter looks at law’s contribution to security through “the process of justification that it imports into institutional policy and in its assumption of responsibility for the

⁷ Quoting Franklin Berman, *The Role of the International Lawyer in the Making of Foreign Policy*, in *THE INTERNATIONAL LAWYER AS PRACTITIONER* 4 (Chanaka Wickremasinghe ed., 2000).

policies chosen” (p. 333). Hence, arguing on the basis of the UN Charter “is to reaffirm the institutional character of the problem, a readiness to bind oneself to a policy . . . and an assumption of the responsibility for so doing” (p. 335).

Models for Providing and Staffing Legal Advice

The Legal Adviser’s role used to be simpler. David Anderson notes that the UK Foreign Office did not acquire its first resident legal adviser until 1886, and until 1945, “the number of Legal Advisers on the staff could be counted on the fingers of one hand” (p. 14). Harold Koh recalls the similarly modest beginning of the U.S. State Department’s legal office. Since that time, of course, many countries have increased their cadres of lawyers providing international legal advice. Nevertheless, other countries’ Legal Advisers face capacity restraints, sometimes severe, reflecting their countries’ relative size, resources, or the limited significance given to international law and lawyers.

Many important states have substantial foreign ministry legal staffs. Writers report that Japan’s International Legal Advice Bureau has more than seventy people (p. 146), Malaysia’s International Affairs Division has fifty-five officers (p. 119), and the FCO has about fifty lawyers (p. 26). On the other side of the scale, India’s Legal and Treaties Division is variously listed as having nine to fourteen people (p. 109), the Czech Republic has eleven lawyers (p. 149), South Africa has nine (p. 171), Ireland has eight (p. 71), and Malawi has two (p. 171). Dire Tladi bemoans many developing countries’ capacity constraints, which can lead to unhelpful distortions of priorities, as scarce legal talent is called on to “push the paper” to meet short-term requirements of lesser importance (“is the communiqué for the Minister’s meeting ok?”) instead of matters affecting greater national interests (p. 170).

Governments staff their international legal advisers in varying ways, although two models predominate, as James Kingston, Yasuo Kita, and Michael Wood describe. In one model (Germany, Japan), countries draw their legal advisers primarily or exclusively from the ranks of their diplomatic corps. Others (the United

Kingdom, the United States) have a cadre of career lawyers who remain in capitals for most if not all of their careers.

Countries with a separate permanent cadre of foreign ministry lawyers may find that this system offers limited opportunities for promotion. As James Kingston describes, this has led the FCO to develop personnel policies that acknowledge the possibility, and indeed desirability, of supporting accomplished staff moving to other career opportunities. Harold Koh notes that the U.S. State Department’s Legal Adviser’s Office has spawned multiple professors of international law.

Contemporary Challenges and Changes

Several authors highlight the effect of the rapidly evolving legal environment on the Legal Advisers’ work. This includes the increasing role in many countries of legislatures, civil society groups, and other actors from outside of traditional foreign policy elites. This has led to heightened public scrutiny, if not open skepticism, of policy decisions and their implementation, multiplied in the whirling media universe. (Such tendencies are not entirely new. Harold Koh recalls Elihu Root’s observation in the first issue of the *American Journal of International Law* regarding “[t]he increase of popular control over national conduct. . .” (p. 295).)

In this environment, Legal Advisers increasingly must interact with and explain themselves to new constituencies, both foreign and domestic. FCO Legal Adviser Iain Macleod points to the changes in FCO lawyers’ working environment stemming from “an increasing readiness to challenge and debate international legal issues in the media and in Parliament, especially where decisions about military action or the use of force are involved” (p. 29). In this context, Harold Koh finds that “a crucial, overlooked aspect of a Legal Adviser’s role remains public outreach. And, perhaps the most vital element of that public outreach is the Legal Adviser’s duty to explain publicly the government’s international law rationale for its actions” (p. 290).

International organizations are not exempt. NATO Legal Adviser Steven Hill explains that, while in the past, public and Allies’ support for

NATO has been assumed, with the organization accountable to governments in the North Atlantic Council, not to the broader public of national parliaments. “[B]ut now that bubble has popped” (p. 223).

Several writers highlight another set of challenges: the increasing involvement of foreign ministry legal offices in litigation, both domestic and international, with its associated appetite for resources and new skills. For some countries, involvement in domestic litigation is now a significant part of Legal Advisers’ workload. For Iain Macleod, “[o]f all the changes in FCO Legal Advisers’ work over the last 20 years . . . [the growth of domestic litigation affecting the FCO] seems certainly the most significant in practice. . .” (p. 27).

International litigation has also grown in frequency and intensity, significantly increasing some offices’ workload. This is particularly so for European Union member countries whose foreign ministry lawyers represent them in EU courts. For France, “conducting litigation has become an increasingly important aspect of the role” (p. 181). Petr Válek does not have this challenge; other lawyers represent the Czech Republic in the Court of Justice of the European Union, and for Válek, litigation in the ICJ would be a “last resort option” (p. 155). On the other hand, public criticism in Japan following the International Court of Justice’s adverse decision in *Whaling in the Antarctic*⁸ led to the creation of a unit “dedicated exclusively to the preparation for international litigation” (p. 143).

International litigation can be a heavy burden for offices already pressed by other matters. Jessica Gladstone, now a partner in Clifford Chance LLP and formerly an FCO legal adviser, describes the increased frequency and complexity of international litigation and the difficult strategic and tactical judgments it generates. As she points out, a Legal Adviser’s role in such cases “tends to be imposed at short notice, and in difficult political circumstances,” involving disputes that “can be all-encompassing” (p. 54).

⁸ *Whaling in the Antarctic* (Austl. v. Japan, N.Z. Intervening), Judgment, 2014 ICJ Rep. 226 (Mar. 31).

Legal Advisers in Other Settings

Several authors address the challenges facing the legal advisers in international organizations and other non-governmental settings, with Michael Wood again cautioning against undue generalizations concerning international organizations. While some may think of international organizations as similar, with a governing body, an executive head, and reasonably clear hierarchies and lines of authority, the reality can be different. Steven Hill, NATO’s Legal Adviser explains, for example, the challenges of maintaining legal coherence in a peculiarly decentralized organization “comprised of different entities possessing separate legal personalities” (p. 231).

In these varying contexts, Legal Advisers’ roles vary with the setting. Valerie Hughes of the World Trade Organization (WTO) explains how WTO lawyers provide crucial support for the WTO dispute settlement process. Maïke Kuhn and Antje Berger describe legal advisers’ roles in the armed forces, focusing on the mixed civilian-military structure in Germany’s armed forces. Roberto Di Donatantonio addresses the role of international role of law missions in monitoring, mentoring, and advising prosecutions. Whatever the setting, however, Peter Quayle of the European Bank for Reconstruction and Development points to the position of lawyers in international organizations as operating at the intersection of the organization’s internal legal order and its exterior legal framework. In this context, “international organizations’ lawyers must be prepared to go beyond advice limited to strictly legal obligations” and to also address “the ways in which reciprocity, reputation and responsibility” may affect an organization’s effectiveness (p. 271).

The essays collected in *The Role of Legal Advisers in International Law* provide a rich store of information and analysis regarding some of the most important practitioners of international law. The book is a significant and useful contribution to the literature on the subject.

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Of the Board of Editors