

Sir Michael Wood is a member of the UN International Law Commission. He was the principal Legal Adviser to the Foreign and Commonwealth Office between 1999 and 2006. Written in 2003, this is a personal perspective on the role of a Foreign Ministry Legal Adviser.

THE PERSPECTIVE OF A FOREIGN MINISTRY LEGAL ADVISER

Michael Wood

To spend nearly thirty-three years as a Legal Adviser in the Foreign and Commonwealth Office may sound unadventurous. Yet the work is infinitely varied, often exciting, and—most of the time—enjoyable.

The first thing to make clear is that the law of concern to a Foreign Ministry is by no means exclusively public international law. Questions of domestic law, including constitutional law, arise constantly, and not only over the domestic implementation of treaty and other international obligations. In the case of the United Kingdom, domestic law includes the law of the United Kingdom's overseas territories. European Union law is a field of the highest importance, as is the law of the European Convention on Human Rights. Both are now largely incorporated into UK domestic law, but have their origins in public international law.

A second important point is that, in areas in which they specialize—especially in general questions of public international law—FCO Legal Advisers tend to give advice and assistance to the whole of Government. This is an important aspect of the wider 'service' which the FCO offers to other Government Departments.

A third point is that, despite our title, FCO Legal Advisers are not confined to giving advice. Much of our time is spent in negotiating, and most of that is done abroad—at the United Nations in New York and Geneva, in Brussels, Strasbourg, and elsewhere. I used to regard at least one trip to Paris a year as a given. I never tire of visiting new places, whether it be a few days travelling around Svalbard (something of a highlight), or three weeks incarcerated at the Wright-Patterson Air Force Base near Dayton, Ohio. A particularly agreeable part of the job is the number of good friends one makes from all over the world: the Governmental 'regulars' on the international legal network are a relatively small and close-knit group, who meet frequently in different locations to resolve (or at least seek to resolve) a great variety of issues.

A fourth and most important point is the role of a Foreign Ministry Legal Adviser. This is a subject which has been much discussed. For the present writer, Frank Berman expressed it best:

What then is the role of the governmental legal adviser? In the writer's view the main role of the Governmental legal adviser is to 'make' his Government comply with international law. One must of course put the word 'make' in mental inverted commas. It would be a rare case indeed if a Governmental legal adviser 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

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the meanest definition of the role of the international law adviser in government cannot treat that policy question as if it were an entirely neutral one. It must be assumed to be a necessary part of the role that the international law adviser should be expected to use his gifts of exposition and persuasion to bring those with whom the power of decision lies to use this power to the right result (Berman, 2000, p 3).

Looking back these thirty-three years, what highlights do I see? A very selective list would include the following:

- negotiating a number of terrorism conventions in the 1970s, including the Internationally Protected Persons Convention (and its accompanying General Assembly resolution) in the Sixth Committee, which was a tough introduction to the legal politics of the United Nations at the time; and the 1978 European Convention on the Suppression of Terrorism, which sought, without complete success, to circumvent the political offence exception to extradition;
- negotiating over many years the United Nations Convention on the Law of the Sea of 1982, especially its Part XI on the Deep Sea Bed, an even more acute exposure to UN legal politics in the era of the so-called ‘New International Economic Order’, and involvement in setting up the International Seabed Authority in Kingston, Jamaica;
- involvement in the Rhodesia settlement, both at Lancaster House and with Governor Soames in Salisbury (now Harare), when questions of public international law were for the large part in the background but nevertheless of considerable underlying importance;
- acting as Agent before the European Court of Human Rights over a five-year period, including in cases such as *Soering*;
- close involvement in the Cambodia peace negotiations; the Two-plus-Four and One-plus-Three negotiations on the reunification of Germany; the Dayton Peace Agreement for Bosnia; and the failed negotiations at Rambouillet for a corresponding Kosovo peace settlement;
- involvement, as Legal Adviser to the United Kingdom’s Mission in New York, in the drafting of the hundreds of resolutions and Presidential Statements adopted by the Security Council during the period 1991–4, including a number which involved innovation and considerable subtlety, eg those concerning Lockerbie, the former Yugoslavia, the Republic of Macedonia’s admission to the United Nations, the International Criminal Tribunals for the Former Yugoslavia and for Rwanda;
- acting as Agent in cases before the International Court of Justice (*Lockerbie*; *Legality of Use of Force*) and in inter-State arbitrations (the OSPAR and UNCLOS arbitrations over Sellafield);
- advising on questions concerning the use of force, including Kosovo in 1998, Afghanistan in 2001, and Iraq in 2002–3;
- handling longer-term developments in international law, including the work of the International Law Commission and the Sixth Committee on matters such as State responsibility and State immunity.

Most of the above issues come to mind because they involved a great deal of work, over an extended period. Other important issues may have to be dealt with very quickly, or appear essentially as critical points in greater developments. Recent examples include aspects of the International Criminal Court (the negotiations leading

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to the adoption of Security Council Resolution 1422 (2002), questions concerning Article 98(2) agreements, the election of the judges). And much that has to be done may be seen as ‘damage limitation’: sitting firmly on silly ideas or, as it was termed in New York, giving a ‘decent burial’ to items on the Sixth Committee’s agenda that were going nowhere.

My main impression, looking back over thirty-three years, is of the huge increase in the quantity and complexity of public international law issues that have to be dealt with by Government, and their increasing political and public interest. Over the last five years alone, we have seen the British media covering international law issues, day after day for weeks on end, such as the immunity of a former Head of State (Pinochet), the rights and wrongs of the United States’ position on the International Criminal Court (during the evolution of Security Council Resolution 1422 in June–July 2002), and—as I write—the legal necessity or not of a ‘second’ resolution before force may be used to disarm Saddam Hussein. The number of lawyers in the FCO has scarcely increased over this period, with the result that they are under far greater pressure than in 1970 when I first joined the Office.

One result of this pressure, which I personally greatly regret, is that it becomes increasingly difficult to find the time to write articles or books. In earlier times, FCO Legal Advisers appeared to have the time to contribute far more to academic debate than they do now, at least in writing. This is unfortunate, since the publication of books and articles often adds to the personal satisfaction that one derives from the job; moreover, those involved in negotiations, and involved in the practical day-to-day application of public international law, are well placed to shed a special light on developments.

‘International law is what other countries break’. So say the cynics. It may be thought that the ‘invisible college of international lawyers’ is largely composed of idealists, not cynics. But for my money, what is really needed is an underlying idealism combined with a very healthy dose of realism. Perhaps the two greatest achievements of international law over the last century are, first, the restrictions on the use of force embodied in the Pact of Paris and then in the United Nations Charter; and, secondly, the development of human rights and humanitarian law and their enforcement. Both these developments are currently under severe challenge. It is, indeed, the best of times and the worst of times to be a Foreign Ministry Legal Adviser. Whatever else it is, life is not dull.

REFERENCE

BERMAN, SIR FRANKLIN (2000), ‘The Role of the International Lawyer in the Making of Foreign Policy’, in Wickremasinghe, C (ed), *The International Lawyer as Practitioner* (London: British Institute of International and Comparative Law), p 3.