

Michael P. Scharf and Paul R. Williams, ***Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser***. Cambridge: Cambridge University Press, 2010. Pp. 332. \$30.99. ISBN: 9780521167703.

In an interview with BBC television on 19 March 2011, British Prime Minister David Cameron described the use of force against Libya in terms of United Nations Security Council resolution 1973 (2011) as 'necessary, legal and right'. This statement once again illustrated the fact that, especially with respect to the use of force in the execution of foreign policy, justification in terms of applicable international law principles weighs heavily on the minds of statesmen. It is therefore not surprising that it is increasingly being recognized in contemporary academic discourse that international law and international politics and security are intertwined subjects and that international law provides a useful paradigm for the analysis of international relations. The momentous events of 11 September 2001, which marked the advent of asymmetric warfare, challenged the ability of especially Western democracies to deal with hitherto unknown security challenges within the established framework of international law. These developments provided fertile soil for developing a discourse on the relationship between international law and international relations and diplomacy, conducted by both academics and practitioners.

However, in American legal tradition this discourse has already been present for several decades: almost half a century ago the American Society of International Law published *Legal Advisers and Foreign Affairs*,<sup>1</sup> a collection of essays by legal advisers to foreign ministries from a variety of states, and an article on the role of the Legal Adviser to the Department of State appeared in the *American Journal of International Law*<sup>2</sup> in 1962. The book under review returns to this theme. The question to be explored, in the words of Harold Koh, present State Department Legal Adviser who wrote the foreword, is what role international law plays in foreign policy crises. Furthermore, the book aims at contributing to an understanding of the role of the Office of the Legal Adviser in the conduct of diplomacy. It therefore attempts to peek inside the 'black box' of government to gain an insight into how international law may frame or even constrain the development of US foreign policy in response to international crises. The authors, both academics who previously served in the Office of the Legal Adviser of the State Department, are therefore eminently qualified to attempt this task.

In the execution of their project, the authors adopted an oral history approach, with former Legal Advisers of the State Department and selected foreign ministries relating their personal

<sup>1</sup> Ed. H.C.L. Merrilat, 1964.

<sup>2</sup> Bilder, 'The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs', 56 *AJIL* (1962) 633.

insights and experiences through four discussions. First, a meeting was held with a small number of former State Department and foreign ministry Legal Advisers who identified the five questions forming the central themes for discussion, namely whether the Legal Advisers considered international law to be binding law, whether the international law rules applicable to a crisis were clear enough to inform about the policy options open to the US Government, whether a Legal Adviser should oppose policies and actions violating international law, whether the Legal Adviser had influence in cases where he opposed a course of action on the ground that it was in violation of international law, and, finally, whether they perceived international law to hinder or promote their government's interests in times of crises.

The contours of the discourse having been set, the second phase proceeded with a closed meeting of all living former State Department Legal Advisers, who served from the Carter Administration to the second administration of George W. Bush, and who then responded to these questions by reference to the role that the Office of the Legal Adviser and international law played in responding to the three most important crises that they had to deal with during their respective terms of office. This was followed by an open roundtable discussion during a meeting of the American Society of International Law, and a further roundtable discussion involving a number of former law advisers to the foreign ministries of the United Kingdom, Russia, China, India, and Ethiopia.

The structure of the book follows the contours of these discussions. A chapter is devoted to each of the Legal Advisers, and one to each of the two roundtable meetings. These chapters are preceded by Harold Koh's foreword, an introduction, and chapters on the compliance debate in international law, a history of the Office of the Legal Adviser and the background of the Legal Advisers and their path to appointment, and is followed by a chapter on how the United States used international law in its response to the war on terror, and a conclusion. An index, glossary, of terms, list of Legal Advisers of the State Department and a select bibliography of academic works by them, often relating to their activities while in office, concludes the book.

The chapter on the compliance debate aims to place the book within the context of the contemporary debate on the degree to which states feel they are obligated to comply with international law, providing a succinct overview of both historical theories and contemporary compliance theories developed by United States scholars. The chapter on the history of the Office, established as recently as 1931, provides a brief overview of the structure, organization, and role of the Office, also referring to the appointment procedure of the Legal Adviser: appointment is done by the President with approval by the Senate, mirroring the politicized appointment procedure of high office bearers that is a somewhat unique feature of the American system of democracy.

The chapters where the legal advisers relate their experiences during times of crises that follow provide a fascinating insight into the hustle and bustle of the Office of the Legal Adviser. The issues dealt with span the whole range of international law, including the negotiation of peace treaties, the dissolution and recognition of states, terrorism, dispute settlement, and, not surprisingly, bearing in mind the global role of the United States, issues relating to the use of force, military operations, and the relevant international humanitarian principles. One conclusion reached is that there is a strong correlation between negative policy outcomes and failures to consult the Office of the Legal Adviser in time: legal advice should be integrated with policy development from the start, in order to ensure not only proper policy-making, but the ability rationally to explain policies and prevent the necessity for after-the-fact containment of negative fall-out. Probably the best example of the negative effects that can result from differentiating policy approaches between government agencies and the wilful exclusion of the Office of the Legal Adviser from policy making processes is the matter of the treatment of detainees in the war against terrorism (the subject of a separate chapter providing an fascinating overview of decision-making within the United States Government with respect to this controversial matter, and specifically the role played by the Office of the Legal Adviser).

These conclusions are confirmed by the roundtable of former State Department Legal Advisers, who also spent some time on the question whether the existing rules of international law can deal with the multitude of new security threats facing the international community, most being of the view that traditional rules still apply, but are often in need of new interpretations. Two important contemporary considerations were also highlighted, namely that new developments, like the use of force in the case of Kosovo, place traditional international law under strain, and that in decisions on the use of force countervailing considerations like security and politics may tip the scale against international law. In this respect, the fact that international law rules are often vague provides a flexibility to apply the law in a policy-sympathetic way.

When dealing with the characteristics of an effective Legal Adviser, the imperative for the Legal Adviser to be, apart from a good lawyer and decision-maker, an effective problem-solver, adept at what one described as 'international legal diplomacy', was emphasized. As regards the operation and evolution of the Office, the Legal Advisers noted the expansion of areas of international law to be dealt with and a resultant increase in workload, together with increased specialization. The theme of the relationship with clients (not only the State Department and Secretary of State, but increasingly also the President and Congress) is debated further in the next chapter on the roundtable with foreign Legal Advisers. Permeating this debate is the question of the weight a policymaker will attribute to legal issues when having to address a matter of national security. Perhaps serving good old wine in a new bottle, a former Legal Adviser to the United Kingdom's Foreign and Commonwealth Office quoted his predecessor, Sir Gerald Fitzmaurice, who was of the view that the Legal Adviser's counsel cannot be impartial, but must be accurate and sympathetic, taking into account the client's needs and objectives.

The concluding chapter aims to pull the threads of these open and introspective discussions together to structure the discourse around the questions. It concludes that the Legal Advisers did indeed consider international law to be binding upon states. While international law may sometimes act as a constraint on foreign policy in the short term, it is of considerable benefit in the long term, especially for the protection of nationals. The fact that international law rules, though binding, often lack precision and clarity is not considered a factor that undermines its legitimacy, but rather as a benefit to diplomatic interaction, providing boundaries to decision-making on the one hand and leaving enough freedom of choice in decisions to serve policy ends on the other. Consequently, international law is seen not as a hindrance, but as a tool for achieving the foreign policy goals of governments.

With respect to the question whether the Legal Adviser has a duty to oppose proposed actions by Government that will conflict with international law, all the participating Legal Advisers were of the view that their duty is not blindly to promote the Government's policies, but that they have a professional responsibility to advise on international law as it stands, and not to offer interpretations in the service of specific policy options. The duty of the Legal Adviser, who to an extent serves as the moral conscience of foreign policy, is to advocate policy choices that will not violate international law, and to point out the negative consequences resulting from the violation of international law.

With respect to the influence of the Legal Adviser on policy, it is concluded that policy makers accord substantial weight to the Legal Adviser's opinions, and several cases were mentioned where US Presidents, although reluctantly, followed the advice of the Legal Adviser, despite policy preferences to the contrary. A further conclusion by the Legal Advisers was that the specialization of modern foreign policy often results in some fragmentation when legal advice is offered, as advisers from other government agencies may then become involved in decision-making and policy development. It was concluded that the Legal Adviser should, however, remain the leading voice on all matters of international law, which may require him getting involved in bureaucratic turf battles. In order to make their influence felt, the Legal Advisers of

the State Department need therefore to be more than skilled lawyers, but must also be seasoned bureaucrats able to play bureaucratic games in order to ensure a place at the decision-making table. The final conclusion of the book is that international law plays a real role in times of foreign policy crises, because Legal Advisers and policy makers are influenced by it, and apply it, in order to achieve desired outcomes.

This book offers a valuable and timely contribution to the ongoing and by necessity, open-ended discourse on the influence of international law and Legal Advisers, on the formulation and implementation of foreign policy and diplomacy. It is written within the constraints of its admitted US bias and the personal narrative and introspection of practitioners, which also results in some degree of repetition between the narrative parts and the chapters of reflection. However, these structural constraints do not detract from its value, which lies in the practical perspectives provided by a range of US legal advisers (with some cross-pollination by foreign practitioners). In this respect, it offers food for thought for practitioners of international law, whether in government service or employed by civil society, and it will also be equally valuable to the academic community in obtaining an understanding of international law at the cutting-edge of inter-state relations.

However, while it is an important contribution to this discourse, its relatively narrow scope necessarily means that it is not the final word on this subject. There is rich soil in this vineyard to be tilled, and this book serves to highlight the need for a contemporary edition of *Legal Advisers and Foreign Affairs*. A wider variety of perspectives, geographical as well as functional, needs to be explored, as it appears that the role of legal advisers to diplomatic missions accredited to international organizations, and at such organizations themselves, is not being adequately focused upon at present. It is hoped that labourers are already toiling with a view to presenting the international law community with some exciting new wines.

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