

Conference Report

“The Role of Legal Advisers in International Law”

26 February 2015

1. Introduction and Overview

On 26 February, the British Institute of International and Comparative Law (BIICL), in cooperation with the Foreign & Commonwealth Office, held a conference on the role, position, and influence of international law Legal Advisers in international policy and diplomacy. The conference was part of a broader BIICL project, in collaboration with BRILL Publishers, examining British influences in international law from 1915 to the present day. It was convened by Dr. Andraž Zidar, Senior Research Fellow in Public International Law at BIICL and Dr. Jean-Pierre Gauci, Research Coordinator in Public International Law at BIICL.

The conference brought together more than 25 current and former Legal Advisers on international law, from a diverse range of legal, political and administrative systems. The panels included Legal Advisers of Ministries of Foreign Affairs or with an equivalent function at other government departments, from various countries including Australia, Belgium, Canada, France, Ireland, Singapore, Sweden, United Kingdom, and the United States. Also on the panels were Legal Advisers from international organisations including the United Nations, the European Bank for Reconstruction and Development, the North Atlantic Treaty Organisation, the World Trade Organization and the European Commission; Legal Advisers to Parliaments; and Legal Advisers of international non-governmental organisations, such as Amnesty International. The conference provided speakers with an opportunity to discuss some of the issues that Legal Advisers face on a day-to-day basis and served partly to recall that many of the challenges are similar across jurisdictions and institutions.

Participants discussed issues critical to the role of a Legal Adviser, including: the functions of Legal Advisers; their position in political and diplomatic decision-making processes; the ethics of providing advice; the relationship between legal advice and legal advocacy; the influence of various legal traditions on Legal Advisers' work; the contributions of Legal Advisers to the development of the international legal system through public outreach, writings and scholarship; and contacts among Legal Advisers. The conference also included a roundtable on the position of Legal Advisers between law and politics.

This report is intended to summarise some of the key discussions and conclusions of the conference. It does not do justice to the depth of insights and the frankness of conversation on the day, but it does outline some of the critical issues that were discussed. The report is structured by session topic, with each topic incorporating relevant comments that were made

during earlier or later sessions. More in depth insights, authored by the panellists themselves, will be published in an edited volume to be published by BRILL in 2016.

The British Institute of International and Comparative law wishes to thank all the speakers and chairs for their participation in making the conference a success. Special thanks also to the members of staff at the Foreign and Commonwealth Office and at BIICL for their logistical support on the day as well as during the run up thereto.

2. The Functions of the Legal Adviser

In most jurisdictions the Legal Adviser has three, inter-linked, principal roles: advising, negotiating and litigating. The Legal Adviser's role and position have changed over time, not least due to the exponential expansion of international law into areas that were not considered half a century ago, the gradual codification of international law and increase in monitoring and accountability mechanisms, and the related need for and tendency towards specialisation. This has been reflected in changes in the size and structure of Legal Advisers' departments, and should also be reflected in the recruitment of new legal advisers. Legal Advisers increasingly tend to advise not only on international law, but also on aspects of domestic law, constitutional law, human rights issues (such as ECHR) and, as relevant, regional law such as EU law.

As regards the advisory function, it requires clarity, precision, concision and an understanding of the position of colleagues in other parts of government. Confidentiality is crucial to ensure full and frank advice. Advice must also be timely, neither too early nor too late. One speaker described being a Legal Adviser as being in a constant law school examination: immediate answers are often required. Consistency is also critical; hence the value of continuity in the Legal Adviser's office.

The principal role of the Legal Adviser is to ensure the government (or other body) complies with international law. The Legal Adviser is "both counsellor and conscience." Legal Advisers should transcend the mis-perception that the law is there to restrain diplomatic activity, rather than to shape and facilitate it. Nevertheless, legal advice is not always consistent with the government's policy position, nor with the message that the decision makers, notably Ministers, would like to hear. As one participant put it, the role of the Legal Adviser is not to tell the government what it wants to hear, but rather what it needs to hear. There is always the possibility that the Legal Adviser's advice is not followed. As one speaker noted, the Legal Adviser is in 'the business of fearless advice and loyal implementation'.

The legal adviser should be proactive in offering advice, rather than merely waiting to be asked, for example when a situation arises in which it's clear legal advice will be needed, or if policy officials are unaware of the need or unwilling to seek advice. One government speaker considered that more attention is paid to legal advice when there is a greater risk of legal proceedings, for example regarding EU matters.

There were differences of view as to whether the legal adviser should advise only on legal issues, or should also express views on policy or political issues. In some areas – for example

regarding international courts – legal advisers may lead on policy. In others, some speakers considered that the Legal Adviser should establish clear boundaries between law and policy, and advise only on legal issues. This notwithstanding, one speaker noted that beyond asking whether a decision is legal, he/she ought to also ask whether it is wise; and should speak frankly when a proposed course of action is “lawful but awful”. One speaker drew an analogy with playing pinball: if the Legal Adviser doesn’t shake the government machine, they are not playing well; but if they tilt it, they are no longer playing properly.

One issue raised was the link between the international and the domestic legal systems. One speaker noted the advantage of having the Legal Adviser on international law working alongside colleagues who are specialised in domestic law. Most Legal Advisers find themselves advising decision makers and fellow government lawyers across a range of departments and Ministries, to ensure compliance with international law throughout and a consistent interpretation of international law by government lawyers in all departments.

Regarding negotiations, Legal Advisers both advise in advance of and during negotiations, and lead negotiations themselves, on topics ranging from treaty negotiation to dispute resolution.

A core role of the Legal Adviser that was raised by various participants is in the development of law at both the international and the national level. At the international level, the Legal Adviser often participates in negotiations, either as part of a broader delegation or leading the negotiations in person. At the domestic level, Legal Advisers are often involved in preparing domestic law, and in procedures for compliance with new international legal obligations.

Regarding international litigation, Legal Advisers often act as agents on behalf of the State. There are political decisions to be made, such as whether and when to commence a case. Once a case has begun, the Legal Adviser’s role is crucial. For example, as there is often domestic counterpart litigation, one role of the Legal Adviser is to ensure the consistency of the government’s position between cases. In addition, the Legal Adviser has to assess tactics such as whether to drop weaker arguments, and what tone to adopt so as to balance legal and diplomatic considerations appropriately. One speaker who has also acted as judge of an international tribunal commented on the value of hearing the Legal Adviser as agent before the court, as authentic spokesperson for the government’s position.

In addition to these three core functions, many Legal Advisers have other functions such as managing the process of nominations for international judicial elections/appointments and negotiating on Court budgets and structures.

One question resonates throughout all of this, which is: who is the client of the government Legal Adviser? Participants noted a series of individuals and entities that could be considered the client varying from the Minister to the Ministry to the broader government or State or even the international community as a whole. Some speakers identified international law as the client; and some considered that the person to whom the Legal Adviser is directly accountable (often the Foreign Minister) is not necessarily the same as the client (the Ministry, the State or the law). Similar concerns arise within the context of institutions such as parliament and international organisations.

3. Organisation and Context of the work of Legal Advisers

The conditions for the giving of advice vary from State to State, not least due to varying administrative and political systems. In many States the Legal Adviser is located within the Ministry for Foreign Affairs; in others within the Attorney General's office or another Ministry. The size and structure of the government Legal Adviser's department varies between countries, depending not least on the extent of the responsibilities the Legal Adviser has and oversees as well as the size of the government overall. Of those present at the conference the smallest example of a Legal Adviser's department given was a team of 8, the largest a team of 250.

A key difference between the various legal systems is whether the Legal Adviser is a political appointee. In the UK, the FCO Legal Adviser is not a political appointee; in the US, the State Department Legal Adviser is. This in part impacts on the perception of the office of the Legal Adviser and the type of advice that can be expected from it.

Critical to the Legal Adviser's role is access to the decision-makers. In some countries this is assured either through institutional structures or through practice whilst in others, the role of non-elected political and/or special advisers has made access to decision-makers more problematic. Access is also facilitated or impeded by the institutional framework in the particular country. One speaker noted that being able to advise the Minister personally gives the Legal Adviser clout, both with the Minister and with the Ministry staff. Working within the Ministry of Foreign Affairs can have a number of advantages, including access to decision-makers and the relevant Minister. One speaker however noted the benefits of locating the Legal Adviser within the Attorney General's office, including enabling the provision of holistic advice to which both international and domestic lawyers have contributed.

The importance of legal involvement throughout the decision-making process was also stressed. One speaker discussed how legal advice can be "mainstreamed" into policy advice. Another speaker expressed the "aeroplane rule": to be in at the landing, you have to be there at the take-off and in the loop throughout the journey.

Whatever the specific location – physical and administrative – of the office of the Legal Adviser, there is clearly a lot of inter-departmental and inter-ministerial work that the Legal Adviser must engage with. One tendency noted by some speakers is the increasing distance between the Foreign Ministry Legal Adviser and advisers to other Ministries.

The nature of the legal, political and administrative system in the country is a further aspect of the context within which the Legal Adviser operates. One speaker noted the considerable differences between common and civil law structures. For international organisations the context is sometimes more narrow. As one speaker noted, the dispute resolution function of the organisation means that the Legal Adviser is limited in what can and cannot be said and to whom.

One International Organisation Legal Adviser observed the importance of international civil servants not pre-empting the legal views of the institution through its Member States. Another speaker noted the importance of the institutional framework and treaty basis for both

cooperation amongst Legal Advisers of Members of that organisation and for the role that the Legal Adviser can take on the international stage, including with other international organisations.

Recruitment from outside the civil service, and the transfer of lawyers between government departments, were also discussed. The wealth of external expertise available was stressed. On the other hand, speakers also emphasised the value of institutional knowledge and experience; for example, one speaker highlighted how institutions with experienced Legal Advisers have significantly more impact than those without.

4. Legal Advisers and Public Outreach

The third session focused on public outreach by Legal Advisers. Two dimensions were discussed: outreach in forming and cementing relationships, and outreach as a “duty to explain”.

As regards outreach and relationships, several speakers highlighted the relationship between Legal Advisers and academia, a great source of scholarly influence and legal development for Legal Advisers and their teams. They also highlighted the importance of developing relationships between Legal Advisers (see below).

As regards a “duty to explain”, one government Legal Adviser explained this as a duty to (a) show that rigorous legal analysis has been part of the policy-making process; (b) define what precedent is being set; and (c) declare parameters, so that it is clear what is not being said or accepted. Other speakers adopted the terminology of “duty to explain”, finding it consistent with an emerging culture of governmental transparency. As regards international organisations, their officials, including Legal Advisers, have a continuing responsibility to promote the objectives of the organisation, including by explaining the international organisation’s position. There was some discussion about the difference between the duty to explain the legal view adopted by the Government or Ministry, and explanation of the Legal Adviser’s personal views which does not fall within the duty. One speaker regretted that we do not see more of international organisations’ internal legal advice.

It was noted that public outreach, in particular explanations of legal position, need to be balanced with the duty of confidentiality. In private practice, lawyers are concerned not to waive their clients’ privilege; so here a balance has to be struck between the confidentiality of legal advice and the duty to explain the government or other institution’s legal positions. For example, in the UK Parliament there is an unresolved question as to whether it should have access to all legal advice provided to the government.

It was considered that the duty to explain encourages better decision-making. In addition, particularly as the government’s action often cannot be judged by a Court, it is often judged by the international legal community, and provision of legal justification may promote fairer, less critical assessments. In addition, explaining rationales will help to preserve valuable aspects of international law that are at risk of disappearing in the face of public opinion, such as immunities in the face of human rights.

5. Contacts Among Legal Advisers

The fourth session related to contacts amongst Legal Advisers, as international lawyers working together within the international community. Contact amongst Legal Advisers is critical for at least two reasons – the first is collaboration and the second is learning and broadening perspectives. Relationships between Legal Advisers provide a platform on which tricky issues can be negotiated and help sought frankly when the need arises. Developing these contacts allows Legal Advisers to build friendships even if official positions might be on different sides, have different perspective or be seeking different outcomes. The ability to network provides the individual Legal Adviser with the opportunity to learn from different views, contributing to provision of better and more knowledgeable legal advice.

Contacts amongst Legal Advisers can be divided into formal contacts and informal contacts. Formal fora for cooperation, such as CAHDI (six-monthly meetings of European and some other government Legal Advisers) and International Law Week (annual UN meetings in New York, open to Legal Advisers of member states and international organisations), provide a good structure and bring many Legal Advisers together to discuss new developments; however often these tend to be long meetings which not all Legal Advisers are able or willing to engage with. Informal contacts on the other hand are more confidential and allow for a freer exchange of perspectives, unrestrained by official positioning.

Some organisations and entities are more prescriptive of the sort of official contacts that their Legal Advisers can have, in order to avoid concerns about conflicts of interest and bias. This is particularly important for international organisations that have a dispute resolution function. Sometimes Legal Advisers of international organisations have to walk a tight-rope between explaining procedural issues and compromising neutrality.

Some speakers noted the importance of personal relations between Legal Advisers as colleagues providing legal advice in an essentially diplomatic and political environment. One speaker described contacts between Legal Advisers as creating a community of lawyers where one can push the boundaries of legal positions and legal interpretations as well as suggesting innovative ways in which particular rules can be applied to new and emerging situations.

In this context, it was noted that contacts provide an extremely valuable opportunity for effective advocacy. For example, one international organisation, through widespread advocacy at various levels and building on existing contacts with Legal Advisers amongst others, helped develop the Arms Trade Treaty, also put the idea of prisoners of conscience into the discourse of human rights and international law.

6. Legal Advisers: Between Law and Politics

Most speakers considered that legal advice can be contrasted with political advice, and focused on whether or to what extent Legal Advisers should advise on the latter as well as the former. Others considered that there is no such distinction. For example, one speaker described law as politics in technical specialist language. Legal Advisers are expected to address political problems through that language, and as “legal advice” their advice has a surprising authority. A new Legal Adviser can make two mistakes – the first is insisting on only following the law and the second is imagining themselves a political wizard, thinking their position places them well to give political advice. The speaker’s advice to Legal Advisers was therefore to be a lawyer but not solely a lawyer.

Another speaker noted that the politicians set the overarching policy and political objectives but there are many gaps to be filled which will be filled in line with the State’s legal obligations. The identification of the relevant legal obligations, and of the relevant precedent to follow, can itself be a political judgement, as there can be choices to be made and the relevant international legal instruments may not be clear.

Part of the role of the Legal Adviser, it was noted, is to find out what the government or Minister wants to achieve, and then to explore ways in which those political aims can be achieved consistently within the law. At the same time, as discussed earlier, government lawyers must uphold the law in the face of political pressure. In practice, they must maintain a balance between law and policy. The manner in which various Legal Advisers do so influences the content and reach of international law. Legal Advisers should make very clear when they are giving legal advice and when they are participating in policy discussions.

The question was posed whether the lack of clarity in public international law, and lack of courts to rule on it, means that the Legal Adviser can be more flexible with clients than otherwise; or whether, in contrast, the approach should be stricter and more insistent on advice. The consequence was considered to be a stress on the Legal Adviser’s obligation to give objective and accurate legal advice and to persuade the government to follow it. This places a moral obligation on both the Legal Adviser and the Minister to give honest and objective views.

One speaker noted the distinction between a Legal Adviser to a national government and to an international organisation. Part of this distinction relates to the lack of judicial oversight of International Organisations and therefore the need for greater internal responsibility; as well as to the need to avoid “getting ahead” of the International Organisation’s members.

7. Conclusions

Certain themes characterised the day. Firstly, the role of Legal Adviser, whether of government or of international organisation, as “both Counsellor and Conscience”, both to enable and restrain in line with international law. It was clear that the function of Legal Adviser is a principled one, based on ethics as well as law. To the extent that the Legal Adviser has a political role, that should be recognised and care should be taken not to disguise political advice as legal advice.

Secondly, the structure and institutional position of the Legal Adviser’s office. Although there are a multitude of different structures for the role and functions of the Legal Adviser and their office, common themes and debates include the owing of duties both to government and to professional bodies; the place of Legal Advisers in the wider institution, including access to Ministers and other decision-makers; the timing of advice and whether it should be pro-active as well as reactive; confidentiality; relationships with Legal Advisers in other parts of government, and the value that outsiders can add.

Thirdly, as regards outreach, the “duty to explain” and the value of contacts between Legal Advisers. While the parameters of the duty to explain were not fully explored, there was much discussion of its rationale, scope, effect as well as of the difference between it and internal discussion of advice. Contacts between Legal Advisers, and with academia, were widely welcomed.

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