

# International Law and International Relations: United Kingdom Practice

Arthur D. Watts \*

Any consideration of the part played by international law in the conduct of the United Kingdom's international relations requires some preliminary description of the way in which both the Foreign and Commonwealth Office and its legal advisers are organised. The inter-relationship between the legal advisers and the rest of the Office is fundamental to the extent to which the Foreign and Commonwealth Office, in its day to day practice, can and does take account of international law.

## I. The Legal Advisers and the Foreign and Commonwealth Office

At full strength, the British Diplomatic Service has a team of twenty-six legal advisers. Of these, twenty serve in the Foreign and Commonwealth Office (FCO) in London. Four others serve at diplomatic posts abroad – in Berlin, Bonn, Brussels and New York. In addition, there are two legal advisers who are seconded outside the FCO – one with the Legal Secretariat to the Law Officers (about which more will be said later), and the other with the Government of Hong Kong (a somewhat special post, but necessary for obvious reasons at this particular stage in Hong Kong's development).

The legal advisers are all professionally qualified (or, exceptionally in the case of new recruits, about to become fully qualified in the very near future). In British terms this means that they are all either barristers or solicitors, or their Scottish equivalents. Recruitment is by means of open competitions organised by the Civil Service Commission, which is the body principally responsible for recruiting civil servants. These competitions are usually held every two or three years, and in general one or two lawyers are recruited at a time: with a relatively small group of twenty lawyers in London, it can be difficult to absorb and train more than two new recruits at any one time. The selection of candidates is based on a scrutiny of their academic and professional qualifications and experience as well as interviews with short-listed candidates.

Generally speaking, successful recruits will either have been lawyers in private or public practice or have come direct from universities. In addition to their professional qualifications, they will nearly always have some post-graduate qualifications or experience in either public international law or in subjects which are related to public international law, such as European Community law or Human Rights law.

It is also to be noted that the legal advisers are career-long legal specialists. They join the Diplomatic Service as legal advisers, and stay as legal advisers. They are nevertheless

\* Sir Arthur Watts, KCMG, QC, Legal Adviser, Foreign and Commonwealth Office, London. The views expressed are the personal views of the writer, and do not necessarily represent the views of the Foreign and Commonwealth Office.

For other accounts of the organisation, functions and role of the Legal Advisers of the Foreign and Commonwealth Office (and, formerly, the Foreign Office) see Malkin, 49 *Law Quarterly Review* (1933) 489-510; Parry, in *Legal Advisers and Foreign Affairs* (ed. Merrilat) (1964) 101-52; Fitzmaurice and Vallat, 17 *ICLQ* (1968) 267-326, esp. pp. 267-77; Macdonald, 156 *RCDI* (1977), iii, 377, 444-9; Sinclair, in *International Law: Teaching and Practice* (ed. Bin Cheng) (1982) 123-34, and *The Practitioner's View of International Law* (Josephine Onoh Memorial Lecture, University of Hull, 1988).

members of and integrated into the Diplomatic Service. It is possible for legal advisers to transfer to the mainstream Diplomatic Service, but this is rare.

The way the legal advisers contribute to the work of the FCO depends upon the way in which that Office is organised. It has about seventy Departments; some are geographical Departments (such as Western European Department, South American Department, and North American Department), while others are functional Departments (like Protocol Department, and Consular Department). Each of these Departments has a designated legal adviser: each Department knows to whom it should turn if it needs legal advice on some aspect of its affairs. The mathematics make it evident that with only twenty legal advisers in the FCO and some seventy Departments, each legal adviser has to advise more than one Department. It is in fact a little more complicated than that, because some Departments are split for purposes of legal advice. To give an example, the South American Department deals not only with South America (Brazil, Uruguay, Argentina, Chile, and so on) but also with Antarctica. Antarctica, however, is somewhat special and certainly raises foreign policy and legal issues quite different from those which arise in relation to the States of the South American continent. It is therefore convenient to have for Antarctic matters a different legal adviser from the one who advises the rest of the South American Department. For some other Departments, or indeed for certain subjects within a Department, there may be more than one legal adviser. Thus, for example, the FCO has two European Community Departments: one dealing with internal Community matters and the other dealing with external Community matters. Each of these Departments has more than one legal adviser doing its legal work simply because there is so much of it. Another example is afforded by the Maritime, Aviation and Environment Department. The aviation part of this Department is concerned mainly with civil aviation agreements with all other States with whom the United Kingdom has such agreements. Much legal work is involved here, and in particular a lot of negotiating with other States. This is why international aviation matters have to be dealt with by three legal advisers quite distinct from the legal advisers who deal with the maritime and environmental aspects of the Department's work.

When a legal problem arises, it is up to the Department concerned to consult its designated legal adviser. There are also arrangements whereby it is always possible for the more senior and experienced legal advisers to be consulted on any particularly complicated or sensitive matters or for them to take the initiative in supervising or conducting work on them.

The legal advisers have two main functions. One is to give legal advice to the FCO on all aspects of its work, including questions of English law concerning, for example, matters of employment or contracts, the Office's activities in London, and the legal aspects of international relations. Their second main function is to give legal advice to other Government Departments on matters of international law, or indeed any other matters on which, for some reason, the FCO legal advisers have particular expertise. This includes, for example, human rights law – in particular questions affecting the European Court and Commission of Human Rights in Strasbourg – and some aspects of European Community law.

The legal advisers' work falls into five main categories. First, there is what may simply be called the daily round of departmental legal problems: whether to have dealings with a revolutionary government, maritime law problems, legal aspects of the administration of the United Kingdom's remaining colonies, protection of British property rights abroad, diplomatic privileges and immunities – a whole range of day-to-day legal issues. Second, there is work related to treaties. Apart from questions of treaty interpretation and application, all treaties concluded by the United Kingdom, whatever their subject matter, must be cleared by FCO legal advisers, who will also often be closely involved in their negotiation. Third, legal advisers regularly attend conferences or negotiations at which legal issues arise. A conference to prepare a treaty – quintessentially a legal matter – will clearly come within this category, but many other international meetings also do so. Fourth, the legal advisers have responsibility for

legislation which is the concern of the FCO. Finally, they 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 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.

There are three final points to be made. First, while the FCO legal advisers are the source of legal advice to the FCO, the ultimate and authoritative source of legal advice on international law as well as English law to the British Government is the Attorney-General and his Ministerial colleagues, together known as the Law Officers of the Crown. Accordingly, on really difficult legal issues or on legal issues which are politically very sensitive the FCO legal advisers consult the Attorney-General through the Legal Secretariat which works for him. To put this in perspective, perhaps 99% of the FCO's legal work is done within the Office by the Legal Adviser and his staff, while some 1% is referred to the Law Officers. It is also worth noting that in the United Kingdom, the Attorney-General and the other Law Officers, in addition to being professionally qualified and experienced as lawyers, are Ministers in the Government and Members of Parliament rather than civil servants.

The second point concerns the FCO's use of outside legal consultants. Generally, outside consultants are not used very often or on any regular basis. But it can happen, particularly in connection with major international disputes which do, or could, lead to litigation. In such matters one should distinguish between the outside legal assistance given by counsel, and that given by academic specialists. But this distinction is not sharp: academic lawyers are often qualified as, and practice as, barristers, and particularly with major international disputes the role of consultant at the pre-litigation stage often merges with the role of counsel in the litigation. When the United Kingdom has a case before the International Court of Justice or some international arbitral tribunal, or a case of any substance before the European Court or Commission of Human Rights, the FCO would certainly rely either on one of the Law Officers or on counsel in private practice for the conduct of the case. The FCO legal advisers would undoubtedly be very heavily involved in the preparatory work, and would provide the Agent for the British Government in the case. But for the advocacy before the tribunal the FCO would normally turn to practitioners from outside the Office. Occasionally, the FCO consults leading academic lawyers to give opinions on questions of international law where its legal advisers either are not in a position to undertake the necessary research or do not have the particular expertise that an academic can offer. But this does not happen very often, and is in any case more often than not connected with actual or prospective litigation.

The final point to note is that the FCO legal advisers do not advise on foreign law. British embassies and consulates abroad usually have a local firm of lawyers to whom they can turn for their local law problems, such as traffic accidents, conveyancing of immovable property, or issues of landlord and tenant relationships. The FCO legal advisers do not claim to have any professional qualifications under, or expertise in, the laws of other States (although it may happen that they do acquire some knowledge of such laws during the course of their work). In this context, two particular factors to note are that the constitutions of most States which have attained independence after being British colonies will have been largely prepared by an FCO legal adviser, and that those independent States which are members of the Commonwealth (particularly if they remain monarchies with Queen Elizabeth II as Head of State) share with the United Kingdom certain common constitutional elements.

## II. The Conduct of Foreign Policy

Against this background we can consider the way in which legal advice is taken into account in the conduct of the United Kingdom's international relations.

One word of warning, however, beforehand. Putting into writing a description of the FCO's working practices may tend to over-emphasise the formal and procedural elements in the FCO's arrangements, and to suggest a degree of rigidity which in practice does not exist. It must be emphasised that for the most part the interplay of law and policy is the result of arrangements which are essentially informal and flexible, applied pragmatically.

A convenient starting point is to draw attention to two guiding principles which underlie the way in which the FCO absorbs legal advice. These are principles of bureaucracy rather than of law. The first is that any given subject is the responsibility of one or other of the 70-odd departments in the FCO, even if, on the face of it, the problem is legal. Thus extradition, which might seem to be primarily a legal matter, is not dealt with in the first place by the legal advisers, but by the FCO's Nationality and Treaty Department (and, outside the FCO, by the Home Office). If that Department has a legal problem – and of course in this context legal questions frequently arise – it will consult its designated legal adviser for advice. Another example is afforded by international claims. Whether or not the British Government should take up claims against another country for damage done to British nationals is, in the first instance, dealt with either by the Claims Department or the geographical Department responsible for relations with the foreign country in question depending on the circumstances. It is up to these departments to consult their designated legal advisers on legal questions which might arise.

The second main principle is that it is the Department which is responsible for the policy. To take a specific example, while the legal advisers will say whether there is a sound legal basis for presenting a claim to another State, the decision as to whether to present a claim or not is ultimately a matter for the Department concerned. It is, after all, a decision which depends not just on legal considerations, but also on political considerations. While in theory it is easy to postulate a distinction between law and policy, there is of course in practice often no clear line between them. In formulating policy, the Department will make use of the legal advice it has been given; and in giving legal advice the legal advisers will not be unaware of at least the broad lines of the Department's preferred policy.

A further factor should be noted, even though it does not fit tidily into any formal organisational or procedural pattern. The FCO legal advisers are not posted to many diplomatic missions abroad and, as a result, they spend most of their career based in London. The FCO's Departments, on the other hand, are staffed by mainstream Diplomatic Service officers who spend most of their careers at posts abroad and serve in London for a much smaller proportion of their time. In practical terms this means that the departmental legal adviser, because he is there longer, may be more familiar with certain aspects of the Department's work than the members of the Department are. In turn, this may give the legal adviser to a department a degree of influence in its work which is greater than the purely formal organisational structure would suggest. This can be very useful, but it is not necessarily always desirable, particularly if it means that legal advisers take a leading role in matters beyond their competence, or that Departments defer too much to the extra-legal views of their legal advisers.

Nevertheless, broadly speaking, it remains the case that Departments are responsible for the policy and it is their responsibility, in reaching a decision, to ensure that legal advice is taken where appropriate. When they recommend a certain course of action to the senior levels in the Office, they will, if legal issues are at all relevant, indicate that the legal advisers have been consulted and agree: it is extremely rare for a Department to put forward a recommendation against the legal advice it has been given, although sometimes a recommendation may need to be accompanied by some indication of legal caution or possible

legal risk. The essential point is that legal views will be sought, and their conclusion mentioned. The initiative, however, normally rests with the Department to decide whether, and if so when, it should obtain legal advice. There are no general guidelines. In one or two special areas, specific rules are laid down for consulting legal advisers: for example, there is an express requirement that all treaties and all questions relating to international claims must be cleared with them.

This might suggest that Departments can very easily decide not to bother to consult their legal advisers. In practice, however, this is not the case. Not only is the training and experience of people who become Heads of Departments such that they know about the need to consult legal advisers, but there are certain other factors which reinforce that knowledge. They are well aware that if they put forward a proposal on a matter where legal factors are relevant, and make no mention of the legal advice they have been given, they will almost certainly be asked whether they have consulted the legal advisers. In practice, there is no difficulty in doing so, since there is a very close working relationship between Departments and their legal advisers, who have their offices in the main FCO building where most Departments also are located. 'Consulting legal advisers' is thus often just a matter of walking down a corridor; and although there can be a relatively formal 'consultation' process, the relationship readily allows for informal consultation as well. And because most legal advisers have served at posts abroad or at least attended meetings or conferences abroad, they know what it is like to be at the receiving end of instructions. They do not live in an enclosed world giving theoretical legal advice but know what it is like to be in the front line and, therefore, the value of practical, operational legal advice.

The last of the special reinforcing factors to be mentioned is the close involvement of the legal advisers in the general work of the FCO. For example, every working day there is a meeting of the senior FCO officials available in the Office, usually between about one and two dozen people. The Legal Adviser, or in his absence a deputy, is one of these officials. These meetings quickly review what happened on the previous day, and try to assess what is likely to happen on the day itself and the following day. During the meetings any legal considerations can readily be brought up. Again, there is a continuous stream of telegraphic exchanges between the FCO and British diplomatic posts abroad, and most substantive telegrams, whatever the subject, are automatically circulated to the FCO legal advisers. Similarly, one of the first things the recipient of incoming letters or documents from members of the public, Members of Parliament, or other Government Departments will do is to arrange for copies to be sent to all the various people who might be concerned. In appropriate cases, such as when there is or may be some legal implication or legal content, this will include legal advisers. In all these cases it is possible for the legal advisers to take the initiative in drawing attention to legal considerations: and not only is this possible, but it also happens quite frequently. In these various ways there is thus a constant, regular and ready interplay between the work of the FCO as a whole and the work of the legal advisers.

In practice, where legal issues are involved, the Departments will consult their legal advisers at a commendably early stage. This will usually be when options are being formulated; almost invariably no later than the stage at which a choice between options is being made.

It has already been stressed that it is extremely rare for a recommendation to be put forward which is inconsistent with the legal advice that has been given. But what if that were to happen? Where the British Government is concerned, and certainly in my own experience, this is a hypothetical question with respect to matters of any substance or importance. However, some indications can be given as to what would be likely to happen should these circumstances arise, as they reflect certain general procedural aspects of the way in which the FCO works. First, there would be no special authorisation procedure for such a course of action. What would happen is that the Department would, in the usual way, put forward its recommendation

for the action to be taken, and when doing so would state that the legal advice was that that action would be contrary to international law. It would remain for those who are responsible for policy to decide whether to accept the recommendation or whether to reject it. Second, there is no particular level laid down at which such a decision would have to be taken. This would depend on the importance of the subject, including the significance of any unlawfulness which might be involved: in practice, however, such a decision on a matter of any importance would be taken by a Minister. Third, if a decision were taken to embark on a certain course of action notwithstanding the contrary legal advice, there would indeed be some negative internal reaction – mainly, perhaps, from the Legal Adviser, but also from others in the FCO. For it would be seen by all to be a very serious matter for the United Kingdom to act in a way which was contrary to its international obligations. However, as has already been noted, this is all hypothetical, and assumes that a decision to act unlawfully has been taken. In practice, long before matters reach that stage senior officials and Ministers would enquire whether there was not some other way, within the law, of achieving the same object. Fourth, and finally, if legal advice were given that proposed action contrary to international law, this would not in any special way be kept secret, although the general rule in the United Kingdom is that, under the Public Records Act, official papers are not open to the public for 30 years. At the end of that period the papers generally become available for public inspection in the Public Record Office.<sup>1</sup>

Before concluding, there are some rather more general comments to be made on the role of the FCO legal advisers. Their task is made a great deal easier by the British Government's committed support for the rule of law in international relations. In a statement of Government policy in Parliament in January 1988 an FCO Minister emphasised three basic elements of Government policy: one of them was 'observing and promoting respect for international law'. In practical terms this is demonstrated, for example, by the fact that from the outset the United Kingdom has accepted the compulsory jurisdiction of the International Court, both the Permanent Court of International Justice and, now, the International Court of Justice operating as part of the system of the United Nations Charter. The United Kingdom is the only Permanent Member of the Security Council to have accepted the optional clause from the start and still to do so. The United Kingdom believes that observance of the law, particularly international law, offers the best way of achieving and maintaining peaceful international relations. Thus the FCO legal adviser is clearly working in a fundamentally sympathetic atmosphere.

Nevertheless, it is the case that the British are not a nation of lawyers, and tend to be somewhat suspicious of them. This can sometimes lead people to pay too much deference to lawyers as specialists who dispense esoteric advice on complex matters which only lawyers can understand; or it can lead others to be unaware of the relevance of law. At their extremes these two attitudes can be dangerous when applied to foreign policy, because they lead, respectively, to two contrasting results. The first is to let legal advisers have too much say in policy, and to treat as gospel all that they say even if it is not strictly on matters of law. This amounts to an abdication by policy-makers of their responsibility for policy, and it imposes on legal advisers responsibilities for which they are not really equipped. The second, contrasting, situation is one in which legal advisers are not consulted as often or as soon as they should be because those who should consult them are not legally aware: lawyers are seen as either irrelevant to the formulation of policy, or at best as the people to consult when a problem has already arisen. These are, of course, two extremes, and neither reflects actual practice, but the

<sup>1</sup> A good example is afforded by the papers which relate to the Suez incident in 1956. Under the 30-year rule, these have only recently been made public, and Dr. Marston, of Cambridge University, has researched into these papers, to see what they show of the Foreign Office's use of legal advice in this specific context. See Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', 37 *ICLQ* (1988) 773-817.

dangers are there. Fortunately, in the United Kingdom, people are growing more legally aware, not just in the FCO but as a more general social trend. And certainly within the FCO there is an awareness that to act in accordance with international law is good not only from a legal point of view but also in terms of policy. States almost invariably see advantages in presenting their actions as being in accordance with international law – even States which are doing opposing things. This shows that States do regard observance of the law as the right policy, although they may differ as to what the law is.

### **III. Conclusion**

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.

When policy is being formulated, it is very important that departments should take legal advice and give it due weight. In this context, the legal adviser needs to take a somewhat objective view, and, in the light of his knowledge and experience of international law, advise on the legal strengths and weaknesses of various possible courses of action. He will do a disservice to his policy-makers if he gives the impression that there are no international legal problems, when in fact there are some – just as he will if, at the other extreme, he advises on the basis of the most cautious and restricted view of what is permissible under international law. He needs to weigh the merits of proposed courses of action in terms of international law as objectively understood, and, in the light of the legal risks as he knows them, advise on which course of action would be most readily defensible, or, if there is room for flexibility, how best to adapt the proposals to secure their conformity with the law.

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.

In this context, it is relevant to note certain characteristics of international law. In large part it is customary law; and even when it is treaty law, treaties are quite often in general terms or refer back, expressly or implicitly, to customary international law. Second, there is for the most part no compulsory judicial settlement. One of the important consequences of these two factors is that international law is capable of development so as to keep abreast of the realities of international life. This is not always the case in national law, where a well-developed and sophisticated legal system may sometimes be too formal and complex to respond readily to changes in society. But international law lacks the formal structures of national legal systems – or if it has them, does so to a lesser extent – and is as a result less likely to be static. Since there is no legislature it changes essentially through State practice, which means what Foreign Ministries do and what Foreign Ministry legal advisers advise their Ministries it is lawful for them to do. Thus, States can, and do, break new ground and so contribute to the creation of new law. Accordingly, a legal adviser may have to take part in this process and may certainly, in appropriate circumstances, advise that it will be lawful to do something which has never been done before, or which would involve the development in a new direction of an existing rule of international law.

But here the inherent flexibility of an essentially customary system of law has its dangers as well as scope for constructive development. Because large areas of international law are still customary law, it is often difficult to point to a clear and precise rule applicable to a given

situation, or prohibiting (or permitting) a particular course of action. In the absence of any general compulsory judicial settlement, the temptation, and sometimes the pressure, to attribute to international law a degree of elasticity which enables almost anything to be condoned (or condemned if that is what is wanted) may be great. Such temptations and pressures must be resisted: the legal adviser should at all times give advice with a proper sense of professional responsibility and integrity. In the longer term, an irresponsible attitude to international law on the part of a State would weaken both the role of law as a factor for stability in international relations and the international reputation and standing of that State.

The nature of the international legal process, coupled with the nature of the work of Foreign Ministries, imposes on their legal advisers a distinctive and difficult role. It is one in which they find themselves part objective assessor of the prevailing state of international law, part constructive interpreter of it, part guide as to the proper paths for its future development, part bridge-builder between the politically desirable and the legally defensible, and part advocate of their Ministries' causes. The one common thread holding together these potentially divergent parts of their role must be a profound sense of professional responsibility and integrity.