ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Международное право на практике

Майкл Вуд

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

International Law in Practice

Michael Wood

ТОМ 11
VOL. 11

Москва 2022
Moscow 2022

ISSN 2687-105X

Центр международных и сравнительно-правовых исследований
International and Comparative Law Research Center

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ТОМ XI / VOL. XI

Москва
2022

УДК 341.1/8
ББК 67.91
Л43

Лекции Летней Школы по международному публичному праву = Courses of the Summer School on Public International Law. – Т. XI. Международное право на практике = Vol. XI. International Law in Practice / Майкл Вуд = Michael Wood. — М.: Центр международных и сравнительно-правовых исследований, 2022. — 162 с.
Л43

Настоящее издание содержит материалы лекций сэра Майкла Вуда по теме «Международное право на практике», прочитанных им в рамках Летней Школы по международному публичному праву 2020 года.

The present publication contains the text of lectures by Sir Michael Wood on the topic “International Law in Practice”, delivered by him within the frames of the Summer School on Public International Law 2020.

УДК 341.1/8
ББК 67.91

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2020 году Летняя Школа состоялась в третий раз. В связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Национальная юрисдикция и международное право». Их прочитали Седрик Рейнгарт («Национальная юрисдикция и международное право»), Алина Мирон («Экстерриториальная юрисдикция: концепция и пределы»), Филиппа Вэбб («Иммунитет государства и его должностных лиц от иностранной юрисдикции»), Манфред Даустер («Осуществление уголовной юрисдикции в Германии и международное право»), Роман Анатольевич Колодкин («Национальная юрисдикция и Конвенция ООН по морскому праву»). Общий курс международного публичного права прочёл сэр Майкл Вуд.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2020, the Summer School was held for the third time. Due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "National Jurisdiction and International Law". The courses were delivered by Cedric Ryngaert ("National Jurisdiction and International Law"), Alina Miron ("Extraterritorial Jurisdiction: Concept and Limits"), Philippa Webb ("Immunity of States and their Officials from Foreign Jurisdiction"), Manfred Dauster ("Exercise of Criminal Jurisdiction by Germany and International Law"), and Roman Kolodkin ("National Jurisdiction and UNCLOS"). The General Course on Public International Law was delivered by Sir Michael Wood.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Сэр Майкл Вуд

Сэр Майкл Вуд является членом Комиссии международного права и ранее был специальным докладчиком по теме «Выявление международного обычного права». Кроме того, он является старшим научным сотрудником Центра международного права им. Э. Лаутерпаха, Университет Кембриджа. Как барристер в крупнейшем объединении Twenty Essex Chambers (Лондон) он практикует в сфере международного публичного права, участвуя в рассмотрении многочисленных дел в международных судах и трибуналах. Он начал карьеру в 1970 году в качестве помощника юрисконсульта. В 1999–2006 гг. руководил Правовой службой Министерства иностранных дел и по делам Содружества Великобритании. Сэр Майкл Вуд является автором многочисленных книг и статей по различным вопросам международного публичного права.

Sir Michael Wood

Sir Michael Wood is a member of the UN International Law Commission where he has recently finished his work as a Special Rapporteur on Identification of customary international law. He is a Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge. He is a barrister at Twenty Essex Chambers, London, where he practises in the field of public international law, including many cases before international courts and tribunals. He was Legal Adviser to the UK's Foreign and Commonwealth Office between 1999 and 2006, having joined as an Assistant Legal Adviser in 1970. Sir Michael Wood is the author of numerous books and articles on diverse topics of public international law.

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LECTURE 1:

The Reality of International Law

It is a pleasure to participate once again in the Summer School of the International and Comparative Law Research Center.[1] It would have been an even greater pleasure to be with you in person in Moscow, but the circumstances of the COVID-19 pandemic did not allow for that. I am grateful to Roman Kolodkin, and to Victoria, Egor, Evgeniya, and all their colleagues who have made these lectures possible in these challenging times.

These are challenging times for public international law. Some commentators say we are entering into a new Cold War or Wars — there are deep suspicions between China and certain Western countries, including the United States; and between Russia and countries such as the United Kingdom and the United States. Appetite for new multilateral treaties appears to have declined, and withdrawal from existing agreements happens all too frequently. In such circumstances, international law is more important than ever, as a common "language" and a (minimum) basis for conduct. International lawyers can, and must, keep talking even in the most difficult of times.

The theme "International Law in Practice" is hardly new. Much has been written on the subject.[2] This first lecture will be preliminary

[1] I thank Dr Omri Sender for his great assistance in preparing these lectures. For my earlier lectures at the Summer School (on customary international law, in 2018), see *Courses of the Summer School on Public International Law*, Vol. I (International and Comparative Law Research Center, 2020), available at <https://iclrc.ru/files/pages/camp/2018/Publications/SSPIL-2018_1_Sir-Michael-Wood.pdf>.

[2] For example, W. Malkin, "International Law in Practice" (1933) Law Quarterly Review 489–510; A.D. McNair, "International Law in Practice" (1947) 1 International Law Quarterly 4–13; M.E. Bathurst, "The Practitioner", in B. Cheng (ed.), *International*

in nature, introducing the main themes. Then in the next three lectures, I develop some aspects, first by addressing the divide between practice and theory in public international law; then by looking more closely at the role of Government legal advisers and legal advisers at international organizations. The remaining four lectures will cover matters that are of interest to any international lawyer, but will do so from the practitioner's angle: the sources of public international law, the provision of legal advice in difficult cases (including the international use of force), the conduct of international negotiations, and the practice of international and domestic litigation.

I consider myself a practitioner, mainly of public international law, sometimes also the constitutional law of the British overseas territories (which used to be called "colonies" until that word got a bad name — the UK still has 14 such territories) and foreign relations law. I am interested in the practical application of international law. I am not an academic, though I do occasionally give talks and have written quite a bit, mostly from a practitioner's point of view.

As a practitioner, I spent thirty-five years in the UK Diplomatic Service, as one of the legal advisers in the UK's Foreign and Commonwealth Office (FCO).[3] The arrangements for legal advice within the FCO are quite similar to those in the Russian Ministry of Foreign Affairs.[4] Most of the lawyers in the FCO's Legal Directorate

Law: Teaching and Practice (Stevens, 1982) 117–122; I. Sinclair, "The Practitioner's View of International Law", in D. Freestone et al. (eds.), *Contemporary Issues in International Law — A Collection of the Josephine Onoh Memorial Lectures* (Kluwer Law International, 1988) 57–76; A. Pellet, "Le Droit international à la lumière de la pratique: l'introuvable théorie de la réalité — Cours general de droit international public", (2021) 414, *Recueil des cours*.

[3] Since 2 September 2020, renamed Foreign, Commonwealth and Development Office (FCDO), though at the time of these lectures it was still the FCO.

[4] The Council of Europe has a useful database on "The organisation and functions of the office of the legal adviser in the ministry of foreign affairs", available at <http://www.cahdidatabases.coe.int/Search/Index/2>. The entry for the Russian Federation dates from 2005.

are members of the UK Diplomatic Service, and thus may be, and sometimes are, sent on postings overseas, usually ones with a high legal content (in New York, Geneva, Brussels, or The Hague).

I was the principal Legal Adviser to the FCO between December 1999 and the end of February 2006. I had hoped for five or six years of peace, but we had the intervention over Kosovo, then 9/11 and Afghanistan, then the 2003 Iraq War, plus a couple of less controversial interventions.[5] All these matters (and many others, including the negotiations with Libya to resolve differences over the Lockerbie incident and the settlement of the ICJ cases,[6] or the two arbitral cases between Ireland and the UK over the MOX Plant at Sellafield[7]) raised a whole host of international law questions, of both substance and procedure, some of which I shall return to in the present lectures. They attest to the fact that, as a former colleague wrote, "[t]he international lawyer in government service performs a remarkable variety of roles on many stages and in many games and forums and arenas".[8]

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[5] For example, in the aftermath of the ECOWAS/ECOMOG interventions in Sierra Leone (1997–1999), between May and September 2000, British troops assisted the Sierra Leonean army to defeat the Revolutionary United Front, led by Foday Sankoh (Operation Palliser, which began as an operation to evacuate foreign citizens from Freetown). See, generally, Andrew M. Dorman, *Blair's Successful War: British Military Intervention in Sierra Leone* (Ashgate Publishing, 2009).

[6] See A.L. Paulus and A. Dienelt, "Lockerbie Cases (Libyan Arab Jamahiriya v United Kingdom and United States of America)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010).

[7] *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. The United Kingdom of Great Britain and Northern Ireland)*, PCA Case no. 2001-03; *Mox Plant Case (Ireland v. The United Kingdom of Great Britain and Northern Ireland)*, PCA Case no. 2002-01. See also R.R. Churchill, "MOX Plant Arbitration and Cases", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2018).

[8] P. Allott, "The International Lawyer in Government Service: Ontology and Deontology" (2005) 23 Wisconsin International Law Journal 13–14 (listing (1) the internal diplomacy of national government; (2) national legislative diplomacy; (3) bilateral international diplomacy; (4) international parliamentary diplomacy; (5) international government; (6) courts and tribunals; and (7) *forum internum*, including research and writing with a view to participating in all the above roles and arenas or as a contribution to public and scholarly debate).

The work of the FCO Legal Advisers covered five main areas: (1) general questions of public international law (on matters such as the use of force, the law of the United Nations and other international organizations, the law of the sea, and international immunities), where the lawyers would be involved in advising the whole of government; (2) European Union law (where things now look quite a bit different); (3) international human rights law, especially under the European Convention on Human Rights; (4) the constitutional law of the British overseas territories; and (5) domestic law relevant to the work of the FCO (foreign relations law; intelligence and security law).

Soon after leaving the FCO in early 2006, I became a lawyer in private practice (a barrister), mostly with States — a range of States — as clients (not, alas, the Russian Federation). I have acted and am acting as counsel in a number of cases before international courts and tribunals, including the International Court of Justice, the International Tribunal for the Law of the Sea and inter-State arbitrations, as well as the European Court of Human Rights and the International Criminal Court. In addition, I occasionally act as arbitrator, or as a member of a board deciding staff matters within an international organization. Since 2008, I have been a member of the UN International Law Commission (ILC), where I served as Special Rapporteur on the topic "Identification of Customary International Law".[9] It has been a great pleasure to work closely over the years with Russian members of the Commission: Roman Kolodkin, Kirill Gevorgian, and Evgeny Zagaynov.

[9] For the outcome of that topic, see the 16 Conclusions, with commentaries, in A/73/10: *Report of the International Law Commission on its Sixty-seventh session (30 April–1 June and 2 July–10 August 2018)*, Chapter V. In resolution 73/203 of 20 December 2018, the UN General Assembly "[took] note of the conclusions on identification of customary international law … with the commentaries thereto, [brought] them to the attention of States and all who may be called upon to identify rules of customary international law, and encourage[d] their widest possible dissemination".

Since I shall be talking quite a bit about practice and theory, you might well ask what my own "theory" is. Well, it may not come as much of a surprise if I say that I am essentially a positivist, with a strong belief in the need for clarity, even simplicity, when it comes to international law.[10] While I may be quite critical of academic writings in the course of these lectures, I would not go so far as a memorable article in the *Virginia Law Review* from 1936, "Goodbye to Law Reviews", in which a Yale Law School professor stated that "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content".[11]

Practice, Practitioners, Positivism

The theme I have chosen for this General Course is "international law in practice". What do I mean by "practice"? Practice, and practising lawyers, as opposed to what? The main distinction I have in mind is between those who practise international law on behalf of clients (whether as in-house lawyers or in private practice), or in some other operational way, for example, as a judge, arbitrator,

[10] M. Wood, "What Is Public International Law? The Need for Clarity about Sources" (2011) 1 Asian Journal of International Law 205–216.

[11] F. Rodell, "Goodbye to Law Reviews" (1936) 23 Virginia Law Review 38; see also at 43 ("Law review writers seem to rank among our most adept navel-gazers. When they are not busy adding to and patching up their lists of cases and their far-flung lines of logic, so that some smart practising lawyer can come along and grab the cases and the logic without so much as a by-your-leave, they are sure to be found squabbling earnestly among themselves over the meaning or content of some obscure principle that nine judges out of ten would not even recognize if it hopped up and slugged them in the face. This centripetal absorption in the home-made mysteries and sleight-of-hand of the law would be a perfectly harmless occupation if it did not consume so much time and energy that might better be spent otherwise. And if it did not, incidentally, consume so much space in the law libraries. It seems never to have occurred to most of the studious gents who diddle around in the law reviews with the intricacies of contributory negligence, consideration, or covenants running with the land that neither life nor law can be confined within the forty-four corners of some cosy concept. It seems never to have occurred to them that they might be diddling while Rome burned"). The author stuck by his views some twenty-five years later in "Goodbye to Law Reviews — Revisited" (1962) 48 Virginia Law Review 279–290.

or member of the ILC, on the one hand, and those who teach or write about international law, on the other hand.[12] To put it crudely, practitioner versus academic.

Of course, many international lawyers are both practitioners and academics.[13] In preparation for these lectures, I looked at the interesting interviews that Antonio Cassese conducted in the 1990s with five distinguished international lawyers, each of them well known for their writings: René-Jean Dupuy, Eduardo Jiménez de Aréchaga, Sir Robert Jennings, Louis Henkin, and Oscar Schachter.[14] I was struck that two of those interviewed, Jiménez de Aréchaga and Oscar Schachter, were mainly practitioners, while Sir Robert Jennings's career was split between academic life and practice.[15] In a similar way, I sometimes consider how many of the 34 members of the ILC are practitioners and how many are academics. It seems to be about 50/50; in fact, many are both.

Then there is perhaps the most important group of people in our field, the students, who generally fall into neither category.[16] They include those who learn about international law as part

[12] I adopt a broad definition of "practitioner", not limiting myself to private practice as Rod Bundy did in his Hague lecture in 2018: R.R. Bundy, "The Practice of International Law" (2020) 406 Recueil des cours.

[13] Before briefly reviewing the work of two scholars as practitioners (H. Lauterpacht and Waldock) and two practitioners as scholars (Becket and Fitzmaurice), Sinclair noted that "[o]ne of the distinctive features of international legal practice is that the dividing line between the practitioner … and the teacher is tenuous in the extreme": Sinclair, *supra* note 2, at 57; see also C.N. Brower, "In Memoriam David D. Caron (1952–2018)" (2018) 112 American Journal of International Law 452 at 457 ("the article was typical David, the academic speaking to the practitioner, and the practitioner to the academic").

[14] A. Cassese, *Five Masters of International Law* (Hart, 2011).

[15] For a detailed account of Jennings's life and career, see C. Jennings, *Robbie: The Life of Sir Robert Jennings* (Matador, 2019).

[16] Students may themselves sometimes be engaged as assistants for the conduct of a case. Professors are well placed to find suitable assistants, and some insist on having an assistant for each major case they are involved in. This is of great help to the practitioner, but is also good experience for the assistant that is otherwise hard to come by. And it is certainly of help to the client.

of their general legal education (and unfortunately not all law students do); and those who specialize in the subject, whether at the master's or doctorate level. There are also non-lawyers who study international law as part of other courses, including those on international relations.

I believe it is important that students of international law get a sense of international law in practice, and do not see it as a largely theoretical subject. International law moots are important in this regard, and it is good to see that students here in Russia are active participants. When I studied at Cambridge in the 1960s, I was fortunate to have teachers who were involved in the practice of international law, and who were able to convey a sense of its reality. I think it is regrettable when, as seems to have happened recently, universities avoid appointing as professors of international law those engaged in practice. In the case of domestic law, legal education is essentially of a practical nature; law is not so much an academic subject as preparation for the profession. Why should it be any different with public international law?

Practitioners in public international law are normally engaged in applying existing law, though in some capacities, for example on the ILC, they may also be involved in promoting the development of the law. Of course, the distinction between *lex lata* and *lex ferenda* is not always clear-cut, but it is real and needs constantly to be borne in mind.[17] At least when applying the law, the practitioner has to be a "positivist". This was well expressed by René-Jean Dupuy. When interviewing him in 1993, Cassese suggested that the people who most impressed Dupuy were all jurists who were not positivists. The response was illuminating:

[17] M. Wood, "The UN International Law Commission and Customary International Law", in E. Cannizzaro (ed.), *Gaetano Morelli Lectures Series (Vol. 3 — 2020), Discourses on Methods in International Law: An Anthology* (International and European Papers Publishing, 2020) 65 at 68–73.

> It's true, they weren't positivists. Although they were perfectly capable of being positivists for the sake of resolving a particular case. I do not look down on positive law at all. In the course of my life, I acted as arbitrator several times, and I pleaded. Therefore I practised positive law. I was also a lawyer in my youth. I am very attached to law. In the end, on the application front, positive law must prevail.[18]

One sees the same positivist approach on the part of others who are known as celebrated academics. As practitioners, whether advising, pleading, or judging, the likes of Michael Reisman and Dame Rosalyn Higgins are very much black-letter lawyers. Take, for example, Dame Rosalyn, an academic who became a practitioner (as counsel, member of the Human Rights Committee, and judge and President of the International Court of Justice). In the book *Problems and Process*, based on her Hague Academy lectures, Dame Rosalyn wrote that "there is an essential and unavoidable choice to be made between the perception of international law as a system of neutral rules, and international law as a system of decision-making directed towards the attainment of certain declared values".[19] In the first sentence of that book, Dame Rosalyn proclaimed that "International law is not rules".[20] Yet as a practitioner (including as a judge), Dame Rosalyn seemed as ready as anyone to express international law in terms of rules.

Practitioners of international law, when acting as such, are very likely to adopt a positivist approach. That really goes without saying in the case of practitioners working in other legal systems. But public international law differs from national law in at least two important respects:

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[18] Cassese, *supra* note 14, at 20.
[19] R. Higgins, *Problems and Process — International Law and How We Use It* (Clarendon Press, 1993) vi.
[20] *Id*, at 1.

First, to a much greater extent than in domestic legal systems, important aspects of international law are still uncertain, though we should not exaggerate the uncertainties as some writers tend to do. In discussions with colleagues from other Ministries of Foreign Affairs (the State Department, the Russian Ministry of Foreign Affairs, and elsewhere), I found a good deal of common ground and agreement as to what the rules were.

Second, in the international legal system there are often no applicable general compulsory procedures for the settlement of disputes entailing binding decisions. Where such procedures are absent, there is little to stop States unilaterally invoking legal positions and acting upon their subjective appreciation of the facts and law without effective challenge, however specious the legal arguments may be in some cases. The powerful, but not only the powerful, may "get away with it". Of course, one may say that they are not in good faith, but an appeal to "good faith" is itself likely to be highly subjective. "Auto-interpretation" as to the law in force is often viewed as a serious weakness in international law, and a source of instability and uncertainty, undermining the rule of law in international affairs. Yet it reflects a reality of international relations in the 21st century, as it did in 1945, 1920, and before. It is inherent in the decentralized international legal system, and is one of the main ways in which that system differs from domestic legal systems. It is unlikely to change anytime soon. Proposals that States accept the "compulsory" jurisdiction of the International Court of Justice under the Optional Clause have largely fallen on deaf ears.

Practitioners of international law, whether consciously or not, may also base their general approach on some underlying theoretical approach. Such theories, which may well reflect what they teach or were taught at university, are more or less strongly held. Yet

successful practitioners are unlikely to stick to their own particular theoretical approaches in their practice, however dogmatic they may be in their writings. More important for the practitioner will be the views and interests of their client; and if the matter comes before a third party, what approach that third party is likely to take. Judges or arbitrators, as Dupuy suggested, will feel bound to apply positive law.

Differences and Similarities Among Practitioners

The practice of a Foreign Ministry lawyer is quite different from that of an international lawyer in private practice.[21] For a start, an in-house Government lawyer has a single client, and that client is the Government. The Government may well already have a position on a point of international law, and your job may be to explain and defend that position, especially if it has been established over a number of years. If you are going to try to persuade the Government to depart from that position, you will need to argue very thoroughly as to why it should do so. After all, States on the whole are expected to be consistent in their view of international law: not only is what they do, or say is the law, liable to become part of their State's practice or evidence of its *opinio juris*, but what they do or say can be held against them later. As a former State Department lawyer has written,

> in articulating and applying its rules, a government lawyer must take a long view. Arguments and approaches must be acceptable in a range of situations and over long periods of time. This means that international lawyers for the government cannot make arguments just to prevail in a particular situation.[22]

[21] See also M. Wood, "The Role of Public International Lawyers in Government", in D. Feldman (ed.), *Law in Politics, Politics in Law* (2013) 109–116.

[22] J.R. Crook, "Practicing International Law for the United States" (1996) 6 Journal of Transnational Law & Policy 1 at 4.

Examples may be found in the British Government's position on certain aspects of the international law on the use of force. Successive British Governments have taken the position, both publicly and internally, that "anticipatory self-defence" is lawful under the UN Charter, provided that the anticipated attack is imminent and that the other requirements of self-defence under customary international law (especially necessity and proportionality) are met. This leads on to a further question: what is meant by "imminence" in the context of self-defence, a matter on which the British Government has also taken a position from time to time. For a government lawyer fresh from his or her studies, the fact that the Government already has a position is unlikely to be much of a problem; for an established international lawyer coming from outside government this may require some adjustment in approach.

A legal adviser to a Government is frequently involved in policy advice, as law and policy are likely to be handled together within government. Nevertheless, distinguishing between law and policy — that is, between law and non-law — is essential. It is equally clear, I would say, that if policy-makers wish to get the best out of their legal advisers, they need to inform them clearly as to their objectives and involve them fully as policy develops, from the earliest stages.[23]

Another difference between the practice of a Foreign Ministry lawyer and one in private practice is that the latter will often write a detailed opinion even on small matters, and even when the answer is obvious. In government, by contrast, you not infrequently have perhaps five or ten minutes to come up with advice on some big issue. Legal advice must be timely, if it is to be useful. You sometimes have to reply instinctively, giving at least a tentative view with little or no explanation, often just saying "yes" or "no", or sometimes

[23] I have had occasion to say this to the United Kingdom's Iraq Inquiry: see <https://webarchive.nationalarchives.gov.uk/ukgwa/20171123123237/http://www.iraqinquiry.org.uk//media/96182/2011-03-15-Statement-Wood-3.pdf>, p. 11.

"maybe". As a study of US State Department legal advisers put it, "often the speed at which events move is such that preliminary legal advice is required within a period of hours, or even minutes".[24] Such initial legal advice can set a Government's line for years to come. For example, within hours of the *Enrica Lexie* incident in February 2012, the Italian Government, on legal advice, took the position that the Italian marines had immunity from the jurisdiction of the Indian courts, a position that was eventually upheld by the arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) in its 2020 award on the merits.[25] Questions of immunity often arise at very short notice indeed; the visit of a President-elect, for example, may suddenly give rise to a novel immunity issue.

But the work of public international lawyers, whether in government, in private practice, or elsewhere, is also — at least should be — similar in several important respects. All international lawyers need to have a sound understanding of the sources of international law; they must know what is law and what is not.[26] As already mentioned, in my own experience, practising international lawyers do share a common understanding of the structure and essence of international law. Any differences are certainly no longer (if they ever were) likely to be based simply on nationality. Different views of the law between practitioners from the various countries are indeed not as great as authors occasionally suppose:[27] I usually found that I had a lot more in common with lawyers from different foreign ministries than with some academics in the UK.

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[24] M.P. Scharf and P.R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010) 17.

[25] PCA Case No. 2015-28, *The "Enrica Lexie" Incident (Italy v. India), Award of 21 May 2020*, available at <https://pcacases.com/web/sendAttach/16500>.

[26] See also Wood, *supra* note 10.

[27] For example, A. Roberts, *Is International Law International?* (Oxford University Press, 2017); K.T. Gaubatz and M. MacArthur, "How International is 'International' Law?" (2001) 22 Michigan Journal of International Law 239–282.

This does not mean that differences of opinion do not exist, even with regard to the sources of international law. In my lectures here two years ago, I recalled Russian suspicion toward customary international law in the years following the October Revolution and then among USSR jurists, a suspicion that, I believe, no longer exists, at least to the same extent.[28] One may also recall French reservations concerning the concept of *jus cogens*. Moreover, as Oscar Schachter has noted, "general agreement on sources does not always extend to the more precise formulations that are often required to resolve concrete disputes".[29] But, apart from one or two points, there is in fact a common approach to the sources of international law among international law practitioners; the work of the International Court of Justice, and of the International Law Commission, membership of which is subject to a fixed geographic distribution so as to ensure representation of the world's main civilizations and principal legal systems of the world, provides ample evidence of that. This is of critical importance for the unity of the system.

A duty to the law and to the legal system exists for all public international lawyers even if there are no rules for an "international bar" to regulate the conduct of those who practise international law, for the most part because of differences between international courts and tribunals and because States wish to retain the discretion to appoint as counsel whomsoever they like.[30] The lack

[28] Wood, *supra* note 1, at 16–23.

[29] O. Schachter, "The Invisible College of International Lawyers" (1977) 72 Northwestern University Law Review 217 at 219–220 (suggesting that "[w]e need only look at the International Court of Justice cases and advisory opinions, where ample evidence of divergent formulas accepted by the majority and by dissenting judges indicates that much of the agreement on criteria (or 'sources') exists only on a fairly general level. At closer quarters, different versions of the standards of decision emerge").

[30] E. Sthoeger and M. Wood, "The International Bar", in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 639–654; J. Crawford, "The International Law Bar: Essence Before Existence", in J. d'Aspremont et al (eds.), *International Law as a Profession* (Cambridge University Press, 2017) 338–354.

of a formal international law bar is a source of concern for some, for whom it means an absence of "a minimum level of qualification in international law, of rules of professional conduct and of an organization entrusted with the task of enforcing them".[31] In my view, however, such concerns are exaggerated. Change is unlikely to lead to improvements. There are too many variables with international courts and tribunals, and among clients. At present, things are largely self-policing, and the possible disadvantages of this should not be overstated.

The practice of international law — perhaps I should say the proper practice of international law — requires more than an understanding of the sources of the law and an allegiance to the international legal system. It also requires a sound grounding in the basics of international law, such as one finds in the various chapters of any good manual of international law: the subjects of international law, State and other international responsibility, the law of treaties, the relationship between international and national law, and so on. It is, in my view, essential that international lawyers are generalists before — if they must — they become specialists in such fields as human rights, international criminal law, WTO law, and so on.[32]

International lawyers should also be reasonably good linguists. International law, while aspiring to be universal, has

[31] Declaration of Judge *ad hoc* Cot, *"Grand Prince" (Belize v. France), Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, at p. 53, para. 13 (referring to the lack of a specialized bar before the International Law of the Sea Tribunal); A. Sarvarian, *Professional Ethics at the International Bar* (Oxford University Press, 2013).

[32] See I. Brownlie, "Problems of Specialisation", in Bin Cheng (ed.), *International Law: Teaching and Practice* (Stevens, 1982) 109–116. A recent #1 *New York Times* bestseller by author David Epstein, called *Range: Why Generalists Triumph in a Specialized World* (Riverhead Books, 2019), quotes from Tolstoy's *War and Peace*: "And he refused to specialize in anything, preferring to keep an eye on *the overall estate* rather than any of its parts. … And Nikolay's management produced the most brilliant results".

to be expressed in particular languages.[33] While multilingualism is important, some languages are more accessible than others, though that depends of course on the intended audience. For domestic lawyers and judges, it is often necessary to have materials available in the national language or languages. But for a worldwide audience, English, French, or to a somewhat lesser extent Spanish, still seem to predominate.[34] At the same time, even if the International Court of Justice operates in English and French, for example, it may well need to consider texts or acts in other languages, with which some of its judges may or may not be familiar. German authors and publishers started publishing mainly in English some years ago; I believe that here in Russia many still publish only in Russian; that inevitably limits the influence of the writings worldwide.

Whatever language you write in, it is important to write clearly and simply, though occasionally you may deliberately intend something to be vague. When writing in a foreign language, it may be necessary to have a native speaker review the text, which otherwise can sometimes be quite disorienting. Brevity can be a great benefit, too; at least for a practitioner, usefulness may be in reverse proportion to length. Busy officials or judges are likely to appreciate it. The ILC's conclusions and accompanying commentary

[33] Thirlway has suggested that in general international law there is in fact no direct linkage between the law and the language of its expression: H. Thirlway, "Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning" (2002) 294 Recueil des cours 286.

[34] International law used to be practiced mainly in French (or Latin), though this is no longer the case. On the use of Latin terms, Tiersma has suggested that "a great majority of legal maxims are indeed in Latin, partly for historical reasons, but sometimes also to mask the fact that many of these maxims are self-evident banalities made to seem more impressive by being expressed in a dead language": P. Tiersma, "The New Black's" (2005) 55 Journal of Legal Education 386 at 397. Reisman has similarly written, with reference to the term *opinio juris* in particular, that "I warn my students that if they confront something in Latin, it is usually a signal that jurists are unsure of what they are talking about and are trying to conceal their confusion behind a solemn and pretentious Latin phrase": W.M. Reisman, "Jonathan I. Charney: An Appreciation" (2003) 36 Vanderbilt Journal of Transnational Law 23.

on customary international law, for example, were deliberately kept brief (some 33 pages).

Perhaps above all, international lawyers all need a good dose of commonsense, and knowledge of the realities of international relations. They can no longer exist in some idealized ivory tower, if they ever did. Alberico Gentili, Hugo Grotius, and F.F. Martens, as most of the "fathers" of international law, were first and foremost diplomats and practitioners. Only then can international lawyers exercise real influence, while bearing in mind the limits of what they and the law can achieve.

A final introductory point concerning the practice of international law is this. In the past, it was often thought necessary to justify the existence and practical importance of public international law as law. Nowadays, the fact that international law is indeed law, and that as such it serves a useful purpose, is no longer seriously questioned. While the somewhat irregular features and unique development of international law as law need to be addressed, this should not be done from an apologetic or a defensive position.[35] According to Brierly, "[m]ost of those popular arguments which prove the non-legal or the peculiarly abstract nature of international legal principles are the pseudo-realist arguments of the theorist who, if he or she has examined the subject at all, has seen it in books and not in action".[36] A similar sentiment was expressed by Richard Bilder:

> An attorney cannot practice in the [United States Department of State] Office of the Legal Adviser without gaining a firm conviction of the reality of international law — an acute awareness of the extremely meaningful and generally effective

[35] See also O. Sender and M. Wood, Book Review (2013) 107 American Journal of International Law 959 at 962–963; S.D. Murphy, "The Concept of International Law" (2009) 103 Proceedings of the ASIL Annual Meeting 165–169.

[36] A. Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*, 7th edition (Oxford University Press, 2012) 504.

> role that international law actually performs in regulating the conduct of nations and in making the international community work.[37]

Precisely this sense of the reality of international law is what I hope to convey in the course of these lectures, and many of the points I have already mentioned will stay with us throughout them. An interesting question to examine more closely at the outset is the relationship — some might say the divide — between international law in practice and international law in the books; to that question we shall turn in the next lecture.

[37] R.B. Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs" (1962) 56 American Journal of International Law 633 at 679.

LECTURE 2:

Practice and Theory — the Place of Teachings

Today I am going to talk about the apparent divide between practice and theory in public international law. This is a persistent theme among international lawyers. It is a matter of deep concern to me, particularly when I see students being taught speculative theories rather than real-life law. On a positive note, I shall also speak about the importance of writings.

The titles given to many writings on international law, and indeed the title of today's lecture, distinguish between practice and theory.[38] They seem to accept the divide as a given. I do not think that is the case with other systems of law. Indeed, when I was a student, law was scarcely regarded as an academic subject. In those days, at least in England, those who wanted to be lawyers were sometimes encouraged to study other subjects at university.

Theoretical writings on international law have increasingly acquired a bad name, often being detached from reality and self-referential, and for the most part of no particular interest

[38] See, for example, C. De Visscher, *Theory and Reality in International Law* (Princeton University Press, 1968, reprinted in 2016); O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, 1991); K. Wellens (ed.), *International Law: Theory and Practice — Essays in Honour of Eric Suy* (Martinus Nijhoff, 1998); C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, 2016); S. Besson, "International Legal Theory *qua* Practice of International Law", in J. d'Aspremont et al. (eds.), *International Law as a Profession* (Cambridge University Press, 2017) 268–284; M. Koskenniemi, "Theory: Implications for the Practitioner", in P. Allott (ed.), *Theory and International Law: An Introduction* (British Institute of International and Comparative Law, 1991) 4–13.

to practitioners — that is, to the real world.[39] I begin with two quotations, both from 2018:

> Sir Christopher Greenwood, a practitioner who was for many years a teacher and professor, has warned that there are "distressing signs of a rift between the study and the practice of international law". He continued: "Writers on international law should never be the mere scribes of state practice but there are worrying indications of a trend in international legal scholarship that is both ignorant of and determinedly detached from the practice of international law". He concluded that "[i]f the scholars of international law write only for one another then we are all the poorer".[40]

[39] This was explained particularly well by John Bellinger in an interview with the *Harvard International Law Journal* in 2010, shortly after he completed 15 years as a government lawyer, he also set out what writings were useful to the practitioner: "An Interview with John B. Bellinger III" (2010) 52 Harvard International Law Journal — Online 32 at 33 ("I encourage international law journals to try to stay away from the theoretical, which is generally not helpful to practising government lawyers. But my government colleagues and I did look to articles that were exhaustive surveys of a particular issue — gathering information that we might not otherwise have gathered, looking through a treaty negotiation record, particularly of an older treaty, and particularly collecting information from other countries that might not otherwise be available — or simply a careful look at a practical problem that the government is facing and a serious analysis of it…I found 90% of law review articles not terribly helpful…").

[40] C. Greenwood, "The Practice of International Law: Threats, Challenges, and Opportunities" (2018) 112 Proceedings of the ASIL Annual Meeting 161 at 167. Harold Koh, an academic who was at the time Legal Adviser to the State Department, is reported to have said that much contemporary scholarship was "unconnected to the practice of international law" and "policy-irrelevant": Speech entitled "What is Useful International Legal Scholarship" at the ASIL Midyear Meeting in Athens, Georgia, 24 October 2012, as cited in M. Windsor, "Consigliere or Conscience? The Role of the Government Legal Adviser", in J. d'Aspremont et al. (eds.), *International Law as a Profession* (Cambridge University Press, 2017) 355. For an earlier American view, see J. Goldsmith, "Scholars in the Construction and Critique of International Law: Remarks" (2000) 94 Proceedings of the ASIL Annual Meeting 318 at 319 ("The legal academy views international law scholarship, on average, as less successful than other legal scholarship by just about any measure, including clarity, insight, theoretical sophistication, persuasiveness and depth. This is related to the fact that international law scholars view themselves as a source of law. Advocacy and

> In his keynote address at the 2018 European Society of International Law Annual Conference, Professor Jan Klabbers suggested that "[i]nternational law, in the academy, is no longer about what states do, but has become about what international lawyers do. We have lost touch with legal practice, and the discipline has become transfixed by methodological debates, …". He continued: "Instead of the fragmentation of international law being a concern, we should be worried about the fragmentation of international lawyers". [41]

These views are borne out by much that one finds in the ever-increasing number of international law journals, edited volumes, and monographs. Getting the methodology right would better enable writers to uphold the basic distinction between a statement of existing law and a statement of proposed law. Too often, as Jennings put it, "missionary zeal tends to enter into the calculation, greatly tempting an enthusiastic 'publicist' to be less than clear about the distinction".[42] In particular, following an

scholarship are often mixed up in the international law field…As a general matter, international law scholarship is characterized by normative rather than positive argument, and by idealism and advocacy rather than skepticism and detachment. These methodological commitments preclude international law scholarship from being taken seriously by lawyers, other legal scholars, and courts").

[41] J. Klabbers, "On Epistemic Universalism and the Melancholy of International Law" (2018) 29 European Journal of International Law (2018) 1057 at 1062 (the 2018 Melland Schill lecture).

[42] R. Jennings, "International Law Reform and Progressive Development", in G. Hafner et al. (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenvelden* (Kluwer Law International, 1998) 325 at 333 (noting, however, that "this use as a rhetorical weapon of the lack of a clear boundary between proposal and existing law is not confined to writers"). Oppenheim, in 1921, suggested that "Science may also test and criticize, from the politico-jural standpoint, the existing rules of customary or enacted law, but, on the other hand, it may not contest their operation and applicability, even if convinced of their worthlessness. It must not be said that these are obvious matters and therefore do not need special emphasis. There are many recognized rules of customary law the operativeness of which is challenged by this or that writer because they offend his sense of what is right and proper … Here they are putting their politico-jural convictions in the place of a generally recognized rule of law": L. Oppenheim, *The Future of International Law* (Clarendon Press, 1921) 57.

orthodox methodology would make writing much more useful when international law must be applied to real situations and serve its ultimate purpose of serving global peace and cooperation.[43] None of this is to say that authors may not challenge the existing law; of course they may — and should. But they should do so responsibly and openly.[44]

I wonder, however, how new all this really is. My teacher, Clive Parry, observed in 1965 that "[o]ne of the most striking things about international law as it appears to a ministry of foreign affairs is how different it is from the law of the books".[45] Perhaps we are just

[43] See P. Allott, "Language, Method and the Nature of International Law" (1971) 45 British Yearbook of International Law 79 at 120: "No one can presume to speak on behalf of all general practitioners of international law, but it is tentatively suggested that what a practitioner would be most happy to find, when he consults a work of learning for assistance in a problem which has arisen in practice, is a very extensive and self-contained description of what happened in similar situations in the past (without comment from the author); a statement of the areas of doubt which exist in the field (including references to the competing interests of States); followed by clear and direct quotations from well-known writers giving their view of the law; followed by the author's own views where they differ from the general trend or where the well-known writers do not speak with one voice. With such material before him, the practitioner's task of forming a view would be facilitated — a view ultimately depending on his own experience and judgment, but slightly more likely to be the view reached by other practitioners if they are all working on the same clear and complete material".

[44] See also R.Y. Jennings, "An International Lawyer Takes Stock" (1990) 39 International and Comparative Law Quarterly 513 at 527–528 ("It is undeniably important that scholars with imagination and vision should publish ideas for better international law. Good ideas, if they are timely and blessed by good fortune, possibly accomplish as much as, or more than, the diplomatic conferences, with their promising drafts of articles, so beloved by those who seek to further the 'progressive development' of international law. Yet it is important not to carry the campaign for a 'new' international law so far as possibly to weaken the authority and respect which our present international law enjoys. And it is still important to distinguish between *lege lata* and proposals *de lege ferenda*; not merely as a technical matter but because of the trap into which the layman so easily falls of supposing all international law to be a proposal").

[45] C. Parry, *The Sources and Evidences of International Law* (Manchester University Press, 1965) 105, reproduced in A. Parry (ed.), *Collected Papers of Professor Clive Parry* (Wildy, Simmons & Hill, 2012). A decade earlier, Schwarzenberger had said that "[n]othing has brought the doctrine of international law into greater disrepute than proneness of individual representatives to present *desiderata de lege ferenda* in the guise of propositions

more aware now of the divide between academics and practitioners, between theory and practice, because there is much more of both. The scope of international law has expanded greatly and there is ever more recourse to international and national courts and tribunals. At the same time, there is a huge and, it has to be said, not always welcome proliferation of articles and monographs on the subject: Jennings observed in 2004 that the "sheer volume of publications … threatens to make this subsidiary means [for the determination of the law], if it is not so already, quite unmanageable".[46] What does remain true today is the warning issued by Oppenheim as early as in 1908:

> the greatest care must be applied to avoid the teaching of rules which either do not exist at all or not to the extent asserted by book writers. … It is no use drawing up definitions and principles which do not agree with the facts as evidenced by the practice of the states. Wherever these facts are not clear, are uncertain, are not numerous enough to enable the researcher to see the full extent of a certain practice, definitions must be drawn up in a more or less ambiguous way, if they are at all necessary. It is a thousand times better to leave a question open than to answer it incorrectly. The science of international law can neither step into the place of legislation and of codification, nor into the place of custom. It is a fact that as regards many questions the practice of the states differs so much that either no unanimity whatever can be stated to exist, or only with regard to some points.[47]

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de lege lata": G. Schwarzenberger, "The Province of the Doctrine of International Law", in G.W. Keeton and G. Schwarzenberger (eds.), *Current Legal Problems*, Vol. 9 (Stevens & Sons, 1956) 235 at 244. Michael Reisman expressed perhaps a somewhat different concern, that "[a] good deal of what is international law in the books is not international law in practice and that includes, unfortunately, some of the most fundamental norms": "The Teaching of International Law in the Eighties" (1986) 20 The International Lawyer (1986) 987 at 990–991 (referring to the experience in the United States).

[46] R. Jennings, "Reflections on the Subsidiary Means for the Determination of Rules of Law", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica, 2004) 319 at 320.

[47] L. Oppenheim, "The Science of International Law: Its Tasks and Method" (1908) 2 American Journal of International Law (1908) 313 at 335.

Article 38(1)(d) of the ICJ Statute and the Place of Teachings in International Law

How, then, as a practitioner, do I view writings? On the one hand, there is the formal position: teachings, even of "the most highly qualified publicists", have a distinctly limited role; Article 38(1)(d) of the ICJ Statute refers to them as a subsidiary means for the determination of rules of international law. On the other hand, writings may be a very useful resource when one is faced with almost any problem of international law, and are often a place of first recourse.

International law, as a system, owes much to the most eminent of the early authors on the subject; in fact, no area of law seems, at first blush, to owe so much to the writings of jurists. Early writers were the first to give some structure to the law of nations and have directly influenced its content.[48] The "fathers of international law", as they are called, developed much of the law before it came to be shaped by practice of States.[49] Yet most of them, as I have mentioned, were first and foremost practitioners, with their writings being closely associated with their practice. Gentili, for example, advised Queen Elizabeth I on matters of diplomatic law, and Spain on maritime law; and Grotius advised, among others, the Dutch East India Company and Prince Maurice of Nassau. The predominance of practitioners amongst writers is not altogether surprising given that in the early days, the law was to a large extent unwritten, and there were few, if any, international tribunals or other bodies to offer authoritative guidance. In addition, the importance of practice and precedent in international law made any careful record thereof — as evidence of what the law was — highly useful. Clive Parry observed that

[48] For a brief account, see Clapham, *supra* note 36, at 1–40.

[49] "Before there existed any great wealth of state practice or judicial precedent, writers on international law held a pre-eminent position": D.W. Greig, *International Law* (Butterworth, 1970) 40.

"both the books and the opinions of the nineteenth century seem often to resemble catalogues of the praises of famous men".[50] He added, with characteristic perception, that it was "no doubt true that, as the body of judicial decisions increases, the authority of the commentator is decreased".[51]

The historical significance of teachings is reflected in the place reserved for them in Article 38(1)(d) of the ICJ Statute, which directs the Court to apply "the teachings of the most highly qualified publicists of the various nations" as a "subsidiary means for the determination of rules of law".[52] In the equally authentic French text of the Statute, the reference is to "*la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit*". "Publicists" sounds odd in English, but it is presumably a literal translation of *publicistes* (meaning persons learned in public law).[53] Nevertheless, in the Statute the term covers all whose writings may elucidate questions of international law.

Under Article 38(1)(d), teachings, like judicial decisions, are a "subsidiary means", an auxiliary means (the French is once again better: *moyen auxiliaire*). These words confirm that "the intention behind the final wording of this provision was that jurisprudence and doctrine were supposed to elucidate what the

[50] Parry, *supra* note 45, at 103 ("'Hear also what Hall sayeth. Hear the comfortable words of Oppenheim' is an incantation which persists even in this [twentieth] century").
[51] *Id*, at 104 (explaining that "[t]he quality of actuality which a decision … possesses as compared with an opinion, plays a part here").
[52] See also M. Wood, "Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2017).
[53] The ILC took an expansive view of the term 'teachings': A/73/10, *supra* note 9, at para. 1 of the commentary to Conclusion 14 ("The term 'teachings', often referred to as 'writings', is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials").

rules to be applied by the Court were, not to create them".[54] This role was well captured in the words of Justice Gray in *The Paquete Habana*: "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".[55] The words of Chief Justice Fuller, dissenting, are no less memorable: he warned of writers that "[t]heir lucubrations may be persuasive, but not authoritative".[56]

The International Law Commission, rather more prosaically, explained that:

> writings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that teachings may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law.[57]

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[54] A. Pellet and D. Müller, "Article 38", in A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edition (Oxford University Press, 2019) 819 at 944. The ninth edition of *Oppenheim's International Law* sums it up as follows — "it is as evidence of the law and not as a law-creating factor that the usefulness of the teachings of writers has been occasionally admitted in judicial pronouncements": R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th edition (Longman, 1992) 43.

[55] *The Paquete Habana and The Lola*, US Supreme Court [8 January 1900] 175 US 677 at 700.

[56] *Id*, at 720. Lucubration is defined by the Merriam-Webster dictionary as "laborious or intensive study"; it goes on to explain: "Imagine someone studying through the night by the light of a dim candle or lamp. That image demonstrates perfectly the most literal sense of *lucubration*. … In its earliest known English uses in the late 1500s and early 1600s, *lucubration* named both nocturnal study itself and a written product thereof. By the 1800s, however, the term had been broadened to refer to any intensive study (day or night), or a composition, especially a weighty one, generated as a result of such study. Nowadays, *lucubration* is most often used as a plural and implies pompous or stuffy scholarly writing".

[57] A/73/10, *supra* note 9, at para. 2 of the commentary to Conclusion 14.

The French text of Article 38(1)(d) is of interest because it refers to "*la doctrine*" in the singular (as opposed to "teachings" in the plural), which may suggest that what counts is a general view in teachings, not simply a series of individual opinions.[58]

The formal role of writers, as enshrined in Article 38(1)(d) of the ICJ Statute, applies to the determination of rules of international law regardless of their source: while we often think of this role in connection with customary international law, it is also applicable to the determination/interpretation of rules set forth in treaties and of general principles of law within the meaning of Article 38(1)(c).

Drawing Upon Writings

The functions of writers in the international legal system are twofold: to offer evidence of what the law is, and to speculate as to its possible development. Brierly suggested that writers "[a]ctually … render exactly the same services as in any other legal system".[59] But his words of warning seem to have been directed particularly at those writing on international law: "it is important not to confuse these two functions".[60]

As I have said, practitioners are likely to regard writings as a point of first call when faced with a difficult or novel problem. What kinds of writings are most useful? First, general textbooks,

[58] Jennings, *supra* note 46, at 329 ("The term 'teachings' was presumably an attempt of translation of the French 'doctrine', and it might have been better translated simply as 'doctrine'. The idea of doctrine seems to introduce a new factor. It suggests that an examination of the works of publicists in the plural, may be used to find out whether a view is one which may be said to constitute a teaching or doctrine that is accepted by publicists in general or at any rate by a considerable number of them").
[59] Clapham, *supra* note 36, at 66.
[60] *Id*, at 67.

in so far as they are reliable (and reasonably up-to-date).[61] It is largely a matter of taste and habit, but I would normally look at the latest editions of Crawford's *Brownlie's Principles of Public International Law* and *Droit international public* by Dailler, Forteau, and Pellet. No doubt there are also reliable general textbooks in Russian. There are of course some good books on particular fields, such as the law of treaties, the law of the sea, and international humanitarian law. Particularly useful are writings by those who were involved in negotiating a convention, such as Sinclair's book on the Vienna Convention on the Law of Treaties,[62] though some care is needed when reading works by those who negotiated a text, since there may be a tendency to believe that one achieved one's objective. Special mention should also be made of the *Max Planck Encyclopedia of Public International Law* and the *Max Planck Encyclopedia of International Procedural Law*, which frequently provide a first point of reference, particularly for the more obscure topics. I recall being asked by a Minister, at no notice, for a quick note on the Free City of Danzig, and was happily able to go to the library and photocopy the relevant entry from Bernhardt's *Encyclopedia of Public International Law*. Up-to-date collections of documents and other materials are highly convenient, even in today's world, for example, Malcolm Evans's *International Law Documents*.[63]

[61] Hernández writes: "Textbooks, and the manner in which they are structured, inculcate the shared vocabulary and methodology of our invisible college for the next generation; they set the boundaries of relevance, establishing what counts as a valid and acceptable legal argument and what does not. … What is more, international law textbooks are highly relevant for international legal practice, being potentially as popular with practitioners, international courts and legal advisors to states as they are with students, precisely given their educational, descriptive approach": G. Hernández, "*E Pluribus Unum?* A Divisible College?: Reflections on the International Legal Profession" [Book Review] (2018) 29 European Journal of International 1003 at 1013.

[62] I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition (Manchester University Press, 1984).

[63] *Blackstone's Statutes — International Law Documents* (new edition by Oxford University Press every couple of years).

Another question is, to which writings should we pay most attention? The ICJ Statute refers to those publicists of the various nations who are "the most highly qualified". Its authors probably had in mind only a handful of such persons at the time, and the notion is, of course, a subjective one.[64]

The views of authors must be considered while bearing in mind various factors, such as the extent to which they reflect the positions of particular States or groups of States, whether they seek to promote a particular viewpoint or to formulate proposals for new rules of law. As the International Law Commission has put it, in the context of customary international law,

> There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies … First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential.[65]

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[64] The Governments of the United Kingdom and the Kingdom of the Netherlands, for their part, referred in this context (in a brief submitted to the United States Supreme Court in the *Kiobel* case in 2012) to "respected jurists": Brief submitted to the United States Supreme Court by the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amici curiae* in support of the respondents in *Kiobel v. Royal Dutch Petroleum* (3 February 2012), p. 4, available at <https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamcuthegovernments.pdf>. For the suggestion that "[i]t is about as difficult to find out who are the most highly qualified publicists in the field of international law as to say with any claim to objectivity what is a peace-loving nation within the meaning of the Charter of the United Nations", see G. Schwarzenberger, "The Inductive Approach to International Law" (1947) 60 Harvard Law Review 539 at 559–560.

[65] A/73/10, *supra* note 9, at para. 3 of the commentary to Conclusion 14. See also M.O. Hudson, *International Tribunals: Past and Future* (Carnegie Endowment for

The ILC further explained that the reference to "the most highly qualified" publicists:

> emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it.[66]

Such caution is perhaps now more necessary than ever. Quite a lot of writing in international law these days does not follow what many would regard as a proper methodology. In the past, as Philip Allott has described, the inquiry was for the most part inductive, that is, seeking to draw a conclusion on the basis of a search for patterns in the practice of States (and other authors). The utility of such texts owed much to the inductive methodology, because, in Allott's words,

> Those who seek to find international law in a given situation are subject to two controlling factors which, in a sense, constitute international law's own verification procedure. The first is that it is not possible easily to delude an attentive reader into seeing a pattern which is not there. The second is that the rules of international law are put to the test, each and every day, in relations between governments. An international lawyer who persists in finding rules of international law

International Peace and Brookings Institution, 1944) 108 ("A tribunal may be assisted, also, by treatises on international law, though it must resort to them with due regard to the time and circumstances in which they were published and to the special preoccupations of their authors").

[66] *Id*, at para. 4. The Commission added that "[t]he reference to publicists 'of the various nations' highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages when identifying customary international law".

> which governments, international tribunals and his lawyer-colleagues never or seldom thereafter treat as law, may be on the side of the angels but will not in the end serve the useful purpose of contributing to the improvement of the quality of relations between States.[67]

Recourse to Teachings by and before Courts and Tribunals

While the judges (as numerous individual opinions show) are well versed in the literature, the International Court of Justice itself rarely refers to writings; it has done so perhaps four or five times over 100 years, and almost always in general terms.[68] Some of this abstention may reflect a desire to avoid being seen as making invidious distinctions between publicists: Jennings, a former Judge and President of the Court, wrote that "[t]his [somewhat squeamish] fear is understandable: for within the world circuit of professional international lawyers there is inevitably something of a club atmosphere".[69] He added, and I believe he was right, that this practice of the Court is "one of those harmless habits that are not easy to defend but which it would be difficult, and probably also rather pointless to endeavour to change".[70]

The ICJ and other international courts and tribunals are not alone in their reluctance to cite authors. There was a debate on the matter in the ILC in 2018, when the Commission adopted the commentaries to its conclusions on the *Identification of Customary International Law*, the outcome of which was that there are no

[67] Allott, *supra* note 43, at 105.
[68] Pellet and Müller, *supra* note 54, at 960–961.
[69] Jennings, *supra* note 46, at 327.
[70] *Id*.

citations to authors in the commentaries.[71] A similar debate, with a similar outcome, had occurred in 1966 when the Articles on the Law of Treaties were adopted on second reading.[72]

How then do practitioners use writings before the International Court of Justice or before other courts and tribunals? Should one, as a practitioner, quote writers to the judges? The answer is "yes", but in moderation, and relatively briefly. If you look, for example, at Equatorial Guinea's Memorial in the *Immunities and Criminal Procedures* case before the ICJ, you will see that at chapter 7 it dealt with the question of whether the Vice-President of Equatorial Guinea, in charge of national defence and State security, was entitled to immunity *ratione personae* under customary international law.[73] The chapter was some 30 pages long, with sections on treaty provisions, the ICJ's case-law, statements by States, State practice (legislation, national court decisions), writings, and the ILC's work touching on this matter. The section on writings consisted of three short paragraphs, with one long footnote, and one quotation (from the book on State immunity by Hazel Fox and Philippa Webb).[74]

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[71] See also G. Nolte, "How to Identify Customary International Law? — On the Final Outcome of the Work of the International Law Commission (2018)" (2019) 62 Japanese Yearbook of International Law 251 at 258–259 ("In contrast to many other outcomes of the work of the Commission, the commentaries on 'Identification of customary international law' do not refer to academic writings. This is so even though the Special Rapporteur has extensively used and quoted academic writings in his four reports before the first reading of the conclusions and commentaries, and has prepared an extensive bibliography. The main reason why the Commission, on the proposal of the Special Rapporteur, has chosen this approach was apparently that the Commission should produce an outcome that would be self-contained and easily readable for non-experts in international law, particularly for judges of national courts, and that such an outcome should concentrate on the most generally recognized authoritative sources").

[72] *Yearbook of the International Law Commission 1966*, Vol. I (Part II), 295–296.

[73] See <https://www.icj-cij.org/public/files/case-related/163/163-20170103-WRI-01-00-EN.pdf>.

[74] H. Fox and P. Webb, *The Law of State Immunity*, 3rd edition (Oxford University Press, 2015).

The Utility of Writings in Relation to Particular Sources of International Law

In the case of treaty law, the practitioner is generally well served by writers; the value of article-by-article commentaries on important multilateral conventions cannot be overstated. Practitioners owe a great debt to the editors and contributors, and indeed to the publishers, of such works, particularly if they are kept reasonably up-to-date. Who would usefully examine a difficult point in the Vienna Convention on the Law of Treaties without turning to the commentaries by or edited by Villiger,[75] Corten and Klein,[76] and Dörr and Schmalenbach?[77] Or a point in the UN Convention on the Law of the Sea, without looking at the exhaustive commentary edited by Preulss?[78] Or in the ICJ Statute without looking at the latest edition of the Zimmermann commentary?[79] The same is true of publications making accessible the *travaux* of major treaties.[80] How far these very practical works, which require a huge amount of thoughtful and meticulous work, are regarded as "academic" by the powers that be in universities is another matter.

With regard to customary international law, writers may have a particularly useful role to play in systematically collecting and analysing the scattered evidence of practice and its acceptance as law. Gathering the relevant data piece-by-piece may be especially

[75] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2008).
[76] O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2011).
[77] O. Dörr and K. Schmalenbach (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2nd edition (Springer, 2018).
[78] A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck/Hart/Nomos, 2017).
[79] A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edition (Oxford University Press, 2019).
[80] See, for example, H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff, 2008).

helpful where no codification efforts exist.[81] It has been suggested that because it is a very challenging intellectual task, the identification of customary international law is "the distinctive responsibility of the international legal scholar".[82] But to the extent that writers seek to justify their own theoretical approaches, or simply to promote their own policies, this greatly reduces the value of their output.[83]

The third source of international law listed in Article 38 of the ICJ Statute, "the general principles of law recognized by civilized nations", remains something of a mystery though hopefully one on which the ILC will soon shed light.[84] To the extent that it is based on what States do, be it domestically or otherwise, again the writer can serve a useful role, particularly in assembling an inventory of such practice and in assessing it.

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[81] See also the Dissenting Opinion of Vice-President Koretsky in *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 156–157.

[82] Reisman, *supra* note 34, at 24, 25 (adding that "Indeed, the Statute of the International Court of Justice stipulates in Article 38 that the work of scholars is a subsidiary source of law upon which the Court is to rely … the task of the international legal scholar was to find and assemble state practice and make sense out of its seeming chaos"); see also E.C. Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice* (Henry Holt and Company, 1931) 30 (observing that "[t]he task of digesting the precedents and formulating suggestions for new rules is mainly the work of the writers on international law", and adding that "[a] similar service is rendered by judges and statesmen who expound and explain the law which they have occasion to apply").

[83] See text at notes 239-240 below. Lauterpacht referred with approval to the type of writers that "certainly share the desire to see a real development of international law, but they have, on the other hand, a full appreciation of the forces working against it. They are positivists, not because they approve of what is, but because they think that even an unsatisfactory law is better than no law at all; and that imagining what ought to be, instead of what is, is likely to damage the not yet firmly established authority of international law. Who will listen to international lawyers whose books are full of pious wishes unrelated to facts?": H. Lauterpacht, "Westlake and Present Day International Law" (1925) 15 Economica 307 at 323. Similarly, Pellet has recently written that "Le juriste sérieux doit savoir resister la tentation de prendre ses désirs pour les réalités": *supra* note 2, at 173.

[84] The ILC took up the topic "General Principles of Law" in 2018; see text at note 250 below.

One area of scholarship that is largely out of touch with reality is to found in writings on *jus cogens*. Daniel Costelloe has observed that "the concept of peremptory norms has developed to a significant extent in the literature and has taken on a life of its own in that realm which, while at times instructive, does not always enjoy a convincing basis in the reality of international legal practice".[85] In fact, most writings on the subject are personal inventions (as indeed are some judicial opinions); the authors or, as the case may be, judges seem not to realise the damage they could do to the fabric and credibility of international law if their expansive views of the subject were to gain ground. Here again, the ILC has taken up the subject, completing the first reading of a set of draft conclusions in 2019.[86] It remains to be seen how far the Commission will be able to inject some common sense into the matter.

The Practitioner as Writer and Teacher

Practitioners may well be authors. G.I. Tunkin, for example, a Government official, was also an internationally renowned scholar. Of course, the converse is also true: writers can also influence the law as practitioners.[87] Jiménez de Aréchaga said that "[y]ou are a better professor if you practice law; you are a better practitioner if you have an academic background".[88]

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[85] D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press, 2017) xviii.

[86] ILC Report 2019 (A/74/10), Chapter V.

[87] In the 1920s, when the Secretariat of the League of Nations was considering who should have the right of appearance before the PCIJ, it referred to not only those "persons admitted to practise as advocates before the highest Court of their own country", but also to "University professors of International Law" and "members of the great international academies of International Law": "Rules of court: Draft prepared by the secretariat" (1922), PCIJ Ser D No 2, 263. Eventually, no rule concerning the right of appearance was adopted, and it seems almost anyone can appear as part of a State's delegation: see, for example, the interventions of the mayors of Hiroshima and Nagasaki in the *Nuclear Weapons* advisory proceedings; and of the individual Chagossian in the *Chagos Islands* advisory proceedings.

[88] Cassese, *supra* note 14, at 70.

Should practitioners pick up their pen differently when engaging in scholarship? They should, to a degree, since they are performing a different function. Crawford explained,

> As a scholar you have to make sure whether you have taken into account all relevant material before you make your argument. When engaged in practice you have to work the other way around, namely starting with the result you want and searching for the arguments supporting that result.[89]

For him, too, however, "[i]n both cases a text should be persuasive and clearly structured".[90]

Practitioners are, or should be, under certain constraints when referring in their writings to cases they have been involved in, though it can of course be very interesting to have their insights. They have obligations to their clients, be it the government for whom they work or an *ad hoc* client, and self-imposed restrictions: to write in detail about a case you have been involved in may at the very least lack good taste (though it does seem to happen more and more). Judges and arbitrators are of course under particular constraints.

Practitioners should also be careful what they write more generally, since it may come to haunt them. Grotius is said to have been "embarrassed when, on a mission to the English court in 1613 to resolve trade differences, James I's negotiators quoted large parts of the work [*Mare Liberum*] verbatim to undermine the arguments he was putting forward on behalf of the Dutch Republic".[91] When selecting arbitrators, or judges *ad hoc*, a careful review of their writings is part of the standard due diligence.

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[89] "Insights from the Practitioner of International Law": Interview with Professor James Crawford (2014), available at <https://voelkerrechtsblog.org/insights-from-the-practitioner-of-international-law/>.
[90] *Id.*
[91] M. Lyons, "The Grotian moment: Hugo Grotius and the invention of international law", available at <https://mathewlyons.co.uk/2011/10/12/the-grotian-moment-hugo-grotius-and-the-invention-of-international-law/>.

Writings by practitioners tend to inject a dose of reality and practicality into doctrine. This is to be welcomed, especially as today we find more and more scholarship that is highly subjective, campaigning even, that seems deliberately to confuse policy with law, to invent the law rather than find it, and that sometimes criticizes practitioners without making any real effort to understand what they actually do.[92] Not infrequently, modern scholarship exemplifies the concern that "especially wherever scholarly discussion starts to feed on itself, it loses touch with reality".[93]

I should, however, end on a positive note. It is important that international legal practitioners and academics understand each other better than they sometimes do. After all, they should all feel that they form part of one community dedicated to promoting and upholding international law. Practice and theory should be mutually supportive. As David Bederman and Lucy Reed wrote some years ago, the "ostensible divisions between academics and practitioners" in our discipline are "false ones and ultimately destructive for the college".[94]

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[92] For example, T.M. Franck, "An Outsider Looks at the Foreign Office Culture" (2005) 23 Wisconsin International Law Journal 1–11. Franck set out six propositions, none of which reflect a Ministry of Foreign Affairs as I know it. I would respond to his propositions with six of my own: The lawyer is expected to provide advice without being specifically asked. When giving advice, the lawyer should of course seek to know what the minister wants to achieve: that does not imply giving the advice the minister wants to receive. The lawyer's task is most certainly not "to demonstrate the indubitable legality of doing whatever the minister wishes to do", but to give honest legal advice to the best of his or her ability. There is nothing wrong with suggesting ways of achieving the minister's goal by other, lawful means. But, if necessary, it is the duty of the lawyer to tell the minister that he may not legally do that which is about to be done. Such advice may be given in writing or (particularly where time is very sort) orally. The task of the foreign office lawyer is twofold, to give impartial advice in advance of action; to put things in the best legal light after action.

[93] H.W. Baade, "Codes of Conduct for Multinational Enterprises: An Introductory Survey", in N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprise* (Kluwer, 1980) 407 at 413. See also J. Kammerhofer, "Law-Making by Scholars", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-making* (Edward Elgar) 305–325.

[94] D.J. Bederman and L. Reed, "The Visible College of International Law: An Introduction" (2001) 95 American Society of International Law Proceedings ix at x.

LECTURE 3:

Advising Governments on Public International Law

International law advisers may be employed by various entities, from States and international organizations to more specialized bodies and non-governmental organizations (such as the International Committee of the Red Cross (ICRC), Amnesty International or Reprieve); or they may be in private practice, whether in a law firm or self-employed (a sole practitioner, in my case, a barrister).

Today I am going to talk about lawyers who advise Governments on questions of public international law, chiefly those within a Foreign Ministry or, depending on the organization of the government, in the Attorney General's Office. Looking at the range of functions carried out by such international law advisers, I shall try to show that it is quite an interesting life, if at times challenging. You are likely to be at the centre of international affairs, and what you are dealing with is often prominent in the media. This is so much so that outsiders tend to think that it is all about crises; in the UK case, the Suez crisis in 1956, the invasion of Iraq in 2003, and Brexit in 2020 are prominent examples.

Lawyers who advise Governments on questions of public international law may of course be found in other government departments, such as the Ministries of Defence, Justice, Transport (including Aviation and Shipping), Fisheries, and the Environment. But in those departments, the lawyers are unlikely to be generalist international lawyers and will rely on lawyers in the Foreign Ministry or Attorney General's Office when difficult questions arise. In the UK, this is so even on such matters as the law of armed conflict (international humanitarian law), where the armed services lawyers obviously have great expertise and experience,

but work very closely with the FCO lawyers whose views would usually carry considerable weight. Those who advise Governments on matters of public international law from within government — "insiders" — are likely to work full-time for the government and thus have a single client (though in some countries — not usually in the United Kingdom — they may also work as lecturers or professors).

A good deal has been written about government legal advisers in the field of public international law.[95] Such writings are mostly brief and anecdotal; for a deeper view I would recommend the book by Guy Ladreit de Lacharrière on *La Politique juridique extérieure,*[96] and the 2016 update by the current Legal Adviser at the Quai d'Orsay, François Alabrune, in a lecture entitled *La Politique juridique extérieure de la France*.[97]

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[95] See, for example, M. Wood, "Legal Advisers", in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (2017); M. Windsor, "Consigliere or Conscience? The Role of the Government Legal Adviser", in J. d'Aspremost et al (eds.), *International Law as a Profession* (Cambridge University Press, 2017) 355–388; M. Wood, "The Role of International Lawyers in Government", in D. Feldman (ed.), *Law in Politics, Politics in Law* (Hart, 2014) 109–116; A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016); S. Bouwhuis, "The Role of an International Legal Adviser to Government" (2012) 61 International & Comparative Law Quarterly 939–960; Scharf and Williams, *supra* note 24*: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010); "An Interview with John B. Bellinger III", *supra* note 39*,* at 32–41; F. Berman, "The Role of the International Lawyer in the Making of Foreign Policy", in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (British Institute of International and Comparative Law, 2000) 3–17; H.H. Koh, "The State Department's Legal Adviser's Office: Eight Decades in Peace and War" (2012) 100 Georgetown Law Journal 1747–1781; United Nations Office of Legal Affairs, *Collection of Essays by Legal Advisers of States: Legal Advisors of International Organizations and Practitioners in the Field of International Law* (United Nations Publications, 1999); H.C.L. Merillat (ed.), *Legal Advisers and Foreign Affairs* (Oceana, 1964); H.C.L. Merillat (ed.), *Legal Advisers and International Organizations* (Oceana, 1966).

[96] *La politique juridique extérieure* (IFRI/Économica, 1983).

[97] See <https://academiesciencesmoralesetpolitiques.fr/2016/07/04/la-politique-juridique-exterieure-de-la-france/>.

Organization of the Government's International Law Advisers

The title and position of Government legal advisers on public international law vary from one State to another,[98] so generalizations can be misleading. The main difference is between lawyers located within the Ministry of Foreign Affairs and those located in a special legal department, often the Attorney General's Department. Each has advantages and disadvantages.[99] There is a variety of arrangements, but all seem to address the same basic issues.

Another important difference is the number of lawyers in the department. In the USA, there were over 175 in 2011.[100] In the UK, it was about 15–20 when I joined in 1970 — now there are more like 40. But some countries have much fewer. Ireland, for example, has eight.[101] Yet they have to deal with many of the same matters and cover the same meetings. Some Ministries of Foreign Affairs may have only one lawyer.

Wherever they are located, three things are particularly important. First, that the lawyers have direct access to the official and ministerial heads of the Foreign Ministry (in the UK, to the Permanent Secretary and to the Secretary of State). This turned out to be a major issue in the Dutch Iraq Inquiry.[102]

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[98] See also the Council of Europe's useful database describing the position in its Member and Observer States: *supra* note 4.

[99] G. Fitzmaurice, "Legal Advisers and Foreign Affairs" (Review Article) (1965) 59 American Journal of International Law 72 at 80–86.

[100] Koh, *supra* note 95, at 1758.

[101] J. Kingston, "Organisation and Context for the Work of the Legal Adviser: The Legal Division of the Department of Foreign Affairs and Trade of Ireland", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 70–86.

[102] Report of the Committee of Inquiry into the War in Iraq (the "Davids Inquiry"), 12 January 2010. An English translation of Chapter 8 of the Report ("The Basis in International Law for the Military Intervention in Iraq") is published, with an Introductory Note, in 57 Netherlands International Law Review (2010) 81–137. See

Second, it is important to be able to give legal advice without it being asked for. Policy officials may not always be aware of the need to seek advice, and even be unwilling to seek it; it can be a battle for legal advisers fully to assert themselves when advice is not sought. As I see it, a legal adviser's duty should be to give timely legal advice, whether the client wants it or not. He or she should be free to give legal advice as and when he or she considers it necessary to do so. It is not acceptable for a client, at least not a government client, to silence the legal adviser, who should be encouraged to speak his or her mind.[103] Such legal advice can of course be of a rolling nature, adjusting with the facts and if and when new legal and policy elements are brought into play.

In the United Kingdom's Foreign Office, it has always been the culture that the lawyers do not wait to be asked; they give advice if they see something that needs legal input, even if it is only spotted in the media.[104] It was regarded as essential that each legal adviser skimmed through the telegrams that came in each day in case things were happening that needed legal input. "Reading the telegrams" (in those days, quite a thick pile of hard-copy documents) took up a significant part of our time.

Such "aggressive legal advising" (as the Americans call it) is not the universal approach. For example, an interesting series of articles given by Legal Advisers to the Spanish Foreign Ministry about their advice on the use of force makes it clear that they were only permitted to give legal advice if and when they were asked for

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also N. Schrijver, "The Dutch Committee of Inquiry on the War in Iraq and the Basis in International Law for the Military Intervention" (2016) 87 British Yearbook of International Law 125 at 135–136, including the reference in footnote 28 to the Dutch Legal Adviser's leaked memorandum of 29 April 2003.

[103] See at note 117 below, the words that were addressed by the UK's Attorney General to the Foreign Secretary in the lead-up to the Iraq War of 2003.

[104] Transcript of evidence given by Sir Michael Wood to the Iraq Inquiry on 26 January 2010, pp. 7–8, available at <https://webarchive.nationalarchives.gov.uk/20170831105440/http://www.iraqinquiry.org.uk/the-evidence/witnesses/w/sir-michael-wood/>.

it. The then Legal Adviser was not asked for legal advice ahead of Spain's assistance to the US–UK-led invasion of Iraq; such advice was in fact drafted (to the effect that the invasion would be unlawful), but not put forward because it was not asked for.[105]

Third, it is essential to know where the ultimate and authoritative source of legal advice on international law lies. In the United Kingdom, for example, it is the Attorney General who is the chief legal adviser to the Government, on all legal matters, including public international law. The Attorney General is a member of the Government (though not a member of the Cabinet, even if attending) appointed by the Prime Minister. The appropriateness of political appointment for the government's chief legal adviser has been questioned from time to time — including following the controversy over the legal advice given by the Attorney General at the time of invasion of Iraq. When I gave evidence to a Parliamentary Inquiry (after I had left the FCO), I said that the present arrangements worked well:

> These arrangements are effective in melding together expertise in international law with the extra weight of the Attorney General's broader experience, and his or her standing as a Member of the Government. They ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure. The Attorney General's status as a Minister gives him or her a greater possibility than would be secured by any other arrangement of ensuring that legal considerations are not misunderstood (or ignored) in high-level decision-making on foreign affairs.[106]

[105] J.A. Yáñez-Barnuevo, "A Chronicle of Frustration and Final Vindication: International Legal Advice in Spain and the Iraq War (2002–2003)" (2015) 19 Spanish Yearbook of International Law 297–303.

[106] Joint Committee on the Draft Constitutional Renewal Bill Session 2007–08, Report Vol II, HL Paper 116-II, HC Paper 551-II, Written Evidence, Sir Michael Wood (6 June 2008), available at <https://publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/166we43.htm>: "I welcome the approach in the White Paper,

It is not all that common for the British Secretary of State to be a lawyer — though the current Secretary of State at the time of this lecture, Dominic Raab, is a public international lawyer. He was in the FCO Legal Advisers from 2000 to 2006, with a period as legal adviser to the British Embassy in The Hague dealing in particular with the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court.[107]

In the United States, the history of the legal adviser goes back to 1848; before that, the Secretaries of State seem to have been their own legal advisers.[108] The position of Legal Adviser of the Department of State is since 1931 established by statute; the Legal Adviser, who is generally not a career official, is appointed by the President, with the advice and consent of the Senate. In both the USA and the UK, the lawyers in the office of the legal adviser at the foreign ministry are professionally qualified lawyers, whose

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and agree, for the reasons there given, that the Attorney General should remain the *Government's chief legal adviser*, and that he or she should remain a Minister, a member of one of the Houses of Parliament, and continue to attend Cabinet whenever necessary ... My particular concern is with the Attorney General's role in furnishing the Government with advice on questions involving public international law. Given the nature of international law, and the critical nature of many of the matters with which it deals, it is important that legal advice within Government should be advanced firmly and convincingly in high-level policy discussions. The existing arrangements comprise, in addition to the Attorney General, the Legal Advisers at the Foreign and Commonwealth Office and the lawyers in the Attorney General's Office. These arrangements are effective in melding together expertise in international law with the extra weight of the Attorney General's broader experience, and his or her standing as a Member of the Government. They ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure. The Attorney General's status as a Minister gives him or her a greater possibility than would be secured by any other arrangement of ensuring that legal considerations are not misunderstood (or ignored) in high-level decision-making on foreign affairs. The current arrangements also ensure that there is a degree of Parliamentary accountability in respect of the legal positions which the Government adopts".

[107] During his time in The Hague, Raab wrote an article on the law on the use of force and the ICJ's *Oil Platforms* case: D. Raab, "'Armed Attack' after the *Oil Platforms* Case" (2004) 17 Leiden Journal of International Law 719–735.

[108] Bilder, *supra* note 37, at 634.

career is wholly or largely spent within the legal office rather than on regular diplomatic assignments. This provides an element of expertise, as well as continuity. In the UK, however, legal advisers sometimes take up positions in the regular diplomatic service, at an embassy, for example; even if they do not, they do from time to time have a policy role, especially when on posting to a mission to an international organization or as head or member of a delegation to an international conference.

There is also the system, as in Germany, where the legal adviser's office within the foreign ministry consists largely, if not entirely, of regular diplomats with a legal background. In fact, even there, the same persons seem to return to the legal department between foreign postings, so there is a measure of continuity.

These first two systems may be combined. In France, some members of the Quai's *Direction des Affaires Juridiques* are regular diplomats, for whom a period in the *Direction* is more or less like any other posting in Paris, whereas others are recruited specifically as legal advisers, for example, on secondment from the judiciary. Occasionally, Foreign Ministries have nominated an academic to hold a position of "Legal Adviser" (an "independent" legal adviser) who may offer legal advice from time to time (while remaining outside the Ministry) in parallel with an in-house head of the legal department.[109] Some States have committees of outside lawyers to discuss or even give opinions on particular topics.[110] It is common practice in some States, including in the United Kingdom, to bring in private lawyers to assist with particular cases, before domestic or international courts, and in giving legal opinions where it is thought an outside view would be useful.

[109] See Schrijver, *supra* note 102, at 143–145.

[110] For example, the Dutch Advisory Committee on Public International Law (CAVV) is an independent body which advises the Government, the House of Representatives, and the Senate of the Netherlands on international law issues: see J.G. Lammers, "The Role of the Legal Adviser of the Ministry of Foreign Affairs: The Dutch Approach and Experience" (2009) 18 Tulane Journal of International & Comparative Law 177 at 180.

In some countries, the foreign ministry receives legal advice mainly from outside sources, typically from an Attorney General's Office/Ministry of Justice. This is the position, for example, in Cyprus, Malaysia, Malta, and Singapore, and used to be, and to some extent remains, the Australian system. This model may have the advantage of minimizing the risk of fragmentation at a time of specialization in specific fields of international law relevant to various ministries (for example, trade or the environment), since an Attorney General's Office has responsibilities across government. A disadvantage, however, may be that those based in such offices may have less diplomatic experience, and may be less close to their diplomatic colleagues.

Here in Russia, as I understand it, the arrangements are similar to those in the United Kingdom. I am impressed by the seriousness and commitment to international law of the lawyers in the Russian Ministry of Foreign Affairs. Of course, as indeed with other foreign ministries, there is a long history to the legal department in Moscow, going back to the great Martens and beyond, but including Tunkin, whose library graces the International and Comparative Law Research Center.

What Is Special About Ministry of Foreign Affairs Lawyers?

Whatever the organizational structure, Legal Advisers to Foreign Ministries hold a special position among government lawyers. In Foreign Ministries, the Legal Adviser has to operate within not one but at least two legal systems: the domestic and international. In London, one may also have to deal with the various legal systems to be found in the United Kingdom itself (and notably Scots law, which is quite different), the law of the various British overseas territories, and — still to some degree — the law of the European Union.

Foreign Ministry lawyers are likely to be particularly concerned with those areas of domestic law that are sometimes referred to

as "foreign relations law". This can be a particularly delicate, even underdeveloped and shifting area of national law. Then there is the relationship between international law and domestic law. We are all familiar with the distinction between monist and dualist systems. But matters are more subtle than that. In fact, each State deals in its own way with the relationship between international and national law, and in each State it changes over time.[111] In some countries, the domestic (constitutional) law governing international conduct is so dominant, at least in certain fields (for example, the use of force), that lawyers only seem able to consider international law through the prism of domestic law.

As I have already noted, an important feature distinguishing the international law landscape from other legal systems is its uncertainties, even — perhaps especially — on fundamental points, such as sources. When one combines this with the fact that States are often left to assess for themselves the legality under international law of certain situations, and there usually is no review of such assessment in the absence of any general compulsory judicial settlement, it will readily be seen that special responsibility is placed on the practising international lawyer to do his or her best to ensure that the law is upheld.[112] Perhaps that is what prompted

[111] For England and Wales, see *Halsbury's Laws of England*, 5th edition, Vol. 61 (International Law and Foreign Relations) (LexisNexis, 2018), paras. 12–30. For a brief overview, see J. Crawford, *Brownlie's Principles of Public International Law*, 9th edition (Oxford University Press, 2019), Chapter 3. For the Russian Federation, see W.E. Butler, *International Law in the Russian Legal System* (Oxford University Press, 2020).

[112] See also E. Wilmshurst, "Disciplining the Discipline: Roles and Responsibilities of International Lawyers: Remarks" (2006) 100 Proceedings of the ASIL Annual Meeting 449–450 ("In reaching a view in difficult cases, the legal adviser should reflect a responsibility to the international legal system as a whole, if that system is to be sustainable: this is perhaps a particular function of the international law adviser, and results in part from the horizontal nature of the system (without legislature and with limited recourse to judicial settlement), and in part from the open texture of many of its rules"); S.R. Tully, "Getting it Wrong or Being Ignored: Ten Words on Advice for Government Lawyers" (2009) 7 New Zealand Yearbook of International Law 51 ("the well-accepted paucity of dispute settlement mechanisms within the

the former United States Secretary of State, Dean Rusk, to observe that the Legal Adviser serves "as the conscience of the Department of State".[113]

In the words of a former Legal Adviser to the UK Foreign and Commonwealth Office, the special responsibility placed on the legal advisers of foreign ministries suggests that:

> 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 were in a position to *compel* the Government he serves to act in one way or another. But it cannot by the same token be the limit of the function of even someone whose role is that of "adviser" simply to ascertain what the law is, to explain it to the best of his ability to his client, and leave it at that. Of course, when it comes to action the final decision may not be his. It is a truism to say that the question whether or not to comply with what international law requires is always a question of *policy*. But even the meanest definition of the role of the international

international legal system elevates the importance of advices as a critical aspect or integer in decision-making"). A Joint Committee established by the American Society of International Law and the American Branch of the International Law Association in the early 1990s to consider the role of the Legal Adviser of the Department of State similarly thought, as a whole, that "it was a specific responsibility of the Legal Adviser to promote respect for and observance of international law by the United States by assuring that decisionmakers within the government are made aware of its requirements whenever applicable": "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", reproduced in 1 Transnational Law & Contemporary Problems (1991) 209 at 212.

[113] As quoted in S.M. Schwebel, "Foreign Policy and the Government Legal Adviser" (1972) 2 Georgia Journal of International & Comparative Law 77 at 79. Sinclair has similarly written that legal advisers in foreign ministries are tasked with fostering a "culture of law-abidingness" in executive government: I. Sinclair, "The Practice of International Law: The Foreign and Commonwealth Office", in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982) 123–134.

> law adviser in government cannot treat that policy question as if it were an entirely neutral one.[114]

Being, in a way, a servant of two masters — his or her Government, and the international legal system — is not always easy.[115] Harold Koh, former United States Department of State Legal Adviser, observed that "[a] legal adviser's greatest tension comes in balancing loyalties: loyalty to clients and felt duties to the international law the lawyer is sworn to uphold".[116] I believe the Government, at any rate, a Government that is respectful of international law, ultimately expects of its legal advisers nothing less. It would not be well-served if its lawyers merely said what they thought the politicians wanted to hear. In the lead-up to the Iraq War of 2003, for example, the UK's Attorney General wrote to the Foreign Secretary to highlight that:

> It is important for the Government that its lawyers give advice which they honestly consider to be correct … [T]hey should give the advice they believe in, not the advice which they think others want to hear. To do otherwise would undermine their function … in giving independent objective and impartial advice … [I]f a government legal adviser genuinely believes that a course of action would be unlawful, then it is his or her right and duty to say so.[117]

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[114] Berman, *supra* note 95, at 3–4.

[115] See also A.D. Watts, "International Law and International Relations: United Kingdom Practice" (1991) 2 European Journal of International Law 157 at 163: "The role of legal adviser in a Foreign Ministry involves striking the right balance between the objective assessment of the legal position and the more partisan function of advocacy. In this context, the distinction can usefully be made between the formulation of policy and its execution — although yet again, in practice the two stages will often not be clearly separated, but will rather merge into a single developing process".

[116] H.H. Koh, "The Legal Adviser's Duty to Explain" (2016) 41 Yale Journal of International Law 189 at 210.

[117] Report of the Iraq Inquiry (Report of a Committee of Privy Counsellors, HC264, published 6 July 2016), Vol. 5, Section 5, para. 357.

Another reason why Legal Advisers to Foreign Ministries hold a unique position among government lawyers is that the position adopted by a State with regard to international law, whether as an incident of State practice or an indication of the State's *opinio juris*, may well contribute to the formation of the law.[118]

The Functions of International Law Advisers

Advice

It is often said that Foreign Ministry legal advisers have two main roles: giving advice to the government while policy is being developed and before decisions are taken; and acting as advocate for the government's position once decisions have been taken. It has also been said that the Legal Adviser has three, inter-linked functions: advising, negotiating and — hopefully not too often — litigating.[119]

The core function is giving advice. How advice is given is very important. It must obviously be timely and as clear as possible. It may have to be virtually instant. Advice may be oral, given in the course of a meeting, or it may be in writing. In either case, it needs to be brief and understandable to those who are not, or no longer,

[118] In listing in 1950 "Opinions of national legal advisers" as evidence of customary international law, the International Law Commission observed that "The opinions on questions of international law given by legal advisers to Governments are published in few countries. Reserve may be needed in assessing the value of such opinions as evidence of customary international law, for the efforts of legal advisers are necessarily directed to the implementation of policy. Nor would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasions with reference to which they were given": *Yearbook of the International Law Commission 1950*, Vol. II, p. 372, para. 76. In 2018, the Commission stated that "Published opinions of government legal advisers may … shed light on a State's legal position, though not if the State declined to follow the advice": A/73/10, *supra* note 9, at para. 5 of the commentary to Conclusion 10.

[119] D. Anderson, "The Functions of the Legal Adviser: Advising, Negotiating, Litigating", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 13–24.

lawyers. I well remember one colleague who had just been to see Prime Minister Thatcher coming back and saying he had forgotten that you had to get everything you needed to say into the first half-sentence. So, generally, advice should be as brief and as simple as possible, not cast in detailed legalise. It is unlikely to convince unless busy ministers and officials have read it, and they are unlikely to read more than a page or two at the most. Important issues are often the most urgent, and the more important the matter is, the shorter and clearer the advice needs to be. We are not supposed to be writing to justify ourselves in the eyes of history.

In bureaucratic terms, legal advisers will normally be expected to have checked any policy documents that contain legal points, or documents drawing upon legal advice. This is important, as it may give the legal adviser some control over the execution of foreign affairs. In London, such documents would traditionally say that "Legal Advisers concur", not that they agreed (to indicate that they do not necessarily agree with the policy, but concur in the sense that they agree that the document does not misstate the law). In cases where the minister or other senior official might not take kindly to being told what to do, or what not to do, by the lawyers, the fact that legal advice was at the heart of a policy recommendation would not necessarily appear on the face of the submission. Words like "Legal advisers say that" are usually unnecessary or even misleading. Legal advice can be folded into policy advice, and the policy recommendation is that of the policy officials, not that of the lawyers.

Occasionally, the lawyers and the policy advisers do not agree. There may be various reasons for this. I will mention two. First, the lawyers may be concerned about the longer-term implications, while the policy side just wants to get through the next few days. Second, it can be inappropriate for policy advisers to seek to insist on their view of policy if the Minister is determined. The lawyer, on the other hand, has an advantage when it comes to standing up to

the Minister: his or her independent position. The lawyer is there to say what the law is, and that is not something that the Minister can ignore.

It is good if legal advice sounds positive, even when it is not. Not only are the clients mostly diplomats who are not used to people saying "No", but there is a need to be constructive, creative if necessary, not just to create hurdles. In the words of Sir Gerald Fitzmaurice,

> What governments want is accurate and judicious legal advice (which is not quite the same thing), and they want it from persons whose function it is (within the limits set by professional standards and the duty of every lawyer to the law itself) to promote rather than judge the aims of government and, moreover, whose awareness of the background and *inponderabilia* of the situation enables them to give their advice with a knowledge of all its implications that no outside lawyer could normally have.[120]

At the same time, as I have already suggested, the special responsibility to ensure that the law is upheld means that occasionally you have to make it clear that something is impermissible; and then you must be able to hold your ground. It is said that "in a break in some tough fisheries talks with the Icelandic PM, [the United Kingdom's] Prime Minister Edward Heath said words to the effect that 'Home civil service lawyers are useful: I tell them what I want and they arrange it. You FCO lawyers, however, try to tell what I can and can't do'".[121] This remark rather overlooks the fact that a government with the support of the legislature can usually change national law, if necessary, but no single government, alone, can change international law. It is reminiscent of what Prime Minister Anthony Eden is reported to have said, at the time of the

[120] Fitzmaurice, *supra* note 99, at 73.
[121] Anderson, *supra* note 119, at 19, fn. 13.

Suez Crisis, of the Foreign Office Legal Adviser: "Fitz[maurice] is the last person I want consulted. The lawyers are always against our doing anything. For God's sake, keep them out of it. This is a political affair".[122] Similarly, according to Michael Glennon,

> Several years ago, during the run-up to the war in Kosovo, the story is told that Secretary of State Albright received a telephone call from her opposite number, British Foreign Secretary Robin Cook. Cook reportedly advised Secretary Albright that he had "problems with our lawyers". The lawyers to the British Foreign Ministry apparently had advised him that NATO needed the approval of the UN Security Council before commencing the bombing of Yugoslavia. Secretary Albright famously responded, "Robin, get new lawyers".[123]

In a 1987 report, the US Senate Foreign Relations Committee referred approvingly to the role of a particular British Foreign Office Legal Adviser. The Committee referred to:

> the standard set by a former legal adviser to the British foreign office, Sir Ian Sinclair, who gained a reputation within and without his government as an immovable rock when he arrived at the judgment that a certain policy was legally impermissible. The Foreign Minister, Lord [Carrington], took to introducing him as "my abominable no-man".
>
> The United States Government needs such public servants — persons willing to place duty over ambition in defending the integrity of the law. Nowhere is this more true [than] in the law of foreign relations, where the discipline of judicial review is often unavailable.[124]

[122] A. Nutting, *No End of a Lesson: The Story of Suez* (Constable and Company, 1967) 95.
[123] M. Glennon, "The Rise and Fall of the UN Charter's Use of Force Rules" (2004) 27 Hastings International & Comparative Law Review 497.
[124] Senate Comm. on Foreign Relations, The ABM Treaty Interpretation Resolution, S. Rep. No. 164, 100th Cong., 1st Sess. (1987) 65.

I shall say more later about the role of legal advisers in times of crisis, where law and policy may seem irreconcilable,[125] but would now just note that it may happen that the advice of the Government's Legal Adviser is ignored. Nevertheless, it is important to speak up: as Bilder has said,

> international law is an important factor in that [policy-making] process — one that government lawyers should make certain is heard. Law must at least *speak* to power, even if power does not always choose to give it determinative weight.[126]

Advocacy

Once a course of action has been agreed and/or pursued, the Legal Adviser's role changes. As Sir Arthur Watts has written,

> Once the policy has been decided, however, the role of the legal adviser consists in putting forward the best legal case he can in support of that policy. In this respect, he is very much an advocate, not a judge. Even so, as an advocate he is still constrained by his professional sense of responsibility; he should not advise that a legal argument be put forward which he knows to be untenable either as a matter of law or in relation to the facts of the case as he knows them. Nevertheless, his partisan role as advocate is clearly different from his earlier role as counsellor.[127]

Litigation

FCO lawyers are closely concerned with litigation in which the FCO has an interest. This includes international litigation before the International Court of Justice and *ad hoc* arbitral tribunals, and litigation before the European Court or (former)

[125] See Lecture 6 below.
[126] R.B. Bilder, "On Being an International Lawyer" (2005) 3 Loyola University Chicago International Law Review 135 at 142.
[127] Watts, *supra* note 115, at 163.

Commission of Human Rights, where the Agent for the United Kingdom will be an FCO legal adviser; it also includes domestic litigation in British courts or in courts abroad. Although the extent to which the Foreign Office legal advisers are involved in such litigation varies — in particular, they do not directly appear as counsel in domestic litigation in the United Kingdom or abroad.[128]

Given the role and possible influence of courts in ascertaining the rules of international law, even judgments and awards of international courts and tribunals that are not binding on the State may well be of interest to it. At the same time, it is well to remember that a State cannot be expected to react to all such decisions. We shall return to this issue later in these lectures.

Outreach

Another role that Government advisers on public international law may be expected to play is in writing and in "outreach activities" more widely. It can be important that the public, including lawyers outside government, understand the legal basis for government decisions. It is good for the system of international law that the law is known to the public and that the Government's legal position is well understood.[129] Sir Gerald Fitzmaurice, "it has been said, 'regarded being a good scholar as part of the job of a good legal adviser'".[130] Harold Koh similarly referred to "the crucial, overlooked responsibility of government international lawyers to explain publicly their government's international law rationale for its actions", what

[128] *Id*, at 159.

[129] Writings by legal advisers are often accompanied by a pro forma disclaimer, by which the Government seeks to have the best of both words: its position published, but without being committed to it. One occasion when there was no such disclaimer was W.H. Taft IV and T. Buchwald, "Preemption, Iraq, and International Law" (2003) 97 American Journal of International Law 557–563.

[130] R. Jennings, "Gerald Gray Fitzmaurice" (1984) 55 British Yearbook of International Law 1.

he called "The Legal Adviser's Duty to Explain".[131] The FCO Legal Adviser at the time of this lecture has said that:

> "Outreach" is at the heart of the [FCO Legal] Directorate's activities. The Directorate's Outreach Strategy promotes the credibility of, and respect for, the UK's positions on international legal issues to external commentators; it provides evidence of State practice for assistance in establishing customary international law and the application of treaties; it helps influence and promotes understanding and support for policy positions which are supported by or dependent on legal views; it challenges received thinking and ensures that others' views are brought into consideration; it develops FCO lawyers and encourages them to build a career and an international profile; it raises the profile of international law and legal issues in government and beyond; and it builds the FCO as a centre of excellence on international law.[132]

An important aspect of this role may be in promoting the publication of a government's practice in the field of international law. Here the leaders are undoubtedly the US State Department legal advisers, who have for many years been engaged in publishing an excellent digest of international law. In the UK, the FCO legal advisers assist the editors of *United Kingdom Materials on International Law*, which is published each year in the *British*

[131] Koh, *supra* note 116, at 189 (also suggesting, at 190, that "[f]ulfilling this duty is particularly important with respect to international law. To participate in a system of international law, nations owe each other explanations of why they believe their national conduct comports with global norms and follows not from mere expedience but from a sense of legal obligation (*opinio juris*). By laying out her government's legal theory in public, the legal adviser shoulders the nation's responsibility to give its citizens, the media, legal commentators, and legislators, as well as the international legal community, a fuller opportunity to assess the legal theory offered to authorize a given action and to test the government's present and future actions in light of that theory").

[132] I. Macleod, "The FCO's Legal Advisers and Contemporary Challenges", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 25 at 31.

Yearbook of International Law. In Germany, on the other hand, I understand that there is no official assistance to the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* publication.[133] There are many other collections of national practice, of various kinds, which are listed in a useful UN Secretariat memorandum from 2019.[134]

Policy Matters

Foreign ministry legal advisers may become involved in policy matters in broadly two ways: directly, by virtue of having policy responsibility within the Ministry in certain fields; and through their day-to-day engagement with the development of policy within the Ministry.

They may sometimes be responsible for certain policy areas with a high legal content, such as treaty matters, consular affairs, the Antarctic, and the law of the sea. In such cases, they need to take special care to preserve the integrity of legal advice, notwithstanding their policy responsibilities.[135] For the lawyers to take on policy responsibilities has its dangers, since it risks legal advice becoming subordinate to policy considerations.

This raises the larger question of the government legal adviser's role in shaping foreign policy. It should be obvious to all concerned that the lawyer must be engaged throughout the formulation of

[133] A useful source of information on German practice is *German Practice in International Law* (GPIL), edited by Stefan Talmon and available at <https://gpil.jura.uni-bonn.de/> to be published in book form by CUP.
[134] A/CN.4/710/Rev.1: *Identification of customary international law: Ways and means for making the evidence of customary international law more readily available — Memorandum by the Secretariat* (14 February 2019). For an account of the work of the CAHDI to promote such digests within the Council of Europe, see L. Caflisch, "The CAHDI Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law", in Council of Europe (ed.), *The CAHDI Contribution to the Development of Public International Law: Achievements and Future Challenges* (2016) 12–18.
[135] See Berman, *supra* note 95, at 9–12.

policy over any matters involving serious legal issues (and such matters are increasing in international affairs).[136] Joyce Gutteridge was surely right to warn that:

> The problems with which [a legal adviser] is faced are not academic ones; they arise from actual situations, and these actual situations more often than not do not fall neatly into any of the textbook categories. They may involve circumstances in which the law is unclear or unsettled, or where no recognized rule is applicable. I submit that it is only by being very fully aware of the political background that the legal advisers can deal with such situations or contribute fruitfully to the creation of new rules or norms. It is therefore extremely important that the legal adviser should maintain close and informal contact with the political or functional departments which it is his duty to advise.[137]

A "Community" of Legal Advisers?

Another special aspect to the work of Ministry of Foreign Affairs lawyers is that there is, in a real sense, a community of legal advisers on public international law across the various States. Their role is a good deal more cooperative than is appreciated by those outside government. International law is not only about disputes; it is also about exchanges of views, consultation, and negotiation.

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[136] See also para. 20 above.

[137] J. Gutteridge, "Foreign Policy and the Government Legal Adviser" (1972) 2 Georgia Journal of International and Comparative Law 71–72. See also Fitzmaurice, *supra* note 99, at 72: "Do governments really want their legal advisers to be always looking over their shoulders with one eye on policy? They want the legal advice given them to take due account of political realities; but, subject to that, they want to know what the true legal position is, simpliciter. The first question to be asked and answered is, 'Well now, how do we stand on this legally?' Can a straight answer really be expected from persons whose whole experience may have led them to look at legal questions through a haze of policy? May not the result be something that is neither good law nor good diplomacy?".

The legal advisers of foreign ministries meet frequently and in various formations. Those working for European Union States, for example, may meet for a week or two each year at the UN General Assembly's Sixth (Legal) Committee, twice a year within the Council of Europe, and four times a year as the EU Legal Advisers in Brussels; and then there are smaller groups, such as that of the P5 Legal Advisers from the five permanent members of the Security Council. In addition, there are regular bilateral meetings: for example, when I was the FCO Legal Adviser, there was a series of annual bilateral exchanges of view with the Norwegian Legal Advisers.[138] Trust builds up, and sometimes real friendships too. Many, especially those from countries with specialized international law offices, know each other throughout their government careers and beyond. Government international legal advisers have indeed been described as "a closely-knit professional community, which is infused with a sense of belonging, similar values and comparable working methods".[139] They have also been referred to as "the principal expositors of the law of nations for their governments and the world".[140]

The constant exchange of views among legal advisers promotes a common understanding of the role of international law in international affairs. Even where different views continue to be held, understanding each other is important. It was in this spirit that, when he was State Department Legal Adviser, John Bellinger devoted time and effort to engaging in what he called "international legal diplomacy", seeking to explain controversial US legal positions

[138] Often in interesting locations such as Svalbard. See M. Wood, "The United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court of Justice", in O. Fauchald et al (eds.), *Festskrift til Carl August Fleischer* (Universitetsforlaget, 2006) 621–643 at n. 1, reproduced in J.-P. Gauci and J. Barrett (eds.,) *Anthology of British Contributions to International Law 1915–2015* (Brill, 2020).
[139] A. Zidar and J.-P. Gauci, "Introduction: Legal Advisers as the Visible College of International Lawyers", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 1 at 3.
[140] United States Senate Comm. on Foreign Relations, The ABM Treaty Interpretation Resolution, S. Rep. No. 164, 100th Cong., 1st Sess. (1987) 65.

on matters such as the "war on terror" and the International Criminal Court.[141] This was appreciated by his colleagues in other Foreign Ministries and has been continued by his successors.

It is remarkable how similar the experiences and ways of thinking of government legal advisers are, even where the governments have very different political and legal cultures. Government lawyers seem to be able to continue to talk to each other even when their governments disagree on important aspects of international affairs. That is when it is perhaps especially important. I recall, for example, that at the time of the Soviet invasion of Afghanistan in late December 1979, bilateral contacts were broken off between the United Kingdom and the Soviet Union. But there was one exception, connected with the ongoing law of the sea conference; the development of the international law of the sea was considered so important that the five so-called "Major Maritime Powers" continued to meet as before.

Such a shared attitude to the law can enable the lawyers to help resolve important differences, especially where they already know each other well. To be able to pick up the phone to someone whom one knows and discuss a sensitive problem may be very helpful indeed. To give a few examples:

- Concerns within the FCO about the legality of a proposed joint course of action would sometimes be discussed directly with State Department lawyers; such discussions would clarify matters and help reconcile positions. We would find that we had been through the same legal reasoning, even if we came to different conclusions. Such conversations had, I am sure, a beneficial effect

[141] See "The Bush (43rd) Administration — John B. Bellinger III (2005–2009)", in M.P. Scharf and P.R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010) 135 at 137 ("I … wanted to make sure that other countries understood that the United States does take international law seriously … I and L's lawyers engaged in intensive international legal diplomacy. I considered this aspect of the office's work to be a central aspect of my tenure as Legal Adviser").

on both sides. On one occasion a State Department lawyer said to me, I hope in jest, "You know, the only reason we worry about international law is because you Brits do".

- In the months following the invasion of Iraq in 2003, lawyers from Australia, the UK, and the USA had tripartite telephone discussions, on an almost daily basis, to exchange and so far as possible coordinate views on the many legal issues arising out of the post-war administration of Iraq. These included the application of occupation law, the drafting, interpretation, and application of Security Council resolutions. We were helped by the fact that we all had lawyers on the ground in Baghdad.

- Following the break-up of the former Yugoslavia, it became necessary to agree on treaty succession with each of the new States: I went to Ljubljana, Zagreb, Belgrade, Sarajevo, and Skopje, where I already knew most of the Foreign Ministry lawyers and was able to reach agreement with all of them — even in Belgrade, where the legal adviser began by saying that he was surprised we needed to discuss the matter as he had not realized that the United Kingdom was a new State.

- A well-documented bilateral example followed the bombing of the Chinese Embassy in Belgrade in May 1999, during the NATO intervention in Kosovo. The State Department Legal Adviser (David Andrews) went to Beijing no less than three times to see his Chinese opposite number. They reached a settlement of this delicate and complex matter. In his account, Andrews emphasises that he and his Chinese colleague "had developed a good working relationship during our previous encounters"; summing it up, he says "this was a case where the lawyers actually got together and resolved a dispute that only they could have done".[142]

[142] "The Clinton Administration — David R. Andrews (1997–2000)", in M.P. Scharf and P.R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010) 118–124.

A Multi-Functional Role

What emerges is certain sense of "multi-functionalism" in the role of the Legal Adviser: "an intricate mixture of the elements one would expect to find in a legal scholar, advocate, skilled legal draftsman, and legal diplomat serving in a public function promoting not only the cause of the Government but also of the international legal order".[143]

I hope I have brought out that the work in a Foreign Ministry legal department is varied and interesting. What should also be clear is that the task of those who advise the Government on matters of public international law is not always straightforward, given the nature of international law and the delicate relationship between law and high policy in international relations. A heavy responsibility rests on all Foreign Ministry lawyers, even the most junior ones. This is what makes the job so very interesting; one is at the heart of many of the most difficult and sensitive questions of foreign affairs. It may not pay as well as in private practice, but money is not everything. I would strongly recommend a career as a government lawyer.

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[143] Lammers, *supra* note 110, at 205. Berman summed it up well: "in advising close colleagues, the primary duty would be to state the law fearlessly and to stick to that even under pressure. In advising the Government more generally, the main duty might be to marshal the broader arguments for respecting legal obligations and the consequences of doing otherwise, or drawing attention to the influence of possible actions on the future development of international law. In explaining governmental decisions and actions, the focus might be most strongly on honesty and clarity, and avoiding deception. In acting as advocate or promoting national positions, the central emphasis might vary as between contributing constructively to international debate (as in the UN Sixth Committee), advancing negotiating proposals in a bilateral or multilateral setting (including propounding what their legal effect might be within the context of a treaty or settlement as a whole), and arguing one side of a legal case before an international court or tribunal. In defending the government's actions or attitudes, the thrust might be a mixed one, incorporating quite legitimately considerations of policy and morality as well as law": F. Berman, "Conclusion", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 380 at 381.

LECTURE 4:

Practising Law at International Organizations

Much of what I have said with regard to the practice of international law, and the work of foreign ministry legal advisers, applies to those practising at or for international organizations.[144] Yet they are worth looking at separately because of the context and legal framework of international organizations (by which I mean intergovernmental organizations).

I will refer to two groups of practitioners: first, those working for Governments at their missions to international organizations, for example in New York, Geneva, Vienna or The Hague, or sent to international organizations to represent them at particular meetings; and, second, those working for international organizations as staff members (whether permanent or on fixed-term contracts), that is, international civil servants, though they may be seconded to such positions by their Governments.[145] These two groups of lawyers work together a good deal, often on the same issues, though from different vantage points; my first advice to both, therefore, is to work together as much as you can, while fully respecting the different loyalties.

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[144] G. Fitzmaurice, "Legal Advisers and International Organizations' (Review Article) (1968) 62 American Journal of International Law 114 at 115 ("there is much in the situation of legal advisers to international organizations which cannot be understood except in the corresponding, and in many ways very similar, light of that of legal advisers to governments and governmental agencies").

[145] I shall not cover "experts"' acting in their individual capacity as members of bodies such as the International Law Commission or the Human Rights Committee, though they are certainly a part of the community of lawyers engaged with international organizations.

The Law of International Organizations

The law relating to international organizations[146] is a relatively new branch of international law.[147] As such, it has naturally been of great interest to writers. From 1920 on, there was real uncertainty about the status of the League of Nations. By the time I was studying law, in the second half of the 1960s, there was already some important case-law from the ICJ, including the 1949 *Reparation for Injuries* Advisory Opinion[148] and the 1962 *Certain Expenses* Advisory Opinion.[149] Yet when I first studied the law of international organizations, there were no international instruments dealing with that law, whereas now there are quite a number, mainly arising from the work of the ILC.[150] At that time, there was no book in English that attempted to describe that law systematically: Jenks's ground-breaking article from 1946 remained almost alone in the field.[151] Bowett's *Law of International Institutions* had just appeared, but the first edition did little more than described the various organs of the United Nations, with only a brief final chapter trying to draw more general conclusions.[152]

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[146] Sometimes referred to — with more or less the same meaning — as international institutional law: H. Schermers, "The Birth and Development of International Institutional Law" (2004) 1 International Organizations Law Review 5–8.

[147] J. Klabbers, "The Life and Times of the Law of International Organizations" (2001) 70 Nordic Journal of International Law 287–317.

[148] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

[149] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151.

[150] These include the Vienna Convention of 1975 and 1986, and the 2011 Guide to Practice on Reservations to Treaties.

[151] C.W. Jenks, "Some Constitutional Problems of International Organizations" (1945) 22 British Year Book of International Law 11. For an illuminating set of essays on the early years of international organizations law studies, see "Symposium: On Theorizing International Organizations Law" (2020) 31 European Journal of International Law 489–619 (with contributions about Kelsen, Jenks, Reuter, Schermers, Sohn and Abi-Saab).

[152] On the other hand, the latest (sixth) edition (from 2009), by Philippe Sands and Pierre Klein, is, as Bowett wrote in his preface to the fifth edition, "a general textbook on this vast, rapidly growing topic".

Schermers's ground-breaking work, *International Institutional Law*, first appeared in 1972. The then current edition of *Oppenheim* had little on the subject.[153]

As a student, I was fortunate to be taught by Eli Lauterpacht, whose lectures described this new field in an innovative yet coherent way. He never wrote a full book on the subject, though his 1976 Hague lectures give a good idea of his thinking.[154] In the 1960s, there was still a debate over whether there was any such thing as "international institutional law" — to some extent there still is — or whether each organization inhabits in its own self-contained legal world. Whatever the answer to that question, it is undoubtedly the case that international organizations have much to learn from the experience of others. It is also the case that the student today is more fortunate: there are now some good books on the law of international organizations,[155] as well as many

[153] H. Lauterpacht (ed.), *Oppenheim's International Law, Vol. I (Peace)*, 8th edition (Longman, 1955). The 9th edition (1992, by Jennings and Watts) has some references to international organizations, notably in relation to the sources of international law (para. 16); but the authors, noting "the extent to which the law and practice relating to international organisations have now become a separate field of study", acknowledged (at xii) that "[i]t no longer seems useful to include a necessarily brief summary in the present volume, and better for these matters to be dealt with in a separate volume. It is the intention, therefore, that, having deleted those sections from the present volume, there will in due course be a new Volume III of 'Oppenheim' to deal with international organisations". In fact, for reasons explained in its preface, the 10th edition includes two volumes dedicated solely to the United Nations: R. Higgins, P. Webb, D. Akande, S. Sivakumaran, J. Sloan, *Oppenheim's International Law: United Nations* (Oxford University Press, 2017).

[154] E. Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals" (1976) 152 Recueil des Cours 381–478.

[155] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge University Press, 2005); P. Sands and P. Klein, *Bowett's Law of International Institutions*, 6th edition (Sweet & Maxwell, 2009); E. Lagrange and J.-M. Sorel (eds.), *Droit des organisations internationales* (L.G.D.J, 2013); H. Schermers and N. Blokker, *International Institutional Law*, 6th edition (Brill, 2018); J. Klabbers, *An Introduction to International Institutional Law*, 4th edition (Cambridge University Press, 2022).

articles,[156] chapters in general textbooks on public international law,[157] and online resources.[158]

What is it that distinguishes the law of international organizations from other fields of international law? First, the materials are if anything even more diffuse than in other fields and can be harder to locate. They are scattered throughout the voluminous documents of hundreds of international, regional, and sub-regional organizations. And while many of the materials are published, some are not.[159]

Second, in many respects the rules of international law by which international organizations are governed are still far from clear. This applies to both primary and secondary rules, but particularly the former. How far are international organizations bound by rules of customary international law, for example, customary international humanitarian law or customary international law of human rights? Some writers seem to assume that the answer is clear; they often refer to a sentence from the ICJ's 1980 advisory opinion concerning the *Agreement between the WHO and Egypt*:

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their

[156] See, from 2004 on, the *International Organizations Law Review* (IOLR), and also, from 1997, the *Max Planck Yearbook of United Nations Law*.

[157] For example, P. Dailler, M. Forteau and A. Pellet, *Droit International Public*, 8th edition (L.G.D.J, 2009) 637–708; Crawford, *supra* note 111, at 156–188; D. Akande, "International Organizations", in M.D. Evans (ed.), *International Law*, 5th edition (Oxford University Press, 2018) 227–258; M. Shaw, *International Law*, 9th edition (Cambridge University Press, 2021) 1133-1176.

[158] *Oxford International Organizations (OXIO)* is a useful place to look for annotated materials: see <https://opil.ouplaw.com/home/oxio>.

[159] International organizations seem to be more secretive even than States — no doubt in part because of the insistence of member States, including through the archival immunities they bestow on their organizations.

> constitutions or under international agreements to which they are parties.[160]

These authors seem to overlook that in this somewhat ambiguous sentence, the ICJ speaks only of "general rules of international law", and then only of any obligations that are incumbent upon international organizations under such rules. The application of rules of customary international law, or of the general principles of law, to international organizations is an underexplored question.[161] So too is the law on the responsibility of international organizations. In the context of its articles on that subject, the ILC noted that:

> The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.[162]

Legal advisers working for international organizations do not readily concede that international organizations have obligations

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[160] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73 at pp. 89–90, para. 37. (In French, the sentence reads: "L'organisation internationale est un sujet de droit international lié en tant que tel par toutes les obligations que lui imposent les règles générales du droit international, son acte constitutif ou les accords internationaux auxquels il est partie").

[161] For a recent article dealing with the question, see K. Daugirdas and S. Schuricht, "Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies" (2020) 3 AIIB Yearbook of International Law 54–87.

[162] *Yearbook of the International Law Commission 2011*, Vol. II (Part Two), pp. 46–47, para. 5 of the general commentary.

under general international law. Although international organizations are embedded in general international law (being almost always constituted by treaty, to which they owe their separate international legal personality), their lawyers sometimes insist they are operating within distinct legal regimes limited to their constituent instrument and other associated normative instruments (a kind of "self-contained regime"). For example, legal advisers to international organizations (and especially the international financial institutions) have been hesitant to accept the rules on responsibility of international organizations as customary international law that binds them.[163] The European Union has a very different approach. The Court of Justice of the European Union has found that:

> the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law … the rules of customary international law… are binding upon the Community institutions and form part of the Community legal order.[164]

Turning to secondary rules, the law of treaties applicable to international organizations is relatively clear and very similar to the law of treaties applicable to States.[165] But international responsibility is another matter. While there is no doubt that they bear international responsibility for their internationally wrongful acts,[166] it was not always easy for the ILC to discover the practice of international organizations when working on its topic

[163] See, for example, M Ragazzi, "The World Bank and the ILC's Project on the Responsibility of International Organizations", in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff, 2013) 235–248; and *infra* note 217.

[164] Case C-162/96, A. Racke GmbH&Co. and Hauptzollamt Mainz (16 June 1998), paras. 45–46.

[165] See the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

[166] See the ILC's 2011 articles on the responsibility of international organizations: *supra* note 162, at pp. 40–105.

"Responsibility of International Organizations". The Commission noted that:

> The main reason for this [the limited availability of pertinent practice] is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it.[167]

Third, there seems to be great flexibility on the all-important question of the powers of international organizations, including their "implied powers", and the distribution of powers between their various organs. The "established practice of the organization" (to borrow from the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations) sometimes seems infinitely malleable, though of course it is not. As the International Criminal Tribunal for the former Yugoslavia (ICTY) explained in *Tadić*, there are limits; international organizations are not *legibus solutus*.[168] They are bound by their constituent instruments and may be found to have acted *ultra vires*, as the World Health Organization was found to have done when it requested the *Nuclear Weapons* advisory opinion.[169] It nevertheless seems to be difficult in practice to argue convincingly that an international organization cannot do that which a majority of its members wish, since there is rarely anywhere where the

[167] *Id*, at p. 46, para. 5 of the general commentary.
[168] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995, para. 28 (referring to the UN Security Council).
[169] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at pp. 81–82, paras. 27–28.

matter can be tested.[170] Indeed, international organizations seem to acquire a life of their own: hence the references made sometimes to mission creep or to their evolution in a Frankensteinian sense.

Fourth, the absence of available dispute settlement procedures is an important fact for lawyers dealing with international organizations. There are even fewer opportunities for international organizations to bring proceedings against others, or to be taken to court, than is the case with States. This applies not only to cases at the international level, but also in the domestic courts, where immunity is likely to play a large role. Redress against international organizations is an undeveloped area. This may be seen as welcome; or it may be viewed negatively. Either way, it must shape the thinking of the lawyers involved, whether working for member States or for the organization.

The opportunities for international organizations to be parties to litigation in their own right is strictly limited and there is relatively little case-law to guide the lawyers.[171] In 2016, it was proposed that the ILC should take up the topic of "The Settlement of International Disputes to Which International Organizations are Parties", but so far it has not done so.[172]

Lawyers Representing States at International Organizations

Against this relatively new and untested legal background, I shall look first at the role of lawyers working for Governments at their representations to international organizations or sent to

[170] The WHO advisory proceedings before the ICJ were a rare exception.
[171] L. Boisson de Chazournes, C. Romano and R. Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, 2002).
[172] A/71/10, pp. 387–399, Annex A: The settlement of international disputes to which international organizations are parties (Sir Michael Wood).

attend particular meetings, such as sessions of the Sixth (Legal) Committee of the General Assembly.[173]

A first thing to note is that government lawyers, including quite junior lawyers, working as representatives at international organizations are likely to be involved in a good deal more policy and negotiation than when they are in the ministry. Their role is similar to that of lawyers taking part in bilateral or multilateral negotiations. In fact, the work at a permanent mission to an international organization may be viewed as involving a continuous negotiation. That is what makes it so rewarding — or frustrating. In addition to great patience, you need to get on well with all your colleagues — and have a sense of humour.

In addition to lawyers posted to missions to international organizations, Government lawyers often attend the legal organs of both universal and regional organizations. Among regional organizations, I should make particular mention of the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI).[174] CAHDI, established in 1991, is an *ad hoc* committee of experts of the Council of Europe. It is composed of the legal advisers from the Ministries for Foreign Affairs of the 47 member States, as well as of a significant number of observer States and organizations. CAHDI meets twice a year to exchange views on topical questions of public international law (including the ongoing work of the International Law Commission). Its principal role is to coordinate the Council of Europe's action and activities in the field of public international law. It responds to requests from the Committee

[173] M. Wood, "Legal Advisers at Permanent Missions to the United Nations", in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (British Institute of International and Comparative Law, 2000) 71–84.

[174] See <https://www.coe.int/en/web/cahdi>; M. Requena and M. Wood, "Committee of Legal Advisers on Public International Law (CAHDI)", in R. Wolfum (ed.), *Max Planck Encyclopedia of Public International Law* (2017). Other such regional bodies dealing with public international law include the *Comité juridique (COJUR)* of the European Union, the Inter-American Juridical Committee, and the African Union Commission on International Law (AUCIL).

of Ministers of the Council of Europe and recommends action in the field of public international law. Furthermore, CAHDI acts as the European Observatory of Reservations to International Treaties.[175]

A number of areas of international law may be particularly relevant for lawyers at missions to international organizations. In addition to the internal law of the organization (including procedural rules and practices, and international civil service law), these include such questions as legal personality, membership, privileges and immunities, and international responsibility. I will highlight just two: the role of international organizations in relation to international law; and the drafting and interpretation of resolutions.

It is important to be aware of the potential contribution of the organization to the development of international law.[176] International organizations, especially but not only the United Nations and its specialized agencies, have an increasing impact on international law. In some cases, this is fairly straightforward, but in two cases in particular, this is not so: the effect of subsequent practice on the interpretation of the constituent instrument, including the powers and functions of the organization;[177] and the effect of the practice of the organization on the development

[175] Among other things, the CAHDI has produced a series of impressive books setting out State practice in some important fields of international law, based on questionnaires sent to the member and observer States: on *State Succession and Issues of Recognition*; on *Treaty Making — Expression of Consent by States to be Bound by a Treaty*; on *State Immunities*; and (in 2019) on the *Immunities of Special Missions*. Other publications under the auspices of the CAHDI include the 2016 volume on *The Judge and International Custom* and the 2016 volume on *The CAHDI Contribution to the Development of Public International Law.* These volumes prepared under the auspices of the Government legal advisers are an eminently practical source of materials and analysis of the law.

[176] Jennings and Watts, *supra* note 54, at pp. 45–49, para. 16.

[177] A/73/10: *Report of the International Law Commission on its Sixty-seventh session (30 April–1 June and 2 July–10 August 2018)*, Chapter IV, Conclusion 12 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

of customary international law.[178] Central to this last point is the legal effect of resolutions, particularly those of the UN General Assembly.[179]

The drafting and interpretation of resolutions is a central activity at an international organization. When I was posted to the UK Mission to the UN in New York in the early 1990s, I was involved in the negotiation of hundreds of Security Council resolutions and Presidential statements (one every couple of days on average). This was a kind of post-Cold War "Golden Age", when the members of the Security Council, in particular the five permanent members, worked well together. It is important, when interpreting Security Council resolutions, to understand how the Security Council works and how resolutions come to be drafted.[180] The *travaux préparatoires* may be more important in the case of resolutions than with treaties. The ICJ explained the position as follows in the *Kosovo* advisory opinion:

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of

[178] See text at notes 213-215 below.

[179] See also A/73/10, *supra* note 9, Conclusion 12.

[180] M.C. Wood, "The Interpretation of Security Council Resolutions" (1998) 2 Max Planck Yearbook of United Nations Law 73–96; M. Wood, "The Interpretation of Security Council Resolutions, Revisited" (2016) 20 Max Planck Yearbook of United Nations Law 3–35. For a thorough account, see S.B. Traoré, *L'interprétation des résolutions du Consel de sécurité des Nations Unies: Contribution à la théorie de l'interprétation dans la société internationale* (Helbing Lichtenhahn Verlag, 2020).

> such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States … irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[181]

I recall the negotiation within the Security Council, over a number of months in 1992 and 1993, of resolution 817 recommending to the General Assembly the admission to the United Nations of the State whose name is now "North Macedonia".[182] Admission to UN membership was not only the fair thing to do for Macedonia, but was also considered important in order to maintain stability within Macedonia (at the time a State seen as particularly at risk of falling into chaos). The difficulties in negotiating this resolution, and of Macedonia's admission to the UN, resulted from the difference between Greece and Macedonia over the name of the new State: Greece was concerned that it might have some ancient claim to Greece's northern territory, also known as Macedonia. Yet by April 1992, Macedonia had clearly emerged as a sovereign independent State, and it had done so with very little by way of conflict compared with most of the other former constituent parts of the former Yugoslavia. The Republic of Macedonia applied to join the UN on 30 July 1992. The UN Secretary-General, doubtless in consultation with Council members, did not circulate the application until nearly six months later, on 22 January 1993. Circulation was followed by nearly four months of intense negotiations among the three EU Council members, France, Spain, and the United Kingdom. France,

[181] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p. 403 at p. 442, para. 92.
[182] Security Council resolution 817 (1993) of 7 April 1993.

at that time under President Mitterrand, was staunchly pro-Greek — effectively Greece had a veto in the Council.[183]

The eventual compromise was a complex package comprising a number of elements. The Security Council admission resolution, which had some unique features; a statement by the President of the Security Council following the adoption of resolution 817, every word of which was carefully negotiated with Greece and Macedonia; a General Assembly resolution repeating some of these features, particularly those connected with the difference over the name;[184] and finally the question where the new member should sit within the UN and the design of the flag.

Perhaps the strangest part of this whole negotiation was the resolution of an acute controversy that arose at the last minute: Where would the new Member, to be provisionally referred to as "the former Yugoslav Republic of Macedonia", be seated in the UN General Assembly: under M? or under F? In the end, the suggestion was made that it sit under T, which proved acceptable to both sides. This required a last-minute change of the inverted commas around the designation in the resolution, so they appeared before "the" rather than before "former", which probably few noted. Both sides were apparently satisfied when the new member sat next to Thailand.

Various other "name" issues occurred at about the same time in the Security Council's Committee on the admission of new members, chaired by the UK legal adviser for the month of April 1993, mostly trivial (the spelling of Herzegovina, which I think we got wrong; and the French spelling of Kyrgyzstan, where the French

[183] M. Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties" (1997) 1 Max Planck Yearbook of United Nations Law 231 at 236–241; D. Hannay, *Britain's Quest for a Role: A Diplomatic Memoir from Europe to the UN* (I.B. Tauris, 2013) 214–216. For recent developments, see M. Wood and N. Pavlopoulos, "North Macedonia", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2019).
[184] UNGA res. 47/225 of 8 April 1993.

delegation disagreed with the UN translators — as chair I sided with the delegation). The most important "name" issue, by a long way, concerned Russia. In December 1991, the Russian Federation was accepted at the UN as the continuing State of the USSR. No one said anything when the new nameplate appeared in front of the Russian representative, who, as it happened, was President of the Security Council for the month of December 1991.

Another difficult membership issue concerned the Federal Republic of Yugoslavia (Serbia and Montenegro).[185] This raised issues of the succession versus the continuity of States (something also relevant to when the Russian Federation replaced the USSR in the United Nations); the powers of the Security Council and the General Assembly in relation to questions of membership and the suspension of membership. And later, the ICJ was also involved in seeking to interpret what the political organs had done.

The Federal Republic of Yugoslavia (FRY) claimed to be the continuation of the Socialist Federal Republic of Yugoslavia (SFRY),[186] while the UN Security Council noted that the FRY's "claim … to continue automatically the membership of the former [SFRY] in the United Nations has not been generally accepted".[187] The other former Yugoslav States maintained that the FRY was, like them, one of the successor States to the SFRY, which had ceased to exist. Against this background, the UN General Assembly, upon the recommendation of the Security Council, considered that the FRY could not continue automatically the former SFRY's membership in the UN and therefore "[decided] that the [FRY] should apply for membership and that it shall not participate in the work of the General Assembly" (a prohibition later extended to the work of the Economic and Social Council).[188] The Security Council and General Assembly resolutions were not without ambiguity, as is

[185] Wood, *supra* note 183, at 241–251.
[186] Proclamation of the Federal Republic of Yugoslavia, 27 April 1992.
[187] Security Council resolution 757 (1992) of 30 May 1992.
[188] UNGA res. 47/1 of 22 September 1992; UNGA res. 47/229 of 5 May 1993.

so often the case with the outcome of difficult negotiations, and led to difficult arguments in cases before the ICJ, but one important legal point stands out: on a matter relating to membership, even one not expressly foreseen in the UN Charter, the General Assembly properly acted only upon the recommendation of the Security Council, by analogy with the procedure set out in Articles 4, 5 and 6 of the Charter (dealing respectively with admission, suspension and expulsion).

Another point to note about the work of government lawyers at international organizations, in addition to the large element of negotiation, is that the substantive area of law may be quite specialized. For example, for those posted to Geneva, international human rights law (sitting in the Human Rights Council or working with the many other human rights bodies in Geneva, such as the UNHCR or the UNHCHR); or WTO law; or international humanitarian law/the laws of war (in the case of relations with the ICRC); or — especially nowadays — world health law. For those in Brussels, EU law; for those in Strasbourg, the European Convention on Human Rights or the many other legal matters that the Council of Europe focuses on from time to time.

A further point, which I have already touched on, is that the law of international organizations is a new and quite amorphous field of international law. It is sometimes hard to get a hold on. Moreover, each international organization has its own "legal system", governed by its own rules and practices, which can really only be learnt on the spot.[189] In the case of many of the UN specialized agencies, for example, delegations from capitals are likely to include experts in the technical fields covered by the organization, and to have a good grasp of the "culture" of the organization; but they will probably not have a wider view of the law of international organizations, which is likely

[189] Finding out about individual international organizations can be quite difficult, though much less so nowadays, when most international organizations have good websites. Some publish useful handbooks (though these are not always fully up-to-date). See, for example, International Bureau of the Universal Postal Union, *Constitution and General Regulations Manual*, available at <https://www.upu.int/UPU/media/upu/files/aboutUpu/acts/manualsInThreeVolumes/actInThreeVolumesConstitutionAndGeneralRegulationsEn.pdf>.

to be relevant, particularly in times of crisis or if some extraneous international problem intrudes. Here a generalist international lawyer from the local mission, or from the capital, is likely to prove valuable.

I might say a word about the relationship between the lawyers in the capital and the mission. It is not possible to generalize, since governments organize their business differently. In fact, not all missions in New York, still less in Geneva or The Hague, have dedicated legal advisers, though in some States, many regular diplomats have legal training, especially in international law. One thing is, however, certain: as between the mission and the capital, the lawyers perform different roles, from a different vantage point, and work within a different hierarchy. Thus, the legal adviser to the UK Mission to the UN in New York works directly for the UK Permanent Representative, who is his or her "line manager": he or she does not work directly for the chief legal adviser in the FCO. While the ultimate instructions to the mission, including on legal matters, will come from the FCO in London, the lawyer in New York may sometimes need to argue legal points with the lawyers back in the capital — though there may be practical difficulties in doing so. Section 3.5 of the UK Iraq Inquiry's Report, a section entitled "Development of UK strategy and options, September to November 2002 — the negotiation of resolution 1441", addresses at some length the negotiation of Security Council resolution 1441, including the provision of legal advice, and the seemingly different views of the effect of resolution 1441 in London and New York. This examination was largely based on the recollections of the participants (since much of the negotiation was unrecorded). The Inquiry noted a lack of direct communication between lawyers in London and New York. But this was hardly surprising given the particular circumstances of the negotiation.[190]

[190] UK Iraq Inquiry Report, 6 July 2016, Vol II, Section 3.5 (Development of UK strategy and options, September to November 2002 — the negotiation of resolution 1441), especially at paras. 1000–1079, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535411/The_Report_of_the_Iraq_Inquiry_-_Volume_II.pdf>.

Legal Advisers Working for International Organizations

Most if not all of the larger international organizations have in-house legal advisers, including a legal section within the Secretariat and, in the case of the UN, lawyers in other parts of the Secretariat and in the field.[191] They rarely seek outside legal advice. The League of Nations had a Legal Section within the Secretariat. At its first session, in 1946, the UN General Assembly resolved that one of eight principal units of the Secretariat would be a Legal Department, which was to

> advise the Secretariat and other organs of the United Nations on legal and constitutional questions; [assist] in the negotiation of agreements and other international instruments; [encourage] the progressive development of international law and its codification; [register] and [publish] treaties and international agreements and [maintain] liaison with the International Court of Justice.[192]

Today, the Legal Counsel to the United Nations has the rank of Under Secretary-General, and is one of the most senior officials in the organization. The Office of Legal Affairs (OLA) has lawyers from a wide range of countries around the world, and comprises six divisions: the Office of the Legal Counsel; the General Legal Division; the Codification Division; the International Trade Law

[191] On legal advisers to international organizations, see H.C.L. Merillat (ed.), *Legal Advisers and International Organizations* (Oceana Publications, 1966), and the book review by Fitzmaurice, *supra* note 144; R. Zacklin, "The Role of the International Lawyer in an International Organisation", in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (British Institute of International and Comparative Law, 2000) 57–68; G. Garzón Clariana, "The Work of the Legal Adviser of International Organisations, with Special Reference to the European Union", in C. Jiménez Piernas (ed.), *The Legal Practice in International Law and European Community Law* (Brill, 2007) 239–254; A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) (with chapters on the European Union, NATO, the World Trade Organization).

[192] A/RES/13(I): Administrative Organization of the Secretariat.

Division; the Treaty Section; and the Division for Ocean Affairs and the Law of the Sea (DOALOS).[193]

The position in the EU is rather different. There is a considerable number of lawyers within each of the EU's major institutions: the Council, Commission, Parliament, the Court of Justice and General Court, and the European Central Bank. For the most part, the work of legal advisers within the EU is in the field of EU law rather than public international law. But as the EU itself is increasingly an actor in international relations, and not only in such traditional fields as trade law (for example, World Trade Organization dispute settlement), there is now more than ever a need to have expertise not only in EU law but also in public international law, for matters such as sanctions, peace-keeping, and international humanitarian law. Both the Council and the Commission Legal Service operate a specialized unit dealing with the EU's external relations, whose members are called upon to give advice on international law matters and to represent the EU as agents in international negotiations and litigation. Since 2011, the EU has a European External Action Service (EEAS) — in effect its own diplomatic service — with its own international lawyers.

As with legal advisers to foreign ministries, there is a range of ways in which lawyers with international organizations are organized. Their role and influence may depend on the powers and functions, and practices, of the particular organization — and also upon their position within the hierarchy. In organizational terms, it is important that the legal adviser has direct access to the chief executive officer of the organization (the Secretary-General). It is undoubtedly the case that some lawyers working for international organizations have been particularly influential, and have had a profound impact on the development of the law of international

[193] See also H. Corell, "United Nations Office of Legal Affairs", in K. Wellens (ed.), *International Law in Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff, 1998) 305–322.

organizations, through their writings and through the precedents they set within their international organizations. Examples include Wilfred Jenks at the International Labour Organization (ILO), Ibrahim Shihata at the World Bank, and Oscar Schachter at the United Nations.

There are major differences among lawyers working for the organization in terms of the substance of their work. Some may handle the organization's commercial and other private law transactions; others may cover staff matters, including pensions and discipline; still others may deal with institutional affairs such as governance, treaty interpretation, and privileges and immunities. Then there are the lawyers who specialize in the law relating to the particular subject matter(s) with which the organization is entrusted, for example, atomic energy, health, aviation or maritime law, deep seabed mining, development or trade law, intellectual property, and so on.[194] In the United Nations, lawyers are likely to be involved in a wide range of international law issues, including the use of force[195] and all matters covered by the International Law Commission.[196] Yet all have a common appreciation of their task and of international law: Hans Corell has written of his staff at the United Nations that:

[194] For a particular example, see R. Wilde, "The Complex Role of the Legal Adviser When International Organizations Administer Territory" (2001) 95 Proceedings of the ASIL Annual Meeting 251–258.

[195] For an insider's account of a number of situations involving advice on the use of force, see R. Zacklin, *The United Nations and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge University Press, 2010).

[196] The Codification Division of the UN Office of Legal Affairs produces excellent memoranda on matters before ethe ILC, either upon request or *proprio motu*. This is so even when topics are not taken up by the Commission, or run into the sand: a good example is the 2010 Secretariat study of the various types of *aut dedere aut judicare* provisions to be found in international conventions, which was much cited before the ICJ in the *Belgium v. Senegal* case (A/CN.4/630: Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic "The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)", Study by the Secretariat, 18 June 2010).

> They came from many countries and represented different religions, cultures and legal traditions. But when it came to international law we saw things in very much the same way. Surely, as lawyers, we could sometimes disagree. However, this was always based on legal aspects after a true legal analysis.[197]

International organization legal advisers are international civil servants; they hold positions requiring independence and impartiality, owing their loyalty to the organization and not to any member State.[198] Schachter wrote that:

> Apart from the International Court of Justice, the Secretariat is the only principal organ which is not composed of representatives of Governments. Its members, like those of the Court, serve in an individual capacity and they are required by the Charter "not to seek or receive instructions from any Government or from any other source external to the Organization". Their presentation of legal points, while not authoritative, may nevertheless be considered as "technical" and nonpolitical.[199]

At a time when all too recently the very concept of an international civil service seemed to be under threat,[200] the role

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[197] H. Corell, "Personal Reflections on the Role of the Legal Adviser: Between Law and Politics, Authority and Influence", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 187 at 192.

[198] See also P. Quayle, "Legal Advisers and International Organisations: The Convergence of Interior and Exterior Legal Obligations", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 255 at 258 ("before they are international organisations lawyers, Legal Advisers to IOs are international civil servants").

[199] O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat" (1948) 25 British Yearbook of International Law 91 at 93.

[200] According to Ralph Zacklin, in the aftermath of the invasion of Iraq in 2003, "[w]ithin the Secretariat divisions had emerged between what came to be known as the traditionalists and the self-proclaimed modernizers. The modernizers, a group that was made up almost entirely of American or Americanized officials who had been parachuted into the Secretariat during the run up to the Iraq war, believed that there

of legal advisers of international organizations as guardians of the organization's principles is critical. As with legal advisers to governments, they owe their allegiance also to international law as a system, as well as to the legal system established by the constituent instrument of the organisation (the Charter, in the case of the United Nations). This role is of course shared with and exercised under the direction of the Secretary-General,[201] even though no such role is expressly set out in the Charter. The legal adviser should not be a mere "housekeeper" or a facilitator for the policy organs, but may more properly be seen as a guardian of the institution.[202]

If the Government legal adviser is, in a way, a servant of two masters (the Government and the law), legal advisers of international organizations have for a client not only the law and the organization as such, but also in a sense its member States, at least collectively; Fitzmaurice referred to "the Janus-like, or even hydra-headed, nature of the institutional legal adviser's 'client'".[203] He further pointed out that the Member States may sometimes even

were no good processes only good outcomes. Expediency not principle was the order of the day and if the United Nations was to survive as an institution it simply had to accommodate itself to the United States power. This group lacked any historical perspective of the Organization and tended to regard the Secretariat as a corporate arm of the United States Government. There was no such thing as the international civil service. The traditionalists, on the other hand, believed that the legitimacy and the credibility of the Organization derived from the Charter-established principles and their consistent application under international law. The Secretariat had a duty and a responsibility to uphold those principles": *supra* note 195, at 157.

[201] I. Johnstone, "The Role of the UN Secretary-General: The Power of Persuasion Based on Law" (2001) 9 Global Governance 441–458. Johnstone draws attention to para. 10 of Security Council resolution 1366 of 30 August 2001, by which the Security Council "*[i]nvite[d]* the Secretary-General to refer to the Council information and analyses from within the United Nations system on cases of serious violations of international law, including international humanitarian law and human rights law … and expresses its determination to give serious consideration to such information and analyses regarding situations which it deems to represent a threat to international peace and security".

[202] T. Dunworth, "The Legal Adviser in Intentional Organizations: Technician or Guardian" (2009) 46 Alberta Law Review 869–884.

[203] Fitzmaurice, *supra* note 144, at 116.

ask the legal adviser for advice independently of the chief executive officer of the organization.[204] Even if the goals of the organization and its Member States should in theory be aligned, in practice that is not always so, and the legal adviser must tread carefully. Being impartial and objective, and keeping in mind his or her duty of loyalty to the organization, are of paramount importance.

Indeed, a legal adviser to an international organization has to exercise considerable discretion, since his or her views (for example, on the use of force) may be particularly sensitive for Member States. A recent UN Legal Counsel put it thus:

> In the UN, the Legal Adviser has to be very careful when acting in public, since he or she has to make a distinction between situations where the Legal Adviser is formally asked to give legal advice, and situations where the Legal Adviser may have to discreetly warn the organ in question that a contemplated decision might conflict with international law. There could also be situations where the Legal Adviser should encourage the organ to ask for a legal opinion so that the subject matter is properly prepared before a decision is made.[205]

As with a Foreign Ministry legal adviser, the role of legal advisers to international organizations is likely to be both advisory and representational, as well as being part of the organization's senior management. In his review of legal opinions of the Secretariat, as early as 1948, Oscar Schachter explained that:

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[204] *Id*, at 116–117. It is actually quite rare, in most organizations (the EU being an exception) for organs of international organizations to seek legal advice. When they do so, the response may be a very delicate matter, if advice is sought on a legal issue disputed between States. For example, in a very unusual move, in November 2001 the UN Security Council sought the UN Legal Counsel's advice on the legality of Morocco offering and signing contracts with foreign companies for the exploitation of mineral resources in Western Sahara. The Legal Counsel's advice, set out in a letter of 29 January 2002 (S/2002/161), provided an important element in this still unresolved matter.

[205] Corell, *supra* note 197, at 197.

> There are … two broad categories of legal opinion of the Secretariat: (1) those which are purely advisory and submitted for the guidance of another body; and (2) those which have direct legal effect in that they relate to matters with respect to which the Secretariat has the authority to make administrative decisions.[206]

Much of the work of legal advisers to international organizations is behind the scenes, and even less likely to see the light of day than that of a government legal adviser: the documentation of international organizations may remain closed indefinitely, unlike the fixed period (now as short as twenty years in the UK) for government documents, though selected legal opinions are published, notably in the *United Nations Juridical Yearbook*. The legal advisers could have an important role in publishing the practice of their international organizations.

Quite a visible task for lawyers working for international organizations is upholding the privileges and immunities of the organization.[207] This can be a delicate matter. Take, for example, the UN's claim to immunity in the Dutch courts in relation to its possible responsibility for the Srebrenica massacre,[208] or its claim to immunity from the US courts in relation to harm caused by the cholera epidemic in Haiti.[209] In this connection, an area that has

[206] Schachter, *supra* note 199, at 95. More recently, it has been said that "two ultimate advisory responsibilities are uniform to all lawyers who lead the legal advice to international organisations. The first is to be responsible for advising the IO upon the law of employment relations of the international civil service, international administrative law. The second is to be responsible for guiding interpretation of the IO's constituent instrument": Quayle, *supra* note 198, at 264. These tasks are not unrelated: "the role of the international organisation lawyer connects the interior legal order and the exterior legal framework of IOs" (*id*, at 269).

[207] For recent accounts, see chapters by Blokker, Boon, Wessel, De Brabandere, and Walter/Preger, in T. Ruys and N. Angelet with L. Ferro (eds.), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019).

[208] *Mothers of Srebrenica et al v. State of The Netherlands and the United Nations*, Supreme Court of The Netherlands, Judgment, 13 April 2012.

[209] *Laventure et al v. United Nations et al*, United States Court of Appeals for the Second Circuit, Judgment, 23 August 2017.

become particularly problematic in recent years concerns actions by staff members or former staff members. The duty of the legal advisers is to uphold the organizations' existing immunity, and they should not be criticized for that; this is not just a matter of the law — were they not to do so, the budgetary authorities and the major contributors to the budget would doubtless complain. But, as is generally required by conventions on privileges and immunities, they must also strive to ensure that there exist sufficient mechanisms within the international organization so as to shield it from criticism that the privileges and immunities are being abused and should be lifted. This is a principal aim of the topic placed on the ILC's long-term programme of work in 2016;[210] and it is a matter being studied by the Council of Europe's CAHDI, though as of yet there is little public information about progress.

In a somewhat idealistic vision of the role of the legal adviser to an international organization, at least it seems so nowadays, Wilfrid Jenks described the key role of the legal adviser in the general development of the law of international institutions and the drafting of law-making treaties. It is in these fields, he said, that:

> the legal staffs of international organizations have the opportunity, if they learn to combine vision and inventiveness with tact and judgment and acquire the practical wisdom which distinguishes instinctively between a time for boldness and a time for patience, to make a major contribution to the constructive development of the law at vital points.[211]

The interpretation of the organization's constituent instrument, in particular, can have a decisive influence on the operation of the organization concerned — essentially allowing it to extend its activities to address new challenges and realities, and to develop

[210] *Supra* note 171.
[211] C.W. Jenks, "Craftsmanship in International Law" (1956) 50 American Journal of International Law 32 at 50–51.

the law. It is here, as Jenks observed, that the interrelation of law and policy are particularly close.[212]

Legal advisers to international organisations can also shape international law even more broadly given that in certain cases, the practice of international organizations can contribute to the formation, or expression, of rules of customary international law.[213] The relevance of such practice is difficult to deny in the case of the European Union or, in fact, in any case where member States may direct an international organization to execute on their behalf actions falling within their own competences: excluding such practice would preclude the member States themselves from contributing to the creation or expression of customary international law. The relevance of practice by international organizations should not be controversial, moreover, if it is accepted that the practice of international organizations in their relations among themselves, at least, could give rise or attest to rules of customary international law binding in such relations.[214] This position is reflected in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which refers in its preamble to the "codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations", and which affirms that "rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". At the same time, given

[212] *Id*, at 52.
[213] A/73/10, *supra* note 9, Conclusion 4(2), with commentary.
[214] Jennings and Watts, *supra* note 54, at 47 ("… international organisations are themselves international persons. They can in their own right give rise to practices which may in time acquire the character of customary law or contribute to its development, there being nothing in Article 38 of the Statute of the International Court of Justice to restrict international practice to the practice of states only. However, the international personality of international organisations is normally limited, and this in turn imposes limits upon the areas of international law which their practice can directly affect").

that international organizations are not States, and vary greatly (not just in their powers, but also in their membership and functions), in each case their practice must be appraised with caution.[215]

The legal opinions of legal advisers to international organizations may also be evidence of the *opinio juris* of the organization, provided they are accepted by the organization.[216] An example may be found in the Joint Statement submitted to the United Nations Legal Counsel on 31 January 2017 by some 24 international organizations, in which the signatories expressed their view, *inter alia*, on the legal status of the rules contained in the Commission's draft articles on the responsibility of international organizations.[217]

Much like their colleagues at Ministries of Foreign Affairs, the lawyers practising at international organizations hold therefore a position that is both multifaceted and important. They too may play a significant role in the international legal system, including with regard to the very sources of the law. It is to these sources that we shall turn to next.

[215] A/73/10, *supra* note 9, at paras. 4–7 of the commentary to Conclusion 4.
[216] *Id*, at Conclusion 10(2) and para. 5 of the commentary thereto.
[217] "Response to the request of the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel of February 8, 2016, for comments and information relating to the draft articles on the responsibility of international organizations pursuant to UN General Assembly resolution 69/126 (2014)", available at <http://opil.ouplaw.com/view/10.1093/law-oxio/e204.013.1/law-oxio-e204-regGroup-1-law-oxio-e204-source.pdf>.

LECTURE 5:

The Sources of Public International Law in Practice

Everyone who has to deal with questions of public international law needs a sound understanding of sources.[218] The practitioner, in particular, has to apply existing rules of international law, and so needs to be able to distinguish between what is and what is not law.[219]

Whatever the function held by those who practice international law, it should not lead them to adopt a different approach to sources. While it has been suggested that different "observational viewpoints" may be legitimate,[220] the idea that, because they are addressing different audiences, observers may with equal validity come to different views as to what the law is, seems to be a denial of law. Of course, that is not to say one cannot join in efforts to develop the law, or be inventive as an advocate.

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[218] Wood, *supra* note 10.

[219] A recent "research handbook" on international "lawmaking" takes what it calls a broad working definition of law: "It does not proceed from a binary classification in 'law' and 'non-law', but takes legal normativity as a sliding scale": C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar, 2016) 2. The book is about law-making, and law-making is not the same as law identification. The term "legal normativity" suggests that sentence is not actually about law. It is generally better to avoid the word "norm" or any of its derivatives ("normative", "normativity", etc.). In English, at least, "norm" (and its derivatives) is unclear; it tends to have a wider meaning than a rule of law: that is perhaps its attraction to some.

[220] The International Law Association, for example, in its *Statement of Principles Applicable to the Formation of General Customary International Law*, suggested that "different *functions* may lead the persons performing them to adopt a somewhat different attitude to the sources": London Statement of Principles Applicable to the Formation of General Customary International Law, and accompanying commentary, adopted by resolution 16/2000 on formation of general customary international law, adopted on 29 July 2000 by the sixty-ninth Conference of the International Law Association, held in London from 25 to 29 July 2000, p. 5, para. 7.

Clarity as to sources is of the essence for all law worthy of its name, and international law is no different. It seems, however, that in other legal systems the fundamental question, from where does the law derives its content and authority, rarely invites debate, whereas for international lawyers it continues to attract speculation, especially among academics.

The very concept of "sources of international law", and even the term "sources", has become controversial in recent years in some quarters,[221] and not only the term, since it has become fashionable among certain "theorists" to decry "sources doctrine", which they tend to associate with positivism and Article 38(1) of the ICJ Statute. This, they assert, is out of touch with modern reality. One recent book chapter goes so far as to proclaim that "whereas earlier approaches would look at the sources *it is now generally understood* that the broader process of speaking the language of international law contributes to its making".[222] What "the broader process of speaking the language of international law" is, is beyond me. A motivation for such views seems to be to introduce a "multiplication of actors as well as new forms of lawmaking", and perhaps more broadly to change or expand the very notion of public international law to embrace that which it is not: "soft law", "transnational law", "global administrative law", and *lex ferenda* (which by their own terms are not existing public international law[223]). Such speculation is unconvincing, and the claim to reflect real life is unsupported; most such authors reflect a narrow inter-academic debate. Such approaches are certainly not "generally understood", as a glance at any standard textbook will show.[224]

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[221] H. Thirlway, *The Sources of International Law*, 2nd edition (Oxford University Press, 2019) 1–8, 223–237.

[222] I. Venzke, "Contemporary theories and international lawmaking", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar, 2016) 66 (emphasis added). For a parade of unconvincing theories, see A. Bianchi, *International Law Theories: An Enquiry into Different Ways of Thinking* (2016).

[223] M. Wood, *supra* note 17.

[224] As Thirlway points out, "the theory of sources of law … is firmly established in the practice of States and of international tribunals": *supra* note 221, at 225.

Article 38(1) of the ICJ Statute

Public international law is by no means as unclear as some suggest. Those who practise it know where to look for it, and how to demonstrate its existence. The text of Article 38(1) of the Statute of the International Court of Justice, now a century old, remains authoritative. Even though it was drawn up in a very different world and is a directive to a particular international court as to the rules it must apply (the applicable law), Article 38(1) has been repeated in many other instruments and circumstances, and is widely accepted by courts and practitioners as a correct statement of sources. It lists three sources (though it does not use that term): treaties, customary international law, and "the general principles of law recognized by civilized nations", with judicial decisions and the writings of highly qualified publicists as subsidiary means for the determination of the law. If accepting this provision as a correct statement of the sources of international law means one is a positivist, so be it. Being led astray by other approaches is not likely to assist in international legal practice.

Some question whether Article 38(1) provides a comprehensive statement of the sources of international law, again pointing out that there are new actors on the international stage (in particular international organizations) and that the range and nature of international law have been transformed. While no one would deny these changes, it is by no means clear that they require any fundamental rethinking of the sources of international law. Decisions of the Security Council under Chapter VII of the UN Charter, for example, are an important source of obligation in international law, but their legal force comes directly from a treaty — compliance is mandated by Article 25 of the UN Charter. In addition, the decisions and actions of international organizations may also contribute to the formation of customary international law, either in their own right or as indications of the views and practice of States.[225] Article 38 does not provide otherwise: even though it was

[225] See also paras. 147–148 above.

drafted in 1920, and even though some drafts referred to practice "among … States" or "in use between nations",[226] the text as adopted refers to "practice" *tout court,* not "State practice".

Clarifications as to sources of public international law have been achieved over the years through the case-law of the International Court of Justice and its predecessor, together with the work of the International Law Commission. The Court has, for example, shed much light upon the law of treaties, including their interpretation and application; upon the formation and identification of customary international law; upon the interpretation of Security Council resolutions; and upon the legal effect of unilateral declarations of States.

The International Law Commission, for its part, has considered it useful to codify (and sometimes develop) such so-called secondary rules of international law, including those that govern the formation and recognition of the law. In relation to sources, it has done so for treaties (including through detailed studies on reservations and on subsequent agreements and subsequent practice), as well as the identification of customary international law. It has also done some work on unilateral acts of States (though only as regards unilateral declarations of States capable of creating legal obligations). It is currently engaged in no less than three topics concerning sources: the provisional application of treaties, peremptory norms of general international law (*jus cogens*), and the general principles of law. I believe that the members of the Commission regard their work on sources as central to their activity; the ICJ seems to welcome it.[227] This may be seen as part of what is often said to be a symbiotic relationship

[226] Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes, at 351, 548.

[227] For example, the President of the ICJ, Judge Yusuf, commended the Commission on the adoption of the conclusions on "Identification of customary international law" when addressing it in 2019: A/CN.4/SR.3478: Provisional summary record of the Commission's 3478th meeting (11 July 2019), p. 6.

between the two institutions, which is imbued with mutual respect and relatively few differences.[228]

Treaties

Treaties are the first source listed in Article 38 of the ICJ Statute, and the rules set forth in them are in general relatively clear compared to the unwritten rules of customary international law. The ILC's work on the law of treaties led to three codification conventions, one of which — the Vienna Convention of 1969 — has been a major success. Many of the Vienna Convention's substantive provisions have increasingly come to be recognized as reflecting rules of customary international law. The Commission's work on reservations to treaties, both in the early years and then once again over a long period culminating in the *Guide to practice* of 2011, is useful to the practitioner and academic alike. The set of conclusions completed in 2018 on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", is likewise of considerable interest.

Several points that may be important for the practitioner deserve mention. First, there may be uncertainty as to whether a particular instrument is, or is not, a treaty. States (and international organizations) frequently have recourse to non-binding arrangements, often referred to as "memoranda of understanding" (MOUs), and so believe they are avoiding entering into legally binding agreements, sometimes because they want to keep the matter confidential (something that in principle cannot be done with a treaty, given the requirement for publication in Article 102 of the UN Charter), or sometimes to avoid constitutional or other practical difficulties. The negotiating parties may, however, have (or come to have) different views on the status of an instrument. This is something that should

[228] O. Sender, *A Partnership for Purpose: International Law-Making by the International Court of Justice and International Law* Commission (Cambridge University Press, forthcoming).

be overcome by clear drafting; in any case, one must keep in mind that under international law, neither the form nor the title given to an international instrument is decisive of its legal status. As the ICJ has observed, "international agreements may take a number of forms and be given a diversity of names": in order to ascertain whether an international agreement has indeed been concluded, regard must be had "above all to its actual terms and to the particular circumstances in which it was drawn up".[229] The answer depends essentially on "the nature of the act or transaction to which the [instrument] gives expression".[230] Indeed, however much one believes that a document is not legally binding, if the matter comes before a court, which will look at the question objectively, one can never be sure.

Second, it can be surprisingly difficult to know whether a treaty is in force for a particular State. This can be so, for example, with older treaties, which may have lapsed or been superseded; or where there have been one or more successions of States. The date of entry into force can also be wrongly identified, in particular, if elementary distinctions such as those between signature, ratification, and entry into force are overlooked.[231] For these and other such reasons, the United Nations Treaty Collection website is an essential resource.[232] Nor is the territorial scope of a treaty always clear. This has given rise to particular difficulties in relation to the territorial application of the European Convention on Human Rights. Such difficulties concern not only the territorial application of the Convention to the various territories of a State,[233] but also the Convention's application

[229] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at pp. 120–121, para. 23 (citing also to *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 39, para. 96).
[230] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 39, para. 96.
[231] Despite all the international legal expertise available to it in the *Pinochet* case, the UK House of Lords made just such an elementary error when it assumed that the UN Convention against Torture entered into force for the United Kingdom upon the deposit of its instrument of ratification rather than 30 days later.
[232] See <https://treaties.un.org/Pages/Home.aspx>.
[233] See, for example, Application no. 35622/04, *Chagos Islanders v. United Kingdom*, European Court of Human Rights, Judgment of 11 December 2012.

to a State's acts and omissions outside its own territory (the meaning of "within their jurisdiction" in Article 1).

Third, there is the need to identify the text of the treaty, usually a title, preamble, and articles, sometimes annexes. There may be two or more documents, a series of inter-connected texts — a "sort of treaty architecture", as one author has said when referring to the Quadripartite Agreement of 1971 on Berlin, and the Implementation Agreement of 1994 to Part XI of the LOS Convention, both of which comprise a short Agreement, followed by Annexes containing the "difficult" parts.[234] The text of a treaty may exist in any number of languages, one, some, or all of which may be declared to be authoritative; the Treaties of the European Union, for example, are authentic in 24 official languages. One has also to take account of any reservations that States parties may have made; the effect of reservations is a notoriously difficult subject, as the sheer length of the ILC's *Guide to Practice on Reservations to Treaties* indicates.

Fourth, treaties almost invariably require interpretation. Interpretation is an art, not a science, and there is much to be learnt from the cases.[235] After much controversy in the past, the rules of interpretation reflected in Articles 31, 32, and 33 of the 1969 Vienna Convention (the "Vienna rules") now provide the basic structure for any treaty interpretation. The formulations of the general rule of interpretation set forth in Article 31 and of the supplementary means in Article 32 have for many years been taken as reflecting customary international law.[236] Moreover, they are now being applied even to treaties adopted a century and more ago. The same may be true for the rules in Article 33 (concerning treaties adopted in more than one language), though there is less authority for this.

[234] Anderson, *supra* note 119, at 21–22.
[235] R. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford University Press, 2015).
[236] See, for example, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3, at p. 29, para. 63 (listing the cases in which the International Court of Justice has affirmed that these articles constitute customary international law).

As a practitioner, it is good to show that you are properly applying the Vienna rules. Points to bear in mind are that Article 31 sets forth a single general rule, albeit one with many elements. This leads to the application of what the ILC referred to as the "crucible approach": the terms of the treaty are central, but the other elements — such as context, and object and purpose — need to be thrown into the crucible as part of a combined operation. Likewise, when having recourse to the *travaux préparatoires* under Article 32, it is important to respect the structure of that provision: in other words, the supplementary means may only be used to confirm the meaning resulting from the application of the general rule; or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

Customary International Law

The spectacular rise of treaties in the twentieth century was not accompanied by a significant decline in the importance of customary international law: it still holds true that, as Parry wrote in the early 1960s, "[o]ne can have a very fair idea of international law without having read a single treaty; and one cannot have a very coherent idea of the essence of international law by reading treaties alone".[237] It should further be said that the expression "customary international law" is somewhat misleading ("international customary law", which one still sees occasionally, even more so): customary international

[237] Parry, *supra* note 45, at 34–35. See also J. Crawford, "General Course on Public International Law" (2013) 365 Recueil des cours 49 ("international law is a customary law system, despite all the treaties; even the principle of *pacta sunt servanda*, the obligation to comply with treaties, is a customary law obligation"); P. Tomka, "Custom and the International Court of Justice" (2013) 12 Law & Practice of International Courts and Tribunals 195 at 215 ("In many ways … Lord Phillimore's observation in 1920 before the Committee of Jurists, that custom 'constitutes in the main international law' continues to be relevant").

law has little to do with the customary law that is sometimes found in national legal systems.[238]

Theoretical controversies associated with customary international law have provided scholars with a fertile research agenda for decades. But such theoretical controversies have proven to be, well, theoretical. In particular, they have not prevented courts and practitioners, and also writers, from regularly identifying and applying customary international law. "[T]he academic torment that accompanied this source of law in the books has not impeded it in action".[239]

Much of the literature on customary international law suffers in this way. To give but one example, a recent article in the *Michigan Law Review* claiming to "mak[e] sense of customary international law", arguing, *inter alia*, that the two-element approach to the formation and identification of this source of law is a "conception … [that] does not describe what global actors use and receive as CIL in the everyday practice of law", and "does not reflect what CIL 'is' as a real-world sociological phenomenon".[240] The article overlooks the simple fact that the two-element approach is firmly grounded in extensive international practice, and has recently received express

[238] See also Crawford, *supra* note 111, at 18: "the definition of custom in international law is essentially a statement of [the principle of general consent or acceptance of States], and not a reference to ancient custom as in English law"; B. Cheng, "Hazards in International Law Sharing Legal Terms and Concepts with Municipal Law Without Sufficiently Taking into Account the Differences in Structure Between the Two Systems — Prime Examples: Custom and *Opinio Juris*", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Vol. 1 (Editoriale Scientifica, 2004) 469–494. Nor is customary international law to be equated with the common law, which depends essentially on court decisions.

[239] O. Sender and M. Wood, "The Emergence of Customary International Law: Between Theory and Practice", in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 133–159.

[240] M. Hakimi, "Making Sense of Customary International Law" (2020) 118 Michigan Law Review 1487–1537. For criticism of the main thrust of this article see K.J. Heller, "The Stubborn Tenacity of Secondary Rules", available at <http://opiniojuris.org/2020/07/07/customary-international-law-symposium-the-primary-rules-of-cil-are-not-coming-to-save-us/>.

and unequivocal support among States in connection with the ILC's work on "Identification of customary international law". The article essentially sets aside the view of the primary law-makers on the international plane in offering what is ultimately the author's own account of customary international law.

I will not say much more about customary international law, since I spoke about this in my 2018 lectures to this Summer School[241] when the International Law Commission had just completed its work on the "Identification of customary international law"; in 2018, its 16 conclusions on the matter, and the commentaries thereto, were endorsed by the UN General Assembly.[242] The basic approach is set out in conclusion 2, entitled "Two constituent elements", which reads:

> To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law.

As the ILC's commentary explains, this approach applies in all fields of international law, and its application of this two-element approach must be careful and rigorous.[243]

The identification of customary international law, like the identification of any existing rule of law, is a legal task, to be performed with rigour and realism, not one to be dictated by policy preferences. Such care has particular importance in the international legal system, and in the identification of customary international law more specifically, for at least two (not unrelated) reasons. First, as I have already said, it is important, for the authority of international law, to maintain a distinction between law and non-law. Determining the existence of rules without a degree of assurance that the international community is committed to them

[241] *Supra* note 1.
[242] A/73/10, *supra* note 9.
[243] *Id*, at para. 6 of the commentary to Conclusion 2.

as obligatory under law "risks the effectiveness and legitimacy of customary international law not only with respect to the individual rules, but ultimately with respect to the system as a whole".[244]

Second, given the fact that the effect of the inquiry may be to "impose" an obligation on a State that is reluctant to accept it, the juridical investigation and analysis must necessarily be rigorous and realistic: "Anything less than that may seem to do for a time but will not survive the moment of truth when some government chooses to question, ignore or defy the alleged rule".[245] An example of a meticulous approach to the identification of a rule of customary international law may be found in the two English judgments in the *Freedom and Justice Party* case.[246]

The ILC's work on "Identification of customary international law" was not its first foray into the matter. The Commission's Statute, adopted in 1947, expressly required it to consider ways and means for making the evidence of customary international law more readily available.[247] That the Commission did in its very first two

[244] J.I. Charney, "Customary International Law in the Nicaragua Case Judgment on the Merits" (1988) 1 Hague Yearbook of International Law 16 at 24. See also F.R. Tesón, "Fake Custom', in B. Lepard (ed.), *Reexamining Customary International Law* (Cambridge University Press, 2017) 86 at 102 ("… fake custom should be rejected. If international law is going to have relevance and gain the respect of the public and of our conventional colleagues, international lawyers should identify a workable, operational definition of customary law that can serve the ethical and functional goals that international law is supposed to serve. If we do not do so, customary law will become a pallid tool for advocacy and partisanship").

[245] R.Y. Jennings, "The Discipline of International Law" (1976) 57 International Law Association Rep. Conf. 620, 632.

[246] *R (on the application of the Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs*, [2016] All ER (D) 32 (5 August 2016); *The Freedom and Justice Party and Others v Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWCA Civ 1719 (19 July 2018).

[247] Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, Article 24: "The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter".

sessions, and duly reported on the matter to the General Assembly in 1950.[248] The result was a series of important publications in the field of international law, which continue to this day, as well as the encouragement of digests of State practice. This work was updated in 2018, as part of the topic "Identification of Customary International Law", taking into account the significant political and technological changes that had occurred since 1950.[249]

The General Principles of Law Recognized by Civilized Nations

Since its inclusion in the PCIJ Statute 100 years ago, the third source of international law, "the general principles of law recognized by civilized nations", has not been of great significance in practice. In 2019, the ILC made a good start after taking up this topic a year earlier,[250] but has so far not dealt with the most difficult issues. One of these is whether, in addition to general principles of law derived from national legal systems, there exist one or more other categories of general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute, consisting of general principles of law formed within the international legal system.

This third source of international law is a subject of great uncertainty in the literature. For example, there is much confusion between "the general principles of law" within the meaning of Article 38(1)(c) and so-called "principles of international law" (or "general principles of international law"). The term "general principles of international law", though often used, does not refer to any specific category of legal rules; references to such general principles are likely to be to rules of customary international law

[248] *Yearbook of the International Law Commission 1950*, Vol. II, pp. 367–374.
[249] *Supra* note 134.
[250] M. Vázquez-Bermúdez and A. Crosato Neumann, "General Principles of Law: The First Debate within the International Law Commission and the Sixth Committee" (2020) 19 Chinese Journal of International Law 157–172.

together with "the general principles of law" within the meaning of Article 38(1)(c) of the Statute.[251]

A comment on the term "general international law" may here be in order. As I said when I was last in Moscow,[252] States, the International Court of Justice and other international courts, writers, and sometimes even the International Law Commission, use the term "general international law" with a range of meanings. Its use to mean only customary international law can be confusing; at times, the term seems to be used to mean something broader than general customary international law, such as customary international law together with general principles of law, and/or together with virtually universal international conventions. It is desirable that the specific meaning intended by the term "general international law" is made clear whenever the context leaves the meaning unclear (which it often does).[253]

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[251] For further discussion, see, for example, G. Gaja, "General Principles of Law", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2020); P. Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford University Press, 2020) 35–46; M. Andenas and L. Chiussi, "Cohesion, Convergence and Coherence of International Law", in M. Andenas et al. (eds.), *General Principles and the Coherence of International Law* (Brill, 2019) 9–35; P. Palchetti, "The role of general principles in promoting the development of customary international rules", in M. Andenas et al. (eds.), *General Principles and the Coherence of International Law* (Brill, 2019) 47–59; C. Redgwell, "General Principles of International Law", in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart, 2017) 5–19; Ch. Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11 Michigan Journal of International Law 768–818. For an early work on the subject, see B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953/2006).

[252] *Supra* note 1, at 29–30.

[253] See T. Treves, "International Courts and Tribunals", *Courses of the Summer School on Public International Law*, Vol. III (International and Comparative Law Research Center, 2020), available at <https://iclrc.ru/files/pages/camp/2018/Publications/SSPIL-2018_3_Tullio-Treves.pdf>, pp. 33–35 (giving his views on the meaning of and reason for use of the term "general international law", and the difference between the ICJ and ITLOS in this respect).

Some confusion concerning "the general principles of law recognized by civilized nations" seems to be reflected in Russian thinking, too, including that of the Ministry of Foreign Affairs. Tunkin, for example, doubted that any principles could be truly common to national legal systems, and did not think that the general principles of law within the meaning of Article 38(1)(c) were an autonomous source of international law. Instead, he spoke of "principles of international law", which in his view found expression through treaties and custom.[254] His view appears to have been followed by the Russian Federation in the Sixth Committee in 2018, when discussing the inclusion of the topic "General Principles of Law" in the ILC's programme of work.[255] By 2019, however, following the debate at the ILC on the Special Rapporteur's first report, the Foreign Ministry appears to have adopted a more nuanced position, saying that if the Commission did find general principles to be an autonomous source of international law, "[t]he question of the recognition by States of any given principle as a general principle of international law was therefore even more crucial. It was also important to clarify the relationship between general principles of law and customary international law, and also treaties".[256] The Russian delegate at the Sixth Committee went so far as to say that her delegation "supported the Special Rapporteur's decision not to rule out the possibility of their being formed at the international level".[257]

Subsidiary Means: Judicial Decisions

The subsidiary means for the determination of rules of international law — judicial decisions and teachings — are

[254] G. Tunkin, "Co-Existence and International Law" (1958) 95 Recueil des cours 26. See also: G. Tunkin, *Теория Международного Права* (Zerkalo, 1970/2017) 167–180; V. Koretsky, *"Общие Принципы Права" в Международном Праве* (Ukrainian Academy of Sciences, 1957).
[255] A/C.6/73/SR.22, paras. 50–54.
[256] A/C.6/74/SR.32, para. 77.
[257] *Id*, at para. 79.

listed in subparagraph (d) of Article 38, paragraph 1 of the ICJ Statute. They are not sources of the law, but means to assist in determining the law. I have already addressed "teachings" in an earlier lecture.[258] Judicial decisions, which include both national and international court decisions, have for many years been a much more significant subsidiary means than teachings; thirty years ago, Jennings observed that "international law has become a case law".[259] However, when having recourse to decisions of courts and tribunals as a subsidiary means for the determination of rules of law, it is important to recognize that, as the ILC has put it, "the value of such decisions varies greatly"; it depends

> both on the quality of the reasoning … and on the reception of the decision, in particular by States and in subsequent case law. Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and the procedures applied by the court or tribunal.[260]

The Commission added that caution is called for when seeking to rely on decisions of domestic courts:

> National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States.[261]

[258] See Lecture 2 above.
[259] Jennings, *supra* note 44, at 519. Judicial decisions themselves sometimes rely on writings, which can be very influential, for better or for worse.
[260] A/73/10, *supra* note 9, at para. 3 of the commentary to Conclusion 13.
[261] *Id*, at para. 7 of the commentary.

Relationship and Hierarchy Between Sources

Even if they operate independently of one another, the sources of international law do not exist in sealed compartments. They may overlap, and there may to some extent be a hierarchy between them.[262] While these are largely theoretical matters, the practitioner needs to understand them as they can become important in particular circumstances. On questions such as these, the report and conclusions of the ILC's Study Group on the Fragmentation of International Law can be of interest;[263] though it is important to recall that they were only taken note of by the Commission, not adopted by the Commission as a whole, and it seems that not all members agreed with all of them.[264]

So far as concerns overlap, rules enshrined in treaties, in particular, may also exist as rules of customary international law, either because the treaty had codified the rule of customary international law, or caused it to crystallize, or because it had influenced its subsequent formation.[265] Moreover, as has been explained,

> over time custom may actually be employed to "mould and even modify" the content of otherwise static treaties. Such was

[262] Thirlway, *supra* note 221, at 152–161.

[263] *Yearbook of the International Law Commission 2006*, Vol. II, Part Two, pp. 176–184. The Study Group "sought to attain an outcome that would be concrete and of practical value especially for legal experts in foreign offices and international organizations": *Id*, at p. 175, para. 235.

[264] See the summary record of the Commission's 2092nd meeting (28 July 2006): *Yearbook of the International Law Commission 2006*, Vol. I, pp. 239–243. The Commission did not even take note of the "analytical study" on which the conclusions were based (A/CN.4/L.682 and Corr.1 and Add. 1), which was finalized by Martti Koskenniemi, chairperson of the Study Group, rather than by the Study Group itself. The whole project bears his stamp.

[265] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 37–45, paras. 60–81; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 95, para. 77; A/73/10, *supra* note 9, Conclusion 11 and the accompanying commentary.

> the case in *Nuclear Weapons*, where the International Court took the words "necessity" and "proportionality" from the customary international law concept of self-defence and read them into conventional self-defence under article 51 of the Charter.[266]

The relationship between rules of customary international law and the general principles of law recognized by civilized nations is difficult to capture.[267] A general principle of law that is widely applied in practice may become a rule of customary international law. The status of a general principle of law may be a kind of intermediary stop on the way to customary status. But it is important to guard against general principles of law being seen as some sort of "custom-lite".

The hierarchy between rules in international law raises some difficult points in practice. First, it is generally agreed that the order of the list of sources in ICJ Statute Article 38(1)(a), (b) and (c) does not, in itself, have any real significance; though in practice one might well look first for any applicable treaty rule, then — in the absence of a treaty — for any applicable rule of customary international law. Only where there is no treaty or customary international law, will recourse be had to the general principles of law.

Second, Article 103 of the UN Charter may come into play, for example where the UN Security Council has imposed obligations on States. To recall, this Article, sometimes called the "supremacy clause" of the Charter, provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and

[266] Crawford, *supra* note 237, at 110 (citations omitted).
[267] M. Wood, "Customary International Law and the General Principles of Law Recognized by Civilized Nations" (2019) 21 International Community Law Review 307–324.

> their obligations under any other international agreement, their obligations under the present Charter shall prevail.

There are many questions left open by this provision, at least according to certain writers.[268]

Third, there is *jus cogens*. One commentator has noted that "the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power".[269] In fact, *jus cogens*, while often referred to, has limited effect in practice, for at least two reasons. First, while some "norms" are indeed widely accepted as *jus cogens*, for example, the prohibition of torture, most are not. Second, as the ICJ has clarified, the status of a substantive rule, even if it has *jus cogens* status, does not affect procedural rules, such as those on jurisdiction.[270] Nor should the result of invalidity be easily attained: as the ILC recently explained, "[w]here it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former".[271] Hopefully, upon second reading of its draft conclusions on "Peremptory norms of general international law (*jus cogens*)" (expected in 2022), the Commission will clarify matters further, both as regards the requirements for recognition as

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[268] See, for example, R. Kolb, "Does Article 103 of the Charter of the United Nations apply only to decisions or also to authorizations adopted by the Security Council?" (2004) 64 ZaöRV 21–35; H. Kelsen, "Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements — An Analysis of Article 103 of the Charter" (1948) 10 University of Pittsburgh Law Review 284–294. For my views, see M. Wood, "The Law of Treaties and the UN Security Council: Some Reflections", in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 244–255.

[269] A. D'Amato, "It's a Bird, It's a Plane, It's *Jus Cogens*" (1990) 6 Connecticut Journal of International Law 1.

[270] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 124, para. 58.

[271] A/74/10: *Report of the International Law Commission on its Seventy-first session (29 April–7 June and 8 July–9 August 2019)*, Chapter V, draft conclusion 20.

jus cogens, and — even more important — the legal consequences of a rule being recognized as having that quality.

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The list of sources of international law are, if you will, a kind of a road map to guide the practising lawyer in searching for the solution to any international legal question that he or she may face. If the questions themselves will sometimes be challenging, so may be the answers. In such cases, lawyers may find themselves in a delicate position, as will be seen in several examples that we shall next explore.

LECTURE 6:

Legal Advice — Difficult Cases

Legal advice may sometimes be sought in "difficult" cases, by which I mean situations where the Government, your client, seems unwilling — or at least reluctant — to comply with the State's obligations under international law. I shall only speak about the United Kingdom Government; I do not feel qualified to speak about other governments, or cases about which I do not have direct knowledge or full access to the facts. Access to the facts is often the key — I find it remarkable that international lawyers not infrequently seem ready to appear in the media and discuss complex events almost immediately, without apparently knowing what actually happened. Today I shall limit myself to occasions involving the United Kingdom. The cases I shall mention concern compliance with certain judgments of the European Court of Human Rights and the international use of force (*jus ad bellum*); fortunately, in my experience at least, such difficult cases are rare. They represent a direct clash between law and policy, and also a failure on one side or the other, or most likely both.

In the United Kingdom, the Government and Government Ministers have a duty to comply with the law. Civil servants, including members of the armed forces, should not act, or be asked to act, in a manner that is unlawful. Does this duty to comply with the law include international law? Let me begin with a rather strange episode in 2015 which was, in my view at the time, a "storm in a teacup", but for some British commentators seemed symptomatic of the attitude to international law of the then British Government.

In the past, the "Ministerial Code", setting out standards of conduct expected of ministers,[272] referred to "the overarching duty on Ministers to comply with *the law including international law and treaty obligations* ..."[273] This language was maintained in successive versions, including that issued by the new Conservative/Lib Dem Coalition Government in 2010. Then, without explanation, in October 2015 a revised version was published, which omitted the reference to international law and treaty obligations and simply referred to "the overarching duty on Ministers to comply with *the law*". This revision provoked consternation in some quarters and led to judicial review proceedings. Professor Philippe Sands QC was reported as saying that the change was "shocking. Another slap to Magna Carta and the idea of the rule of law".[274] The government wished "to free itself from the constraints of international law and the judgments of international courts".[275] A few days later, in a letter to the same newspaper, my predecessor as FCO Legal Adviser wrote that —

> It's impossible not to feel a sense of disbelief at what must have been the deliberate suppression of the reference to international law in the new version of the ministerial code.[276]

And a former head of the Government Legal Service felt moved to write that:

> As the government's most senior legal official I saw at close hand from 2010 onwards the intense irritation these words [including international law and treaty obligations] caused

[272] A "Ministerial Code" had been in existence in some form — as a confidential internal circular (such as Questions of Procedure for Ministers) — since at least the Second World War. See C. Rhodes and H. Armstrong "The Ministerial Code and the Independent Advisor on Ministerial Interests", House of Commons Briefing Paper No. 03750 (12 August 2021).
[273] On the origin of this language, see Berman, *supra* note 95, at 5–7.
[274] D. Taylor, "Lawyers express concern over ministerial code rewrite", *The Guardian*, 22 October 2015.
[275] *Id*.
[276] F. Berman, letter to *The Guardian*, 25 October 2015.

> the [prime minister] as he sought to avoid complying with our international legal obligations, for example in relation to prisoner voting. Whether the new wording alters the legal obligations of ministers or not, there can be no doubt that they will regard the change as bolstering … their contempt for the rule of international law.[277]

A non-governmental organization then brought a judicial review challenge against the Prime Minister's decision to change the language of the Ministerial Code, but permission was refused by the High Court in March 2016 and again by the Court of Appeal in August 2018. In so refusing, the Court of Appeal took note of various government statements to the effect that the change in language meant no change of substance.[278] A storm in a teacup, but one that at the time was thought to have led to useful clarification that British Ministers do indeed have a duty to comply with international law, including treaty obligations.[279]

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[277] Letter form Sir Paul Jenkins, Treasury Solicitor and Head of the Government Legal Service, 2006–2014, to *The Guardian*, 25 October 2015.

[278] *R (Gulf Centre for Human Rights) v the Prime Minister & Anor* [2018] EWCA Civ 1855 (1 August 2018).

[279] For an informative post about on this episode, see R. Reichhold, "Do Ministers have to comply with international law? Court of Appeal looks at legal challenge" (November 20, 2018) available at <https://lawofnationsblog.com/2018/11/20/do-ministers-have-to-comply-with-international-law-court-of-appeal-looks-at-legal-challenge/>. The language in the latest version of the Ministerial Code, issued in August 2019, is unchanged from that of 2015: "The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life". A few weeks after the present lectures were delivered, this provision of the Ministerial Code again hit the headlines when a Minister informed Parliament that certain Clauses proposed by the Government in the United Kingdom Internal Market Bill broke international law "in a very specific and limited way". This apparent willingness to break a recently entered into treaty commitment provoked uproar, including from very senior Conservative politicians, all living former Prime Ministers, the EU, and influential US politicians. A Government Minister resigned (Lord Keen, Advocate General for Scotland), as did the head of the Government Legal Service (Sir Jonathan Jones). The offending Clauses were adopted by the House of Commons, only to be overwhelmingly rejected by the House of Lords. They were eventually dropped from the Bill, when agreement was reached on the implementation of the UK Withdrawal Agreement's Northern

At the time of the change of the language of the Ministerial Code in 2015, British Ministers were concerned about certain judgments from the European Court of Human Rights, in particular, a 2005 Grand Chamber finding that the UK's blanket ban on prisoner voting contravened Article 3 of the First Protocol to the European Convention on Human Rights.[280] The British Parliament, as well as some Ministers, was unwilling to bring English law[281] into line with what they considered to be a wrongly decided judgment — though even wrongly decided judgments are of course legally binding. It took 13 years, until 2018, before some minimal changes were made to the election law that satisfied the Committee of Ministers of the Council of Europe in Strasbourg. The 2005 judgment by the European Court of Human Rights gave rise to fundamental debates about the role of the Court and its "living instrument" approach to the interpretation of the Convention, and about the democratic rights of the British Parliament faced with the decisions of an international court. These debates rumble on today, and not only in the United Kingdom.

I now turn to the use of force. In an article published in 2013,[282] I quoted the former Secretary-General of the United Nations, Kofi Annan:

> No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4

Ireland Protocol. It is not obvious how the advice from the Attorney General and Solicitor General (to the effect that "the reference to 'law' in the ministerial code can only be a reference to UK law and UK constitutional principles" and that the ministerial obligation under the code only related "to compliance with the rule of law as a matter of UK law") could be compatible with the Government assurance that formed a basis for the Court of Appeal decision in 2018.

[280] ECtHR, *Hirst v United Kingdom (No.2),* Grand Chamber judgment, 6 October 2005. See House of Commons Library, report, *Prisoners' voting rights: developments since May 2015*, available at <https://commonslibrary.parliament.uk/research-briefings/cbp-7461/>.

[281] The position in Scotland and Wales was somewhat different.

[282] M. Wood, "International Law on the Use of Force: What Happens in Practice?" (2013) 53 Indian Journal of International Law 345–367.

> … Secretaries-General confront many challenges in the course of their tenures but the challenge that tests them and defines them inevitably involves the use of force.

The same might be said of Government legal advisers.

In the article, I mentioned several practical points confronting a lawyer advising a government on the use of force,[283] which I shall just list:

- There is a distinction between the rules of public international law on the use of force and rules of constitutional law. In the UK we tended to focus on the former, whereas lawyers in other countries might be principally concerned with the latter.
- Legal issues arise not only when the government you are advising uses force, but also when it aids or assists another State to use of force, for example, by permitting the use of its territory to carry out an armed attack against a third State.
- The question often arises how strong a legal basis has to be before a State embarks upon a use of force. Is a reasonable case sufficient, or an arguable case, or a reasonably arguable case?
- Proof of the relevant facts may be especially difficult, for example, if it would require the disclosure of intelligence reports or sources.

Another point I made was that it is important for a lawyer to distinguish between "legitimacy" and "legality"; they are not the same thing.[284] Whole books have been written about legitimacy and international law, and there is a celebrated article by Anthea Roberts.[285] In a Security Council debate, the representative of the

[283] *Id*, at 346–350.
[284] *Id*, at 350.
[285] A. Roberts, "Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?', in: P. Alston and E. Macdonald (eds.), *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008) 179–213.

Russian Federation said, with reference to the tripartite attack on Syria of 14 April 2018:

> as for international law, the West long ago came up with a formula for that — "illegal but legitimate". This international legal nihilism culminated in the aggression against Syria on 14 April.[286]

I now turn to four "difficult" cases involving the use of force: the Suez crisis in 1956 (where no credible legal argument was put forward); the bombing of Libya in 1986 (which was controversial both on the facts and on the law, being based on anticipatory self-defence against non-State actors); the Kosovo conflict in 1999 (where the United Kingdom relied upon an exceptional right to avert an overwhelming humanitarian disaster); and the invasion of Iraq in 2003 (which turned on whether a series of Security Council resolutions could be interpreted as authorising the invasion).

The Suez Crisis

The Suez crisis saw Israeli, French, and British armed forces invade Egypt after the Egyptian President, Gamal Abdel Nasser, nationalized the Suez Canal.[287] The crisis had a huge impact on how the United Kingdom was seen in the world. It also had a huge impact on international lawyers in the United Kingdom, especially those in the FCO. It casts a long shadow; but I must emphasize just how exceptional it was.

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[286] Provisional summary record of the 8262nd meeting (17 May 2018), on "Upholding international law within the context of the maintenance of international peace and security": S/PV.8262, p. 27.

[287] See also S. Bastid, "L'action militiare franco-britannique en Egypte et dans le Droit des Nations-Unies", in *Mélanges en l'honneur de Gilbert Gidel* (Sirey, 1961) 49–78; K. Scott, "Commentary on Suez: Forty Years On" (1996) 1 Journal of Armed Conflict Law 205–215; A. Hofer, "The Suez Crisis — 1956", in T. Ruys, O. Corten, with A Hofer (eds.), *The Use of Force in International Law: A Case-based Approach* (Oxford University Press, 2018) 36–47.

Central to the invasion of Egypt was the "Protocol of Sèvres", signed on behalf of France, Israel, and the United Kingdom, which sketched out, first, an Israeli attack on Egypt, and then an Anglo-French intervention in reaction to Egypt's inevitable response to the Israeli attack. The text was only disclosed after most of the legal writings on the crisis had been published. It showed that those who asserted a tripartite conspiracy at the time were correct.

In a well-known article, published in 1988, Geoffrey Marston described how the British Government's arguments justifying the use of force were put forward by the Lord Chancellor, Lord Kilmuir, and rejected by the Government's legal advisers (the two Law Officers and the Foreign Office Legal Adviser).[288] The Attorney General explained to Prime Minister Eden that he could not support the action as a matter of law; he therefore recommended that the Government "seek to justify our action not under a branch or branches of international law but on the ground of expediency in the interests of the nations of the world and in conformity with the intentions underlying the Charter of which we were one of the main architects. I am sorry but I cannot think of a better line".[289] Later, when Lord McNair, a former President of the International Court of Justice, cast doubt upon the legality of the use of force, Kilmuir replied that "he did not want to get involved in the theoretical arguments of international law".[290]

The British authorities put forward various legal arguments in Parliament and at the United Nations. As the Attorney General had foreseen, none was convincing, either in law or on the facts. The British referred to conducting a "police action", when the Charter speaks only of two exceptions to the prohibition on the use of

[288] G. Marston, "Armed intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government" (1988) 37 International and Comparative Law Quarterly 773–817.
[289] *Id*, at 804–805.
[290] W. Friedmann, "United States Policy and the Crisis of International Law" (1965) 59 American Journal of International Law 857 at 869.

force: self-defence and Security Council authorization. There was also talk of saving British nationals, "a palpably inadequate excuse, as British lives were never in danger until the military action by the United Kingdom Government".[291] It should also be said that even if the advice of the Government's Legal Advisers was ignored, Prime Minister Eden got the advice he wanted from the Lord Chancellor — though it was not the Lord Chancellor's role to give such advice.

I note in passing that Israel's arguments in favour of its own prior attack on Egypt were rather more orthodox, being grounded in the inherent right of self-defence, albeit involving an "accumulation of events" theory (numerous infiltrations into its territory by militant *fedayeen*) to construct an armed attack by non-State actors.

The Bombing of Libya in 1986

I turn next to the US bombing of Tripoli and Benghazi in April 1986.[292] This followed an attack, on 5 April, on the *La Belle Discotheque* in West Berlin, frequented by American soldiers. The bombing was attributed to persons operating from the Libyan People's Bureau (that is, embassy) in East Berlin. The US planes used in the bombing of Tripoli and Benghazi took off from US bases in the UK, and the UK's own responsibility was thus engaged.[293] In any event, the legal basis for the attack could clearly not be

[291] R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963) 221.

[292] C. Greenwood, "International Law and the United States' Air Operation against Libya" (1987) 80 West Virginia Law Review 933–960, reprinted in C. Greenwood, *Essays on War in International Law* (Cameron May, 2006) 483–516; M. Kamto, "The US Strikes Against Libya — 1986", in T. Ruys, O. Corten, with A. Hofer (eds.), *The Use of Force in International Law: A Case-based Approach* (Oxford University Press, 2018) 408–425.

[293] As now codified in Article 16 of the ILC's 2001 Articles on State Responsibility: *Yearbook of the International Law Commission 2001*, Vol. II (Part Two).

reprisals or deterrence; it was claimed to be self-defence, being aimed at averting imminent attacks. I happened to visit Moscow shortly afterwards, and recall explaining this to an unconvinced Ministry of Foreign Affairs legal adviser, Yuri Rybakov. There were doubts in London, too; the FCO legal adviser dealing with terrorism resigned since she could not defend the UK action supporting the US attack.

Kosovo 1999

The NATO intervention over Kosovo in 1999[294] seems to have been found by States to be particularly difficult to justify, with many different reasons being given and many, especially the United States, effectively remaining silent as to the law.

The UK relied upon a strictly limited doctrine of humanitarian intervention. In response to a Written Question in Parliament, an FCO Minister, Baroness Symons, wrote:

> There is no general doctrine of humanitarian intervention in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms

[294] C. Greenwood, "Humanitarian Intervention: The Case of Kosovo" (1999) 10 Finnish Yearbook of International Law 141–175, reprinted in C. Greenwood, *Essays on War in International Law* (Cameron May, 2006) 593–629; Zacklin, *supra* note 195, at 91–109.

> of relevant decisions of the Security Council bearing on the situation in question.[295]

This line has been pretty consistently repeated. Thus, on 29 August 2013, following the use of chemical weapons in Syria, the British Prime Minister's Office issued a statement of the Government's legal position, which included the following:

> If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:
>
> > (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
> >
> > (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
> >
> > (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e.,

[295] HL Debs., vol. 594, WA 139-40, 16 November 1998, reproduced in G. Marston, "United Kingdom Materials on International Law 1998" (1998) 69 British Yearbook of International Law 593. The Foreign Affairs Committee of the House of Commons, after taking evidence from international lawyers, including Professors Brownlie, Chinkin, Greenwood and Lowe (see Memoranda in 49 International and Comparative Law Quarterly (2000) 876–943), concluded "that, at the very least, the doctrine of humanitarian necessity has a tenuous basis in current international customary law, and this renders NATO action legally questionable": Conclusion (18) of the Fourth Report of the Foreign Affairs Committee, Session 1999–2000.

> the minimum necessary to achieve that end and for no other purpose).[296]

An exceptional international legal right of humanitarian intervention has gained limited traction. Attention has passed instead to a so-called "Responsibility to Protect" ("R2P"). In the 2005 World Summit Outcome — a General Assembly resolution and as such not legally binding, the Heads of State and Government noted that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[297] They went on to say that "the international community, through the United Nations" also has the responsibility to use appropriate peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations. The key sentence then followed:

> In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[298]

It is clear from this text that it did not establish some new right of intervention. What is legally significant is the confirmation that the powers of the Security Council under Chapter VII of

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[296] See <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position>. Apart from the reference to "the doctrine of humanitarian intervention", the 2013 text follows closely the language of the statement of the criteria that was set out, in connection with Kosovo, in a note of 7 October 1998, circulated by the United Kingdom within NATO (and cited by A. Roberts, "NATO's 'Humanitarian War' over Kosovo" (1999) 41 Survival 102 at 106; see also 70 British Yearbook of International Law (1999) 571–572).

[297] GA Res. 60/1 (2005), para. 138.

[298] *Id*, at para. 139.

the Charter encompass measures to protect populations from genocide, war crimes, ethnic cleansing, and crime against humanity.

The Iraq War of 2003

Then there was the Iraq War of 2003. Unlike Kosovo in 1999 and Afghanistan in 2001,[299] the legality of the invasion of Iraq did not turn on any new legal principle. The sole argument seriously advanced in its favour was Security Council authorization. This in turn depended upon the proper interpretation of a series of Security Council resolutions, and in particular resolution 1441 (2002) of 7 November 2002. My advice as the FCO Legal Adviser was to the effect that the resolutions did not authorize the invasion. The Attorney General came to a different conclusion. The difference between us turned on a fairly narrow point: and the Attorney General seems to have been particularly influenced by the negotiating history of resolution 1441, and by the US view.

Other countries reached their own conclusions on the law (or apparently turned a blind eye to it[300]). Australia seems to have followed the UK Attorney General's legal argument almost to the letter; others had a different position (France, Germany, Russia). In an unusual move, the Legal Department of the Russian Ministry of Foreign Affairs published in the *International and Comparative Law Quarterly* a working paper from late March 2003, which concluded that in the absence of a new decision of the UN Security Council, the use of force against Iraq was unlawful.[301] In possibly an unguarded moment in September 2004, the UN Secretary-General, Kofi Annan,

[299] M. Byers, "The Intervention in Afghanistan — 2001", in T. Ruys, O. Corten, with A. Hofer (eds.), *The Use of Force in International Law: A Case-based Approach* (Oxford University Press, 2018) 625–638.
[300] Spain; see *supra* note 105.
[301] "Legal assessment of the use of force against Iraq" (2003) 52 International and Comparative Law Quarterly 1059–1063.

said that the invasion of Iraq in 2003 had been an illegal act that contravened the UN Charter.[302]

The report of the UK's Iraq Inquiry had much to say about the process whereby the British Government sought and received legal advice, but reached no conclusion on the law. None of the members of the Inquiry was a lawyer. Dame Rosalyn Higgins (who was the legal adviser to the Inquiry) has subsequently suggested that "scholars and practitioners can surely find ample material within the Report on which confidently to base their own conclusions".[303]

A question that occasionally arises, and that arose at the time of the Iraq crisis, is whether a legal adviser should resign in the event that advice on such critical matters is rejected, and if so whether he or she should say anything about it in public. Resignation appears to have been contemplated by Fitzmaurice at the time of Suez, but in fact no one did resign on that occasion. As I have already mentioned, an FCO legal adviser resigned over the attacks on Tripoli and Benghazi in 1986. Elizabeth Wilmshurst, FCO Deputy Legal Adviser, left the FCO because of the invasion of Iraq in 2003. When I was asked by the Iraq Inquiry why I did not resign as Legal Adviser, I said, *inter alia*, that "I carried on, and I think –I wouldn't say this was the only consideration, but it would have certainly been even more disruptive for the legal advisers in the Foreign Office if there had been a whole host of resignations".[304] Elsewhere I explained that:

> In my view this is not a matter on which one can generalize. Each case is objectively and subjectively different; the facts will differ, as will the circumstances of the particular individual …

[302] Zacklin, *supra* note 195, at 1 and 135–147.
[303] R. Higgins, "Introduction to the Symposium" on Law and Procedure: The Iraq Inquiry and the Use of Force" (2016) 87 British Yearbook of International Law 101, at 103.
[304] See <https://webarchive.nationalarchives.gov.uk/20110119123318/http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100126.aspx>.

> The suggestion that to remain after a decision has been taken with which one disagrees undermines one's commitment to the law is too general a proposition.[305]

To this, it may be added that a resignation might simply lead to the appointment of a more "flexible" lawyer.[306]

This is not to say that the legal adviser should defend as lawful that which is not: "If national sovereignty must take precedence, as indeed it must in many cases, it should not be with implausible rationalizations and a veneer of justification from the legal adviser's office".[307] The role of the legal adviser as an advocate for the Government's position once decisions have been taken — "the more partisan function of advocacy", as Watts referred to it[308] — should

[305] M. Wood, "The Iraq Inquiry: Some Personal Reflections" (2016) 87 British Yearbook of International Law 149, at 152–153.

[306] H. Corell, "Cooperation among Legal Advisers on Public International Law", in United Nations Office of Legal Affairs (ed.), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, 1999) 97 at 110.

[307] R. St. J. Macdonald, "The Role of the Legal Adviser of Ministries of Foreign Affairs" (1977) 156 Recueil des cours 393; at 390, a former State Department lawyer, Mr. Loftus Becker, is referred to as saying that "the Legal Adviser may be overruled, but he cannot acquiesce". See also Watts, *supra* note 115, at 163 ("Once the policy has been decided, however, the role of the legal adviser consists in putting forward the best legal case he can in support of that policy. In this respect, he is very much an advocate, not a judge. Even so, as an advocate he is still constrained by his professional sense of responsibility; he should not advise that a legal argument be put forward which he knows to be untenable either as a matter of law or in relation to the facts of the case as he knows them. Nevertheless, his partisan role as advocate is clearly different from his earlier role as counsellor").

[308] Watts, *supra* note 115, at 163. See also J.C. Daskal, "Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser", by Michael P. Scharf and Paul R. Williams" [Book Review], *Lawfare* (11 September 2011), available at <https://www.lawfareblog.com/shaping-foreign-policy-times-crisis-role-international-law-and-state-department-legal-adviser> ("Sure, lawyers should — and often do — say no. But more often than not, a good government lawyer will come up with the best possible legal arguments in support of a client's policy goals, while also acknowledging the countervailing legal arguments and other risks associated with a proposed action. Those risks include, among other things, the possibility that an expedient legal justification is manipulated by others to achieve a nefarious policy outcome").

not require that he or she takes positions that they strongly object to, but if they stay they may of course have to explain the Government's policy.

The invasion of Iraq and other occasions, not least the terrorist attacks of 9/11, have brought to the fore the question of whether the rules of international law on the use of force are adequate to face current threats. The General Assembly of the United Nations, at the level of Heads of State and Government, responded to this question in its 2005 World Summit Outcome document. The Heads of State and Government reaffirmed:

> that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.[309]

Thus, in the view of the Heads of State and Government as expressed in this resolution, the rules on the use of force in the Charter, when properly interpreted and applied, are adequate to meet new challenges. What is needed are not new rules, but political will on the part of States, including members of the Security Council and potential troop-contributors. Legal advisers have a key role to play in developing such will.

[309] *Supra* note 297, at para. 79.

LECTURE 7:

International Negotiations

It may be thought that negotiation between States is a purely political matter and, at one level, that is correct. Even so, lawyers may well have an important contribution to make to the process, which may have a more or less high legal content.

A practising international lawyer needs to approach questions relating to negotiations against the background of some important legal points.

- Negotiation is one of the means of dispute settlement listed in Article 33 of the UN Charter. It is listed first, which reflects its importance in practice. It is generally accepted as the best way to settle a difference between States, though sometimes it may be seen to favour the more powerful. Negotiation may not be the only means available, and a lawyer needs to be aware of the full range of means (including conciliation, arbitration and judicial settlement) and the possible relationships between them.

- Under customary international law, there is no general obligation to negotiate. Any such obligation arises by virtue of a treaty rule or a particular legal regime applicable in customary international law: the obligation to negotiate maritime boundaries, for example, is a rule under UNCLOS and also under customary international law. The case between Bolivia and Chile was all about a possible obligation to negotiate, but the Court found that Chile had not in fact undertaken a legal obligation to negotiate a sovereign access to the Pacific Ocean.[310]

[310] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, at p. 564, para. 177(1).

- Where there is an obligation to negotiate, this may preclude access to other means of settlement, by virtue of specific limitations in dispute settlement clauses. This is a point to bear in mind when accepting seemingly innocuous provisions concerning settlement of disputes through negotiation. For example, China has sought to avoid other means by relying on the 2002 Declaration on the Conduct of Parties in the South China Sea (the "DOC"), under which the ASEAN States and China undertook "to resolve their territorial and jurisdictional disputes … through friendly consultations and negotiations by sovereign states directly concerned".[311]

- Conversely, there are cases where under a treaty an attempt to negotiate is a precondition for access to arbitration or judicial settlement. In the *Belgium v. Senegal* case, jurisdiction was based on Article 30 of the Convention against Torture, which provided that a dispute concerning the interpretation or application of the Convention "which cannot be settled through negotiation" could be brought by one party to arbitration or the ICJ. The Court referred to its earlier case-law, including *Georgia v. Russian Federation*, when recalling *inter alia* that there must, at the very least, have been a genuine attempt by one disputing party to engage in discussions with the other disputing party, with a view to resolving the dispute.[312]

The lawyers concerned in negotiations will usually be Government officials, but this is not always the case. For example, over the last few years, I have been part of Timor-Leste's team negotiating maritime boundaries with first Australia and then Indonesia. When the negotiations with Australia were going

[311] The text of the Declaration is available at <https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2>.
[312] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at pp. 445–446, para. 57.

nowhere, Timor-Leste initiated compulsory conciliation under UNCLOS.

The most basic role of Government lawyers is to advise the government on all aspects of international law. Beyond that, negotiating is perhaps the most important role that an international lawyer has; it is likely to take up far more time than litigation. It is also, in my view, usually more enjoyable and satisfying. My former colleague at the FCO, Phillip Allott, rightly listed negotiating among the most important skills an international lawyer in government should have.[313]

Lawyers may — indeed should — be involved at various stages of negotiations. First comes a decision to negotiate. Then detailed preparations. Next, the negotiations themselves, which may last a long time. Then, assuming the negotiations are successful, the government (and sometimes the Parliament) has to be persuaded to endorse the resulting agreement, the content of which may have to be transposed into national law. Later, sometimes much later, comes the role of interpreting the agreement (perhaps in the context of litigation between the parties), when the negotiating history may be important. Finally, and hopefully not too often, lawyers are likely to be much involved when States decide to leave treaties, which may well require further and sometimes equally complex negotiations.

Different Forms of Negotiation

Negotiations may take many different forms. They may be held in public, in private, or in secret; they may be lower- or

[313] Allott, *supra* note 8, at 14 (adding that "For better or for worse, diplomacy is a stylised ritual in which so-called national interests, often of a crudely material kind, are pursued in highly conventionalised symbolic forms of which the treaty is only the most tangible example. The analogy with team-games is especially apt, but with this difference, that, unless the result is a breakdown of a negotiation or war, the outcome should be seen as satisfactory by all parties and, ideally, should be capable of being represented as more than satisfactory to the party served by a given international lawyer in government service").

higher-level (including summit discussions between Heads of State or Government, or Ministers for Foreign Affairs); formal or relatively informal; and with a fixed or open-ended agenda. They may be bilateral or multilateral, and may proceed within an *ad hoc* setting or have a more continuous or institutionalized nature, for example, within some sort of joint commission, e.g., Meetings of the Antarctic Treaty Consultative Parties. Negotiation may also be short or protracted; either way, it may be advisable to fix some sort of timeframe.

Multilateral negotiations require more skill and effort; it is often harder, for example, to achieve a good result in the UN General Assembly than in a smaller body like the Security Council. I would point to three great differences between multilateral and more restricted negotiations. First, there are likely to be many more negotiators, and the more participants the more patience is required. States may form blocs, which can speed up negotiations but also make negotiation more difficult. Once they have reached a common position (and that in itself may take more time than the actual negotiation), groups can become inflexible.

A second point about multilateral negotiation is that there usually the possibility of voting (though not normally in the UN General Assembly's Sixth (Legal) Committee, where virtually all decisions are taken without a vote). The Security Council is a good example where the threat to call a vote may be a powerful negotiating tactic. One might contrast the negotiation in the Security Council of Presidential statements and resolutions; the former require unanimity, the latter only a qualified majority; if one member holds out against the wording of a Presidential statement, it may be possible to turn the text into a resolution and put it to the vote. Consensus comes with its own difficulties (as we have seen within the OSCE); it means that every member of the body effectively has a veto and may have to be bought off. Aiming for a consensus can lead to particularly unsatisfactory texts, though

a dissenter may sometimes be satisfied with something relatively harmless, often in the preamble; breaking a consensus is not an entirely comfortable stance.

Third, at the UN and in most other multilateral settings, much takes place in public, and such confidentiality as there is rarely lasts long. An honest and open approach to negotiation is even more important under such circumstances.

Participation in negotiations usually means being part of a delegation, but it may also mean chairing the meeting. The chairing of multilateral meetings is a great art; it is often done by someone from a State that is seen as reasonably neutral. The Law of the Sea negotiations had many fine chairpersons, but the most credit is probably due to Tommy Koh of Singapore and Satya Nanda of Fiji. Koh chaired the conference with great skill after the untimely death of its first president, Hamilton Shirley Amerasinghe (of Sri Lanka), while Nandan chaired various organs of the Conference and the UN Secretary-General's Informal Consultations on outstanding issues related to deep seabed mining. Under Nandan's skilful guidance, the international community was able to come together in an innovative and imaginative process to resolve a major blockage to the acceptance of the Montego Bay Convention.[314]

The Aims of the Negotiators

States resort to negotiation as a means to advance their interests or settle differences and disputes. It is a basic instrument

[314] See A/48/950: *Consultations of the Secretary-General on outstanding issues relating to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea. Report of the Secretary-General* (9 June 1994); and *Secretary-General's Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents* (International Seabed Authority, 2002). For assessments of Nandan, see M. Lodge and M. Nordquist (eds.), *Peaceful Order in the World's oceans: Essays in Honor of Satya N. Nandan* (Brill/Nijhoff, 2014).

in interstate relations, albeit often thought to favour the powerful. As I have noted, negotiation is most often resorted to voluntarily, but may be mandatory for States, in particular when provided for by treaty;[315] by virtue of a binding judicial decision calling for negotiation on its basis;[316] or when an obligation to negotiate flows from the very nature of certain rights of States that require definition or delimitation (such as preferential rights).[317] Of course, an obligation to negotiate is not an obligation to reach agreement, but it does require good faith efforts to seek an agreement. The jurisprudence of the International Court of Justice and its predecessor, including most recently in the 2020 *ICAO Council* judgment,[318] as well as arbitral awards, has repeatedly explained that an obligation to negotiate is "not only to enter into negotiations,

[315] For example, UNCLOS Articles 74 and 83 (dealing with delimitation of exclusive economic zones and the continental shelf respectively); United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), Article 27(1); United Nations Convention against Transnational Organized Crime (2000), Article 35(2). See also H. Owada, "Pactum de contrahendo, pactum de negotiando", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008).

[316] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 85(*a*); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 83, para. 2(B); *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 299, para. 90(e); MOX Plant (*Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at pp. 110–111, para. 1 (on entering into consultations).

[317] See *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 32, paras. 74–75. See also *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 October 2015), para. 345: "The Tribunal recalls that "[n]either in the [United Nations] Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to [international adjudication]". An obligation to engage in negotiations may, however, arise as a result of the particular legal regime applicable in customary law or as a result of interaction of the respective rights claimed by the States in question. An obligation to negotiate or a requirement of negotiations prior to compulsory settlement may also arise on the basis of a treaty applicable between the Parties".

[318] Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International *Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment of 14 July 2020.*

but also to pursue them as far as possible, with a view to concluding agreements".[319] This should be kept in mind even if a State has a very narrow aim in a negotiation, for example, to have a failed negotiation or to attempt a negotiation solely in order to fulfil a precondition for going to arbitration or the ICJ or ITLOS under a compromissory clause.

In short, one should not enter into an obligation to negotiate lightly. Apart from being a real obligation, as we have seen in some recent cases before the ICJ, it may arguably affect undertakings under compromissory clauses, especially those that have a reservation for other means of dispute settlement agreed upon by the parties.

States may have many objectives when they engage in negotiations. They may be seeking to secure a text of general application that may set the framework for international relations in a particular field. This may happen at a multilateral conference (for example, the 1982 Convention on the Law of the Sea, and the codification conventions negotiated in Vienna or within an organ of international organization, such as in the Sixth Committee), or in the negotiation of a "declaratory" General Assembly resolution (such as the Friendly Relations Declaration (1970) or the Definition of Aggression (1974), which took many years of careful negotiation). The negotiation of UN Security Council resolutions may be complex and prolonged, as we saw with resolution 1441 (2002) of 8 November 2002 in the run-up to the Iraq conflict of 2003.

On the other hand, negotiations may have a narrower aim: to resolve some specific dispute, usually but not always a bilateral one, such as a maritime delimitation negotiation: to mention just one example, the Treaty between Norway and Russia of 15 September 2010 on Maritime Delimitation and Cooperation in the Barents

[319] *Railway Traffic between Lithuania and Poland, P.C.I.J., Series A/B, No. 42*, 1931, at p. 116; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at p. 685, para. 132.

Sea and the Arctic Ocean, which seems to have been a major achievement.[320] Another example is the tripartite negotiations between Libya, the UK, and the USA over Lockerbie, which led to the discontinuance of the two ICJ Lockerbie cases in September 2003.[321]

General Thoughts on the Role of Lawyers in Negotiation

In considering the part that lawyers can play in negotiations, I think that my former FCO colleague, David Anderson, has said all that needs to be said, with his usual brevity and clarity, when he wrote: "It is essential to prepare your position thoroughly, to present it clearly, and to listen carefully to the response. Patience is often required".[322] Beyond this, five general and fairly obvious points come to mind.

My first point is that, as with all diplomacy, meticulous preparation is essential. For the lawyer, who (perhaps unlike those on the policy side) may come relatively new to a subject, this means studying the background and past history, and reading carefully as many of the records and documents as possible. I recall being very impressed, soon after joining the FCO, by a colleague who told me that before going off to New York in the early 1970s to the special committee on the question of defining aggression, he had read all the files on the negotiation, going back to the 1930s. When I was involved in a major negotiation, I used to read as many

[320] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation in the Barents Sea and the Arctic Ocean, signed in Murmansk on 15 September 2010; see C. Lathrop (ed.), *International Maritime Boundaries*, Report Number 9-6 (3), Vol. VII, 5167–5203.

[321] *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United Kingdom)*, Order of 10 September 2003; *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United States of America)*, Order of 10 September 2003.

[322] Anderson, *supra* note 119, at 22.

books about the history of the matter as I could: for example, on the constitutional history of Sothern Rhodesia (for the negotiation on the Southern Rhodesia settlement 1979/1980),[323] or the tragic histories of Cambodia and Yugoslavia (for the negotiations on the 1991 Cambodia settlement, the 1995 Dayton peace agreement for Bosnia, and the failed 1999 Rambouillet talks on Kosovo). You should know at least as much as your policy colleagues.

Second, there is a need to be clear about the scope of the negotiations: which issues are included, and which are not. It is often good to keep the scope of the negotiations to an absolute minimum, so as to keep the negotiations as straightforward and limited as possible. It may then transpire, as the negotiations proceed, that it is necessary — or even desirable — to bring in other matters in order to achieve a "package deal". A good example was the Timor-Leste/Australia negotiation (and conciliation), which were initially limited to maritime delimitation, drawing lines in the sea, but which expanded to special arrangements for the regulation and taxation of certain gas fields, including joint exploitation of one of them.[324] Another example was the negotiations on German unification. The three Western Powers (and West Germany) looked to see what was the absolute minimum that needed to be resolved, internationally, ahead of the imminent unification of the two German States. We concluded that there were three key issues: to fix the definitive land boundaries of a united Germany with its neighbours (and especially Poland); the termination of Quadripartite Rights and Responsibilities relating to Berlin and Germany as a whole; and the resumption of full sovereignty by the united Germany (the continuation of the German *Reich*). We did prepare, however, for many other issues, in case these were raised by the USSR. The British delegation had a thick briefing manual on detailed issues

[323] C. Palley, *The Constitutional History and Law of Southern Rhodesia, 1888–1965* (Clarendon Press, 1966).
[324] See also A. Crosato, "Conciliation between Timor-Leste and Australia", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2020).

such as the Free City of Danzig, Kaliningrad, war reparations, etc., but happily, most of these were not specifically raised. One that did arise, and which proved very contentious, was the deployment of NATO forces in the eastern part of a united Germany.

Third, preparing realistic negotiating instructions is crucial. Assuming the aim is to have a successful negotiation, the instructions need to be achievable. Negotiations are unlikely to succeed if one side seeks only its maximum position; some negotiating leeway needs to be built into the instructions. It is good to have in mind an outcome that both sides can live with, and preferably welcome. Reaching an agreement would usually not satisfy fully the preferences of each side. If it did, it might not last, and the hope is that agreements do last. Richard Bilder wrote in this spirit, of the legal advisers at the United States Department of States, that:

> While the Office seeks to accomplish maximum United States objectives in all negotiations, there is also a realization that any attempt to "win" a negotiation — to try to "put something over" on the other party — may be self-defeating, since experience suggests that an unbalanced or one-sided agreement will in the long run tend to cause more disputes than it resolves. An agreement which is fair and confers benefits on both sides is thus the most profitable one for all parties.[325]

Fourth, it is important to have the right negotiating team. You need to put together a group of people — preferably not too large — with the right experience, knowledge, and skills. The members of the team need to work well together. Sometimes the composition of the team is fairly obvious; for a maritime delimitation negotiation, as a minimum, you need a lawyer who knows the law, case-law, and practice of delimitation, preferably with experience in such negotiations; and a hydrographer who is able to construct proposals on attractive sketch-maps and come

[325] Bilder, *supra* note 37, at 650.

up with bright ideas. For more complex negotiations, the team will be larger.

The choice of the head of the negotiating delegation may be very important. It needs to be someone who has the confidence and the ear of the authorities back in the capital, but who is also willing at least to understand the details of the negotiation. Often at critical moments, the heads of delegation meet alone to try and hammer out a solution. Sometimes the head of the delegation may be a senior lawyer, but that is relatively rare, and not necessarily desirable, since it may detract from the independence that a lawyer needs if he or she is implementing policy.[326] The lawyers are more likely to be needed for the detailed work, which may take place in drafting groups. It is quite common for delegations to reach an agreement in principle and then leave it to the lawyers to turn the in-principle agreement into, say, a treaty text. This was the case, for example, in the case of the negotiations that took place within the framework of the Timor-Leste/Australia conciliation. A four-page "Comprehensive Package Agreement" (an agreement in principle) was reached on 30 August 2017,[327] to be followed in October 2017, and after many hours of bilateral negotiations by video or teleconference between lawyers, by quite a lengthy treaty.[328]

Fifth, in negotiations the lawyer should operate as a full member of the delegation, ready to speak on all matters, not just the law. At

[326] Anderson has written that "[a] legal adviser could act as a member of a delegation headed by a minister or senior diplomat. In this format, advice would be given first at the stage of drafting the negotiating instructions; and then, when the talks had begun, further advice could be given to the delegation leader as appropriate. A more experienced legal adviser could graduate to acting as the leader and spokesperson for negotiations with a high legal content. This was more enjoyable than passing notes along the table to the leader": *supra* note 119, at 21.

[327] Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, annex 21, available at <https://pcacases.com/web/sendAttach/2349>.

[328] Treaty between the Democratic Republic of Timor-Leste and Australia Establishing Their Maritime Boundaries in The Timor Sea, signed on 6 March 2018, entered into force 30 August 2019.

the same time, he or she may be expected to deploy particular skills and have particular qualities (though most of these apply to other members of the delegation):

- A thorough understanding of the legal framework of the negotiations. The lawyer may need to remind the delegation that negotiation (and any agreement that may be reached by it) must be seen against the background of the overall legal position. It must correspond to the requirements of international law.[329] The *Principles and guidelines for international negotiations* adopted in 1998 by the United Nations General Assembly affirm "the importance of conducting negotiations in accordance with international law" and offer a "general, non-exhaustive frame of reference for negotiations".[330]

- Powers of persuasion, especially the clarity of oral presentation: "[i]n … international negotiations, persuasion may be the only available means to achieve an objective, and the lawyer's skill in the clear and forceful presentation of a position an invaluable weapon".[331] (Of course, this may also apply within one's own delegation.)

- Drafting abilities, including how to draft compromise texts. It may be necessary to pay close attention to the various language versions. Compromises do not have to be ambiguous (though the parties may sometimes want them to be: Allott memorably wrote that "a treaty is a disagreement reduced

[329] See also M. Lachs, "International Law, Mediation, and Negotiation", in A.S. Lall (ed.), *Multilateral Negotiation and Mediation: Instruments and Methods* (Pergamon Press, 1985) 183, at 195: "No separation between law and negotiations is possible. Of course, negotiations may be predominantly of a political nature and dominated by political considerations, but, even so, legal elements will always be present".
[330] General Assembly resolution A/RES/53/101 (8 December 1998).
[331] Bilder, *supra* note 37, at 641.

to writing".[332]) Ambiguities may store up difficulties for the future. It often turns out to be a provision that no one really considered carefully becomes the point of contention in the future. When you are in the middle of negotiations, you rarely know what will come to pass later on. A well-drafted text may also be important for the reputation of the organ concerned: for example, when for three years I was on the UK delegation to the Security Council, I considered it important to ensure that its resolutions were drafted as clearly and consistently as possible, not because of any direct UK interest but in order to maintain so far as possible the reputation of the Council.

- Patience and a good sense of timing. Negotiation often requires considerable patience: you have to sit there, sometimes day after day, and let the other side or sides talk and talk, waiting for the right moment to put forward a proposal. Being under time pressure can put you at a serious disadvantage. It is generally not a good idea to have to catch a plane. You may need to be ready to stay another day, or two. At the same time, it can be very useful if all sides feel they are under some kind of a deadline. That focuses the negotiators, and even setting an artificial deadline can be very useful. Former United States President Jimmy Carter, for example, has said of his experience in negotiations that:

  > [d]eadlines helped too … we had specific deadlines every time we were successful. At Camp David, we announced that on the thirteenth day, which was Sunday, we were going to go home regardless of whether we were successful or not. And in the negotiations that Warren Christopher concluded in Algiers, the Iranians knew that if they went past noon on the twentieth day of January, 1981, that they would have to

[332] P. Allott, "The Concept of International Law" (1999) 10 European Journal of International Law 31 at 43.

recommence the entire negotiating process with a brand new Reagan administration. That is why the hostages came out at the end of my administration.[333]

- Maintaining a friendly atmosphere and building up trust are very important. Honesty, openness, and good humour are essential qualities; deception rarely works.

- To show frustration or annoyance, however justified, can be disastrous. To stonewall and simply repeat oneself is unlikely to be a good tactic, assuming that the aim is to make progress. (I recall one Government lawyer whose State seemed to include him in the delegation when they did not want to make progress. If we saw him there, we would suggest an early lunch and then catch the plane home).

Negotiations often involve a package deal: "nothing is agreed until everything is agreed". But, in fact, that is not entirely true. As lawyers, we should know that it is not always easy to draw back from positions taken during a negotiation, even when there is no joint record of the meeting.

Negotiations may also fail or, at least, not succeed: either no agreement is reached, or the agreement is not ratified. It is well to remember in this case that a failed negotiation may well be the starting point for the next negotiation.

More importantly, perhaps, negotiating and drafting agreements may form the basis of new rules of international law — not only treaty rules, but also rules of customary international law. A general practice that is accepted as law (i.e., accompanied by *opinio juris*) may be crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice; and a rule set forth in a treaty may generate a new rule of customary international

[333] J. Carter, "Principles of Negotiation" (1987) 23 Stanford Journal of International Law 1, at 10–11.

law.[334] Even where a treaty provision could not eventually be agreed, it remains possible that customary international law has evolved "through the practice of States on the basis of the debates and near-agreements at the Conference [where a treaty was negotiated]".[335] An example is the important effect on the customary international law of the territorial sea of the preparatory work and proceedings of the 1930 League of Nations codification conference.[336]

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If negotiations do fail and disputes remain, other settlement means are of course available to States, including adjudicatory means, for which lawyers are bound to play a central role. I now turn to examine these more closely.

[334] See also *supra* note 265; J.I. Charney, "International Agreements and the Development of Customary International Law" (1986) 61 Washington Law Review 971–996.

[335] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 191–192, para. 44.

[336] T. Treves, "Historical development of the Law of the Sea", in D.R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 1, at 7–9.

LECTURE 8:

International Lawyers and the Courts

States organize the handling of international litigation in various ways. In the United Kingdom, these matters are chiefly dealt with by the FCO lawyers. Among other things, it is felt that they are more likely to understand the diplomacy involved in handling international courts and tribunals than the domestic lawyers elsewhere in government.[337] An important aspect of the work of FCO lawyers concerns support for international dispute settlement procedures and their design. First and foremost, and not always so straightforward, comes policy towards the International Court of Justice, including the acceptance of its jurisdiction by treaty, under the Optional Clause, compromissory clauses, and *ad hoc*. Elections, and the selection of the National Group, are also very important matters.

The United Kingdom is, since 1985, the only permanent member of the Security Council to accept the compulsory jurisdiction of the ICJ under the Optional Clause. France withdrew its declaration in 1974 in reaction to the *Nuclear Tests* cases, and the United States did likewise in 1985 following the Court's finding that it had jurisdiction

[337] Sir Arthur Watts, writing in 1991, explained that FCO lawyers "are closely concerned with litigation in which the FCO has an interest. This includes international litigation before the International Court of Justice and *ad hoc* arbitral tribunals, and litigation before the European Court or Commission of Human Rights, where the Agent, and sometimes Counsel, for the United Kingdom will be a FCO legal adviser; it also includes [used to include] some litigation before the European Court of Justice, or domestic litigation in British courts or in courts abroad. Although the extent to which the Foreign Office legal advisers are involved in such litigation varies — and in particular they do not directly appear as counsel in domestic litigation in the United Kingdom or abroad — they will be closely associated with all cases with an international law element which involve the British Government": Watts, *supra* note 115, at 159. This remains so today, though the quantity of cases, particularly in the domestic courts, has increased enormously.

in the *Nicaragua* case. The People's Republic of China and the USSR/Russia have never made an Optional Clause declaration. Yet the United Kingdom's own record is hardly a glorious one. Although the United Kingdom has accepted the Optional Clause since 1930, with only one gap of a few days in 1957,[338] its acceptance of the Court's jurisdiction has often been so hedged about with reservations as to be, in the eyes of some, hardly acceptance at all.[339] That may be thought to be especially the case today, given the new reservations[340] made following the Court's very close decision on jurisdiction in the *Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case.[341]

Government lawyers are likely to be involved in the negotiation of dispute settlement provisions, in the Government's relations with any permanent bodies once established, and then in any cases that are of concern to the State. The negotiation of new dispute settlement provisions can be a complex matter: it may require taking into consideration existing dispute settlement commitments, a good grasp of the case-law, and very careful drafting. For example, at the Third UN Conference on the Law of the Sea, the UK representatives played a broadly positive role in the negotiations on dispute settlement. We tried, not very successfully, to avoid it becoming excessively complicated. And we did not favour the establishment of a new law of the sea tribunal, which

[338] See Wood, *supra* note 138. For the battle in the UK to accept the clause, and the role played by the Foreign Office legal advisers, see L. Lloyd, *Peace Through Law: Britain and the International Court in the 1920s* (Royal Historical Society/Boydell Press, 1997).

[339] See Wood, *supra* note 138.

[340] The UK's latest Optional Clause declaration is dated 22 February 2017.

[341] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833. The Court's finding that it was without jurisdiction was adopted by eight votes to eight, with the President's casting vote (only the fifth such casting vote (*voix prépondérante*) in the history of the Court and its predecessor, the others being *Lotus*, *South West Africa* (*1966*), the *Nuclear Weapons* Advisory Opinion, and *Nicaragua v. Colombia* (Preliminary Objections, 2016)).

we thought was unnecessary given the existence of the ICJ.[342] Once the International Tribunal for the Law of the Sea (ITLOS) came into being, however, the United Kingdom through its legal advisers has sought to make it a success. The United Kingdom was likewise sceptical about the point of creating a Court of Arbitration and Conciliation under the auspices of the Organization for Security and Co-operation in Europe (OSCE), the jurisdiction of which the United Kingdom has not accepted. Thirty-four States have ratified the Stockholm Convention, yet it remains a dead letter — never used — since it was first established in 1992.[343]

Another little-known but healthy example of British scepticism concerns a joint USSR-United States ICJ initiative in 1989 within the P5 Legal Advisers. This began well enough, with President Gorbachev's support for the ICJ, including a speech he gave at the UN General Assembly in 1988, which was followed in March 1989 by the withdrawal of the USSR's reservations to the dispute settlement clauses in a number of human rights conventions. The US Legal Adviser, Abe Sofaer, summarised his recollection of this initiative as follows:

> The idea consisted of the five permanent members summitting collectively to the mandatory jurisdiction of the ICJ in a uniform manner by treaty for the adjudication of a list of issues that could be expanded over time. Other states would have been allowed to join this submission. In addition, states that wished to expand the grounds of their submission could

[342] The UK's declaration under Article 287 of UNCLOS, choosing the ICJ, contains the following paragraph: "The International Tribunal for the Law of the Sea is a new institution, which the United Kingdom hopes will make an important contribution to the peaceful settlement of disputes concerning the law of the sea. In addition to those cases where the Convention itself provides for the compulsory jurisdiction of the Tribunal, the United Kingdom remains ready to consider the submission of disputes to the Tribunal as may be agreed on a case-by-case basis".

[343] C. Tomuschat, R. Pisillo Mazzeschi and D. Thürer (eds.), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (Brill/Nijhoff, 2016); C. Tomuschat and M. Kohen (eds.), *Flexibility in International Dispute Settlement. Conciliation Revisited* (Brill/Nijhoff, 2020).

> do so, and procedures were set in place to enable parties in all cases to utilize panels of fewer than all the judges of the court. Substantial progress was made in negotiating agreement to this treaty, but the effort was abandoned after I left office, due to the objections from the British Foreign Ministry attorneys.[344]

In fact, my recollection is that we had concluded that the proposal was little more than a propaganda ploy, an effort to polish the US image after the abrupt withdrawal of its Optional Clause declaration, and one that would have been damaging to the Court, since it would have enshrined the old US self-judging exception to the Court's jurisdiction and given it the blessing of all of the permanent members.

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Turning to the settlement of particular disputes by adjudicatory means, it ought to be clear that advising on the choice of means is a very important function of the practitioner. When your client is the Respondent, there may be little choice, though even then there may be some options. For example, a Respondent may propose, or even commence, some alternative method of dispute settlement. This may, at the least, lead to delay, but sometimes the Applicant may agree to an alternative, particularly where there is uncertainty over jurisdiction. A recent example is the *San Padre Pio (No. 2)* case between Switzerland and Nigeria, which began as an inter-State arbitration commenced by Switzerland under Annex VII of UNCLOS and then, by agreement, was brought before the full ITLOS.[345]

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[344] A. Sofaer, "The Reagan and Bush Administrations — Abraham D. Sofaer (1985–1990)", in M.P. Scharf and P.R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010) 65 at 67 and 263, note 5. For more detail, see A.D. Sofaer, "Adjudication in the International Court of Justice: Progress through Realism" (1989) 44 Records of the Association of the Bar of the City of New York 462–492; R.E. Lutz, "The World Court in a Changing World: An Agenda for Expanding the Court's Role from a U.S. Perspective" (1991) 27 Stanford Journal of International Law 265 at 324.

[345] ITLOS Case No. 29: *The M/T "San Padre Pio" (No. 2) Case (Switzerland/Nigeria)*.

Another option for a Respondent is non-appearance. No party can be forced to appear in international legal proceedings, though non-appearance does not mean that the non-appearing party is not bound, as a matter of law, by the judgment or award.[346] There have been a number of recent examples, perhaps most prominently the *South China Sea* case instituted by the Philippines against the People's Republic of China before an UNCLOS Annex VII arbitration.[347] The Russian Federation did not participate at any stage of the *Arctic Sunrise* case under UNCLOS, either before the ITLOS or before the Annex VII arbitral tribunal;[348] nor did the Russian Federation participate in the provisional measures stage of the *Detention of three Ukrainian naval vessels* case before ITLOS.[349] Venezuela did not participate in the jurisdictional phases of the proceedings brought against it by Guyana, leading to an expression of regret by the International Court of Justice.[350] In its *Guyana v. Venezuela* judgment of December 2020, the ICJ summarized the position as follows:

> Though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules … In this instance, Venezuela sent a Memorandum to the Court … It is valuable for the Court to know the views of both parties in whatever form those views may have been expressed … The

[346] See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, at pp. 23–24, para. 27.

[347] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19.

[348] "*Arctic Sunrise*" *(Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230; PCA Case No. 2014-02, *The Arctic Sunrise Arbitration (Kingdom of The Netherlands v. The Russian Federation*).

[349] *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018–2019*, to be published.

[350] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela) (Jurisdiction of the Court), Judgment of 18 December 2020*, para. 24.

> Court will therefore take account of Venezuela's Memorandum to the extent that it finds it appropriate in discharging its duty, under Article 53 of the Statute, to satisfy itself as to its jurisdiction to entertain the Application.[351]

"Non-appearance" in advisory proceedings is another matter, given that there are no parties as such. One may here compare the approaches of Israel and the United Kingdom in the *Wall* and *Chagos* cases respectively. In the *Wall* case, Israel decided not to take part in the oral proceedings (though it did submit a Written Statement setting out its detailed objections to the jurisdiction of the Court and the propriety of the Court responding to the request for its opinion), whereas the UK participated fully in both the written and the oral proceedings in the *Chagos* case, arguing both on propriety and on the merits.

Even if non-appearance is always an option, it is not one that most lawyers are likely to recommend, unless the circumstances are exceptional. While it might have political attractions domestically — where non-participation may look tough, and participation weak — it could mean that arguments that the State concerned might put forward go by default.[352] This might be particularly serious in the case of the facts, since there are limits to what a court or tribunal can do *proprio motu* in this regard. For example, it might have had some effect on the result in the *Arctic Sunrise* case, though that is speculation. It cannot be excluded that non-participation may have a psychological effect on some judges or arbitrators, who may see it as a sign of disrespect for the court; that too may not help the non-participating State's case.

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[351] *Id*, at para. 28.

[352] See, however, Article 53 of the Statute of the ICJ:

"1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law".

Intervention in a case between two other parties is almost the opposite of non-appearance. It is becoming quite common, particularly in the context of law of the sea disputes.[353] While such participation will normally be done by way of actual or attempted intervention, other less formal ways of indicating an interest are also employed. These may include:

- Transmitting a submission (sometimes called a *livre blanc*) to the court or tribunal. This is most often done by a non-participating Party. In the *Arctic Sunrise* Arbitration, Russia submitted a position paper to the arbitral tribunal. Owing to the fact that the document was submitted only a few days before the issuance of the Award on the merits, the arbitral tribunal decided to take no formal action in this regard.[354] In the *South China Sea Arbitration*, China, a party to the case which chose not to participate in the proceedings, transmitted a "Position Paper" on Jurisdiction; and Viet Nam, a non-party to the case, transmitted a Note Verbale as to its legal interests related to the case.[355]

- Attendance as observers at otherwise closed hearings. This happened in the *South* China *Sea Arbitration*, when representatives from Australia, Malaysia, Indonesia, Vietnam, Brunei, Singapore, Thailand, and Japan were permitted to observe the hearings.

[353] See also M. Wood and E. Sthoeger, "Third-Party Intervention and Involvement in Inter-State Arbitration", in H. Ruiz Fabri, E. Franckx and T. Meshel (eds.), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill, 2020) 61–82.

[354] *Arctic Sunrise Arbitration (The Kingdom of the Netherlands v. The Russian Federation)*, PCA Case No 2014-02, Award on the Merits (14 August 2015), para 68.

[355] See also E. Franckx and M. Benatar, "Non-Participation in Compulsory Procedures of Dispute Settlement: The People's Republic of China's Position Paper in the South China Sea Arbitration and Beyond"', in A. Føllesdal and G. Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018) 183–205.

- Requesting copies of the written pleadings before they are made publicly available. This happens quite often in cases before the ICJ. The purpose may be to consider whether or not to request to intervene formally. It may also be a gentle way of indicating to a court or tribunal the third State's interest.

- Sometimes, a third State (or more often a non-participating Party) may make its legal views known in more indirect ways, such as by publishing a comment or by commissioning an article or blog by some learned author. But the commissioning is hardly likely to remain unknown, and the origin of the piece will at least be the subject of much speculation. A one-sided essay is unlikely to do credit to its author, and is unlikely to be of much benefit to the State. On the other hand, if carefully done, such writings can serve the purpose of floating detailed legal argument, to a certain degree at arm's length. This may also be done before or after a judgment or award has been delivered, or both.

One of the means of dispute settlement listed in Article 33 of the UN Charter is conciliation, that is, the process by which a third party assists the parties to a dispute by clarifying it and, if an agreed settlement is not reached, recommending terms of settlement which the parties are free to accept or reject.[356] I make a point to mention this means here, even though it is not strictly speaking an adjudicatory one; conciliation should not be overlooked, though its use has been infrequent. In April 2016, Timor-Leste commenced compulsory conciliation against Australia under UNCLOS, after Australia refused to negotiate maritime boundaries in the Timor Sea.[357] This ended in a success, with the signing in 2018 of a Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, which entered into force in August 2019. This outcome, which took

[356] See also Tomuschat and Kohen, *supra* note 343.
[357] PCA Case No. 2016-10: see <https://pca-cpa.org/en/cases/132/>.

account of non-legal factors as well as the law, could not have been achieved through litigation.

Of course, the Government is not always the Respondent. It may itself bring a case (in the State's name) against another State as a peaceful means of settling a dispute.[358] Initiating such proceedings should not be considered an unfriendly act between States;[359] though it often is, perhaps understandably so, when the aim is to shame, perhaps by engineering a publicity "coup" with interim or provisional measures. Provisional measures have indeed become a very powerful weapon in present-day "lawfare", especially now that they have been recognized to be legally binding despite the terms of Article 43 of the ICJ Statute.[360]

The choice between judicial settlement and arbitration, where there is one, may have significant practical implications that are important to bear in mind when advising a client.[361] The most obvious and visible difference is in the size and composition of the tribunal. So far as size is concerned, there is an obvious difference between a court of 15 (or even 17) judges, or in the case of ITLOS 21 (or 23) judges, and an arbitral tribunal of, say, 3 or 5. Seventeen

[358] See also J. Gladstone, "The Legal Adviser and International Disputes: Preparing to Commence or Defend Litigation or Arbitration", in A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (Brill, 2016) 34 at 51 ("The Legal Adviser should keep an open mind to the question of potential alternative routes to resolve a dispute, and actively revisit this periodically throughout the course of an ongoing dispute. Even if diplomatic negotiations were insufficient on their own to resolve a dispute, they may yet prove central to the overall strategy, in parallel with formal dispute resolution").

[359] See also Manila Declaration on the Peaceful Statement of International Disputes, Annex to United Nations General Assembly resolution 37/10 of 15 Nov. 1982, Sec. II, para. 5 ("Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States").

[360] *LaGrand (Germany v. United States of America), Judgment, I.C. J. Reports 2001*, p. 466, at pp. 501–506, paras. 99–109.

[361] See also M. Wood, "Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases" (2017) 32 ICSID Review — Foreign Investment Law Journal 1–16.

or 23 is a very large bench and may be more likely to lead to compromise reasoning that may even appear arbitrary (although a very large majority may also lend weight to the legal position adopted). A tribunal of 5, or 3, might also be prone to compromise, especially where they want to reach a unanimous decision, but the reasoning may be more detailed and thus perhaps more convincing. The option of forming, by agreement, a chamber of a permanent court may seem to give the parties the best of both worlds. They can have the benefits of standing court (known authority, greater procedural foreseeability, significantly lower cost), but with some of the benefits of a smaller hand-picked arbitral tribunal (party control of the membership of the chamber for the particular dispute, and the efficiency and rigour of reasoning that seems to be easier to achieve with a smaller bench). This of course depends on the size of the chamber. One recently formed ITLOS chamber comprises no less than 9 judges (7 from ITLOS and 2 *ad hoc*).[362]

With arbitral tribunals as with courts, lawyers and their clients pay great attention to who the judges or arbitrators will be. We all "know" this is crucial. But how far is this really so? Yes, there may be some people one might rule out for a particular case, because of their known opinions, especially in the investment field. That is the easy part. But most often, and in many (though perhaps not all) inter-State cases, choosing a member of the tribunal is not much more than guesswork. The person selected is unlikely to have taken a position on the particular subject matter. Trying to guess how an independently-minded individual will decide a case can be a fool's errand. At most, one may be reasonably confident that a particular individual will understand the law and the facts, and apply the law to the facts diligently and fairly. Clients, and sometimes their lawyers, tend to forget that what matters more than anything is to have a good case on the law, and above all on the facts.

[362] ITLOS Case No. 28: Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives).

At the same time, from the point of view of the parties to the case, a wide range of considerations arise when selecting an arbitrator or judge. Without being exhaustive, it seems to me that at a minimum, these will include the availability of the potential arbitrator; his or her knowledge of, experience in, and views on the legal fields in question; his or her nationality, even if chiefly for symbolic or political reasons; the existence of any potential conflicts of interest; and knowledge of the relevant languages. In the case of a president, in particular, efficiency and a reputation for being hard-working may be important. Finally, one indefinable quality to which I would attach a good deal of importance is common sense.[363]

It is important to appoint within applicable time limits, and this may require careful planning. As has been written,

> for a State, the choice of arbitrator is likely to require briefing and agreement at the highest levels of government, and from several different individuals and departments. It is crucial that this process is initiated as soon as possible, with guidance from counsel as to appropriate names to consider. It is important to keep a close track of time-limits in this process — and ideally an authorised shortlist would be agreed, in case first choice arbitrators are unavailable or have a conflict — as there may not be time to go through the internal process again before the deadline for the appointment of an arbitrator has passed. A State does not want to lose its right to appoint through internal delay in process and sign-off.[364]

[363] In the case *In re Piracy jure gentium* (1934), the Privy Council, when considering some peculiar definitions of piracy, opined, with what might be seen as British understatement: "their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law": *In re Piracy jure gentium* [1934] AC 586.

[364] Gladstone, *supra* note 358, at 47–48 (adding that "As a practical matter, the process of nomination of an arbitrator also tends to be a more laborious exercise for the State Legal Adviser than for a private party. For a commercial entity, such matters are more likely to be left to the in-house counsel to agree with the external legal representatives, who as arbitration practitioners will know the personalities in order to select the right arbitrator for the case").

On a more general level, it is often said that with arbitration there is party control over the proceedings — certainly more than there is in judicial proceedings. This is true up to a point, but only at the initial stage of agreeing to arbitration (assuming such agreement is necessary, i.e., where arbitration is not compulsory), and thereafter provided that the parties agree among themselves. An important aspect of party control may be the control over intervention by third States, which may or may not be welcome; and the possibility of requests for provisional (or interim) measures. The treatment of preliminary objections to jurisdiction and admissibility may be very different in the case of arbitration, too, as the main proceedings will not necessarily be suspended as is the case with the ICJ and ITLOS. Personally, I feel more at ease before a permanent tribunal, where I know the rules and practices, than before an arbitration, where it seems anything can happen — and sometimes does.

Some further practical differences between judicial settlement and arbitration, which are important if rather obvious, are (1) cost (a permanent tribunal is usually free at the point of use, apart from the party's own costs, whereas the costs of arbitration can be high); (2) the registry (a permanent tribunal will have its own experienced registry, although the Permanent Court of Arbitration does stand ready to facilitate various arbitral proceedings — and they are very good at it); (3) the rules of procedure being predictable, indeed already there in the case of a permanent tribunal; and (4) the option of confidentiality (arbitration can be held in private, though States may want a degree of publicity for inter-State arbitration). One should also keep in mind that even though there is no doctrine of *stare decisis* in international law, in fact a permanent court is likely to follow its earlier case-law, whereas *ad hoc* arbitral tribunals may well not feel constrained to follow the case-law of other courts and tribunals.

These differences are frequently not in fact significant; there is much similarity between judicial settlement and arbitration.

The first, and fundamental, similarity (however much some may regret it) is that the jurisdiction of an international court or tribunal depends upon consent. A second important similarity is that, in almost all cases, international courts and tribunals have the power to determine their own jurisdiction, *compétence de la competence/Kompetenz-Kompetenz*. This principle is essential if a tribunal is to function properly. A third similarity is that the award of an arbitral tribunal in an inter-State case, and the judgment of a permanent international court, are binding on the parties and often final in the sense that they are not subject to appeal. Finally, the judgment or award will, in most cases, be based on international law. Some might point to *applicable law* as one of the main differences between arbitration and judicial settlement; but in most cases, the tribunal or court will be required to decide, and will in fact decide, on the basis of international law. Only exceptionally, and by the express agreement of the parties, will other matters come into consideration. These similarities between arbitration and judicial settlement seem to me to be greater than the differences. I would thus say that except in practical (and quite often in political) terms, the choice between arbitration and judicial settlement is not particularly significant.

Litigation before domestic courts is another matter. Here the role of the public international law practitioner may be secondary. On most of the rather rare occasions when I have been in the English courts, it has either been as the client (when I was in the FCO) or with a non-speaking role (present to assist those who are litigation experts in the domestic courts). Domestic courts do not generally like to be lectured on international law. Here it is essential to appreciate the place of international law in domestic law. It is equally essential to appreciate that the judges are not, first and foremost, specialized in public international law. While one might hope that they have at least some understanding of the sources of international law, perhaps a distant memory from student days,

even that is not always the case.[365] It can be useful to have some basic documents to refer them to, for example, the ILC's conclusions on *Identification of customary international law*, which domestic courts, including supreme courts of the UK and Canada, have already found useful.[366]

Given the role and possible influence of courts in ascertaining the rules of international law, even judgments and awards of courts and tribunals that are not binding on the State may be of interest to it.[367] This is true in a more direct way for the decisions of national

[365] Roger O'Keefe, after acknowledging that "many members of most domestic jurisdictions have handled and continue to handle public international law with facility", goes on to say that most domestic judges' "study and professional experience of public international law is somewhere between limited and non-existent": R. O'Keefe, "Domestic Courts as Agents of Development of the International Law of Jurisdiction" (2013) 26 Leiden Journal of International Law 541, at 550–551.

[366] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, UK Supreme Court, Judgment of 18 October 2017, paras. 31–32; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, Supreme Court of Canada, Judgment of 28 February 2020, paras. 77–78.

[367] At the same time, as I have already said, it is well to remember that a State cannot be expected to react to all such decisions; see also D. Bethlehem, "The Secret Life of International Law" (2012) 1 Cambridge Journal of International & Comparative Law 23 at 32–33 ("A state such as the UK could object, but the consequences of objection are very significant. First of all, if you take the Guyana/Suriname arbitration, can you just imagine the consequences if the UK or the US or Australia or some other state had said 'we think that this arbitration award is wrong, or is wrong in respect of these paragraphs'? Were we to do so, we would be intruding into a private dispute settlement award between two other states with potentially all sorts of problematic repercussions. Second, it would be utterly impossible for us to be comprehensive in an approach of this kind. The volume of material that is out there is both considerable and not always readily visible. But if we were not comprehensive, the question that would inevitably arise would be whether our silence on some or other issue would be regarded as acquiescence. Third, if a state is going to object, it is not simply a matter for the foreign ministry legal adviser to speak out in some or other forum, without having first discussed and cleared the statement carefully with others, to say that this or that point is problematic. It has to be the state speaking, formally, properly considered, cleared and authorised. The consequence of all of these considerations is that in the vast majority of cases states simply say nothing. But the problem remains that these dispositive appreciations of variable quality ultimately inform the development of the law").

courts, so much so that it is not uncommon for the Attorney General to be represented as an *amicus curiae*, so that the court is aware of the Government's view on questions of international law. After all, if the English court comes to a wrong conclusion on a question of international law, say, on whether a State or a foreign official is entitled to immunity, that may involve the international responsibility of the State[368] and most certainly embarrass the Government.

It is sometimes suggested that a government cannot seek to influence national courts on questions of international law because to do so would be contrary to the independence of the judiciary. It is difficult to see why this should be the case (indeed, it may seem merely an excuse), provided that the "influencing" is done through legal argument in open court. It may of course be uncomfortable, as when a government lawyer goes to court to plead for immunity in hard cases (for example, where a government official is said to have engaged in torture, but he or she was nevertheless acting as an official).

Conclusion

I began these lectures by contrasting the practice of public international law with theoretical approaches that one finds in the literature. The practitioner, for the most part, has to deal with the law as it is, not with speculation about how the law might or should look. He or she is, inevitably, a positivist.

[368] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 4(1): "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".

As international lawyers, we also need to be realists, albeit with a touch of idealism. The two are not incompatible.[369] Unrealistic idealists can do grave harm to international law, since they bring it into disrepute. Unscrupulous campaigners likewise.

The distinction between those practising public international law and those who teach or write about the subject is important, though in fact many do both. Practitioners often write about their subject and quite a few practitioners spend a good part of their time teaching. Conversely, some teachers are, at least some of the time, practitioners. Such a combination of tasks is often beneficial.

All legal practitioners have a duty to the legal system in which they practise. This is a fundamental aspect of the ethical principles that apply to lawyers, which may be written down in the codes of ethics applicable at the national level.[370] Whether or not there are general ethical principles that apply formally at the international level, I firmly believe that public international law practitioners, too, owe a duty to the law alongside their duty to their client. Given the nature of the international legal system, the international lawyer should feel under at least a moral obligation to uphold the law and support such legal institutions as exist. Indeed, the majority of international lawyers should "see themselves and their work as favouring international law and institutions in a way that lawyers working in many other fields do not".[371] As Philip Allott has written:

> International lawyers are not the servants of governments but of international society. As lawyers they are servants not of

[369] Pace M. Koskenniemi, "Between Commitment and Cynicism: Outline of a Theory of International Law as Practice", in M. Koskenniemi, *The Politics of International Law* (Hart Publihsing, 2011), Chapter 11; reproduced in J. d'Aspremost et al. (eds.), *International Law as a Profession* (Cambridge University Press, 2017) 38–66.

[370] National codes of ethics do vary, and they may do so even on some quite fundamental points.

[371] D.W. Kennedy, "A New World Order. Yesterday, Today and Tomorrow" (1994) 4 Transnational Law and Contemporary Problems 7.

> power but of justice. It is thus the duty of international lawyers, even lawyers employed by governments, to consider not merely what is in the interest of this or that state but what is in the long-term interest of international society.[372]

A legal adviser to the Government, in particular, must strive to ensure that the Government complies with international law: he or she has a duty to the law going beyond a duty merely to advise on what the law is. As Kofi Annan put it, when still UN Secretary-General,

> Legal advisers of States and international organizations, as well as practitioners in the field of international law, are among those individuals most committed to promoting respect for international law.[373]

I sought to make just that point to the Iraq Inquiry when I said that:

> because there is no court, the Legal Adviser and those taking decisions based on legal advice have to be all the more scrupulous in adhering to the law … It is one thing for a lawyer [in a domestic legal system] to say, "Well, there is an argument here. Have a go. A court, a judge, will decide in the end". It is quite different in the international system where that's usually not the case. You have a duty to the law, a duty to the system. You are setting precedents by the very fact of saying and doing things.[374]

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[372] Allott, *supra* note 8, at 24.

[373] United Nations Office of Legal Affairs (ed.), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, 1999) ix.

[374] Transcript of evidence given by Sir Michael Wood to the Iraq Inquiry on 26 January 2010, pp. 33–34, available at <https://webarchive.nationalarchives.gov.uk/20170831105440/http://www.iraqinquiry.org.uk/the-evidence/witnesses/w/sir-michael-wood/>.

Научно-практическое издание

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ
ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

COURSES OF THE SUMMER SCHOOL
ON PUBLIC INTERNATIONAL LAW

ТОМ XI / VOL. XI

Майкл Вуд / Michael Wood

Международное право на практике

International Law in Practice

На английском языке

Корректор *Ю. В. Субачев*
Вёрстка *В. В. Котов*
Дизайн обложки *Д. Кравец*

ISSN 2687-105X

Подписано в печать 30.11.2021. Формат 60 × 90 1/16.
Гарнитура «PT Serif». Печать цифровая. Усл. печ. л. 10,1.
Тираж 100 экз.

АНО «Центр международных и сравнительно-правовых исследований»
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Отпечатано в типографии «Onebook.ru»
ООО «Сам Полиграфист»
129090, Москва, Волгоградский проспект, д. 42, к. 5
E-mail: info@onebook.ru
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