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Assistant Legal Adviser, U.S. Department of State. This is a revised version of an Edward Ball Chair Distinguished Lecture presented by the author at the Florida State University College of Law in March 1996. The views and opinions expressed herein are those of the author and are not necessarily the views of the U.S. Department of State.

Address

PRACTICING INTERNATIONAL LAW FOR THE UNITED STATES

JOHN R. CROOK*

I am honored to have been invited to the Florida State University College of Law to give this year's first talk in the series of Ball Chair lectures. Professor Lillich asked that I take as my topic the practice of international law as a government attorney in the Office of the Legal Adviser in the U.S. Department of State.

I am happy to do so. The Office makes important contributions to the observance and growth of international law. I also believe that the work of the Office reveals much about the nature, strengths, and limitations of international law.

The Office, known within the Department by the bureaucratic moniker "L," is the in-house general counsel of the Department. The Office's work is summed up in its recruiting brochure:

> The Office of the Legal Adviser furnishes legal advice on all problems, domestic and international, that arise in the course of the Department's work. This advice includes assisting Department principals and policy officers in formulating and implementing the foreign policies of the United States and promoting the development of international law and its institutions as a fundamental element of those policies.
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> Attorneys in the Office . . . contribute to the development and conduct of U.S. foreign policy and . . . work directly with high-level U.S. and foreign officials, the Congress, and White House staff, as well as . . . travel overseas. Typically, attorneys draft, negotiate, and interpret international agreements, domestic statutes, federal regulations, executive orders, and other legal documents and provide guidance on questions of international and domestic law. They represent or assist in representing the United States in meetings of international organizations and conferences . . . .
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> Attorneys . . . participate in international negotiations involving . . . [many types of agreements] . . . . In addition, the Office represents the United States before international tribunals such as

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the International Court of Justice and the Iran-U.S. Claims Tribunal, as well as in international arbitrations.[1]

As in most government departments, a good number of Office attorneys oversee legal aspects of the Department's daily administration, including personnel, procurement, finances, and compliance with ethics laws. Such work is often fast-paced and challenging, and it is vital to the Department's effective functioning. Sometimes, as with projects involving the acquisition and operation of foreign buildings, this work has a distinctively international flavor, often involving interesting or even exotic factual situations. Nevertheless, for the most part, it does not involve public international law.

Instead, today I will focus on work carried on by the Office that is more directed to the analysis and application of public international law to foreign relations issues. In these settings, Office attorneys play several roles, including those of counselors, drafters, negotiators, and advocates in international dispute settlement proceedings.

In performing these tasks, Office attorneys rarely are asked to render disinterested opinions on abstract questions of international law. Instead, their role is the role of practical lawyers advising clients. The milieu of such practice was well described by Sir Gerald Fitzmaurice, who was Chief Legal Adviser of the Foreign and Commonwealth Office in London before his election to the International Court of Justice. Sir Gerald posed and answered the question—"What do governments want from their foreign ministry legal advisers?"—as follows:

> They do not, properly speaking, want "impartial" advice, any more than private citizens or industrial concerns are looking for impartiality in their family or corporation lawyers. 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 . . . . [This attitude] represents no more than what every man looks for in his lawyer and, not finding it, goes elsewhere.[2]

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1. U.S. DEP'T OF STATE, PRACTICING LAW FOR THE OFFICE OF THE LEGAL ADVISER 1 (1991).

2. Gerald Fitzmaurice, *Legal Advisers and Foreign Affairs*, 59 AM. J. INT'L L. 72, 73 (1965) (reviewing LEGAL ADVISERS AND FOREIGN AFFAIRS (H.C.L. Merillat ed., 1964)) (footnote omitted).

There is a school of thought that might not fully agree with Sir Gerald. Some contend that, in providing legal advice in the area of international law, government legal advisers have a special or higher professional responsibility because their advice is not normally tested in courts of law or by other outside checks.[3] I will not try to tackle all of the professional and constitutional complexities of this debate here. I will limit myself to the brief observation that international law rules are often far from clear. Accordingly, I at least—and I trust that my colleagues as well—recognize the need for caution and deliberation before asserting that something is or is not a rule of international law.

There are aspects of practicing in the Office that reveal a good deal about the nature of international law and of the international legal process. Some of these were identified over thirty years ago in an excellent article on the Office by Professor Richard Bilder.[4] Although details have changed with the passage of time, most of Professor Bilder's analysis remains right on target.

The first point is that an Office attorney cannot do his or her work without being reinforced in the belief of the existence and importance of international law. As Professor Bilder stated:

> [A]n attorney cannot practice in the 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 role that international law actually performs in regulating the conduct of nations and in making the international community work.[5]

It is true. The Office's work demonstrates the incredible range of private and public conduct that is regulated by mutually beneficial rules of international law willingly accepted and willingly observed.

By way of example, I scanned the copy of this morning's *USA Today* left at my hotel room door. There were powerful illustrations of the roles and significance of international law today. The first page reported negotiations between Germany and the United States to develop an "open skies" civil aviation agreement.[6] The parties to this negotiation seek to develop an aviation relationship that may spur competition, improve service, and reduce cost to consumers,

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3. *See* John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992) (reviewing CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991)).

4. *See* Richard Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 639-42 (1962).

5. *Id.* at 679 (footnote omitted).

6. *See* Donna Rosato, *USA Seeks 'Open Skies' to Germany*, USA TODAY, Feb. 19, 1996, at 1A.

using for this purpose the mechanism of an international agreement binding under the international law of treaties.[7] Another first-page article reported on a tragic terrorist bomb blast in London.[8] This reminds us of the web of international treaties and agreements aimed at combating terrorism and at facilitating cooperation among law enforcement authorities. Another noteworthy article reported on the latest high-level meeting aimed at reinforcing compliance with the Bosnian peace accords.[9] Cooperation with the International War Crimes Tribunal in the Hague was a key part of the discussions.[10]

Another page reported an earthquake in Indonesia,[11] a situation that may call for international assistance through the network of international institutions for providing humanitarian assistance. This event also reminds us of the web of international legal rules and practices aimed at relieving and protecting those displaced by natural and man-made disasters. The newspaper also included a story on the next launching of the Shuttle Columbia.[12] The shuttle will attempt to deploy and retrieve an Italian satellite,[13] probably involving an agreement between NASA and the Italian authorities. The shuttle will fly and perform its mission in outer space, the use of which is governed by international agreements.

It is important to remind ourselves of these important roles that international law plays in promoting and protecting our national interests. The point is by no means universally agreed upon. No lesser persons than the former U.S. Permanent Representative to the United Nations and her legal counsel have questioned whether some contemporary developments in international law reflect the core interests of the United States.[14]

Related to the belief that international law exists is the recognition that, 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. Advocacy of the client's interests thus demands more rigor and analysis than may

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7. *See id.*

8. *See* Jack Kelley, *Blast Shreds London Bus*, USA TODAY, Feb. 19, 1996, at 1A.

9. *See* Jack Kelley, *Leaders Avert Threat to Bosnia Pact*, USA TODAY, Feb. 19, 1996, at 1A.

10. *See id.*

11. *See A Powerful Earthquake*, USA TODAY, Feb. 19, 1996, at 4A.

12. *See Shuttle Countdown*, USA TODAY, Feb. 19, 1996, at 3A.

13. *See id.*

14. *See* Allan Gerson, THE KIRKPATRICK MISSION: DIPLOMACY WITHOUT APOLOGY, AMERICA AT THE UNITED NATIONS, 1981-1985, at 246-54, 274-75 (1991).

be required in many forms of private practice. A couple of examples may illustrate the point.

One, I am working on preparations for an argument that will take place in the International Court of Justice in a few months. The other side has invoked and quoted arguments made by the United States before the court years ago in another case. I think the arguments we made were right, and I am not particularly troubled to have them invoked against us now. However, I am glad that my predecessors thought the thing through and got it right.

Two, our long-term interests also mean that we must generally forswear arguments about the effects of changes, even very great changes, of circumstances on treaties, even where we might be able to make a plausible international law argument for change or modification to a particular treaty. Our longer-term interests as a nation lie in the integrity and stability of treaty regimes in times of change and turmoil.

The pressure to respond to events and to find solutions to the unique problems that confront a superpower inevitably leads to a view of international law as a tool.

> The task of finding ways to work out international disputes tends also to develop in the Office attorney what might be called a pragmatic or functional approach to international law—a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order.[15]

This has led to the Office's important role in recent years in creating new international institutions, which I see as probably our greatest contribution to international law of the last fifteen years. Office attorneys have played major roles in the creation and successful operation of several important new institutions, including the following: (i) the Iran-U.S. Claims Tribunal, which has been described by Professor Lillich as "the most significant arbitral body in history";[16] (ii) the United Nations Compensation Commission, the body set up by the United Nations to address claims for damages resulting from Iraq's invasion of Kuwait;[17] and (iii) the international

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15. Bilder, *supra* note 4, at 680.

16. Richard B. Lillich, *Preface* to THE IRAN—UNITED STATES CLAIMS TRIBUNAL, 1981-1983 [Seventh Sokol Colloquium] at vii (Richard B. Lillich ed., 1984). For an extensive bibliography on the Tribunal, see MATTI PELLONPÄÄ & DAVID D. CARON, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN LIGHT OF PRACTICE OF THE IRAN—UNITED STATES CLAIMS TRIBUNAL 548-57 (1995).

17. *See generally*, THE UNITED NATIONS COMPENSATION COMMISSION [Thirteenth Sokol Colloquium] (Richard B. Lillich ed., 1995); *see also* John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993).

criminal tribunals created by the Security Council to address genocide and other violations in Rwanda and the former Yugoslavia.[18]

Such institutions have been designed to serve practical ends—to do justice or to provide compensation for individuals injured by great events that are beyond the control of these individuals. Further, such institutions become powerful machines for applying and strengthening existing legal norms, and even for generating new norms.[19]

I must close with a cautionary note. Work in the Office reinforces faith in international law, but it is also a harsh teacher of international law's limits. International law tends not to work very well where it does not reflect, to some degree, values shared by the parties whose conduct is affected by an asserted rule. That is why humanitarian law is not working effectively in many internal conflicts today. Too often, the participants do not accept its key principles—for example, that one should not deliberately make war on civilians. In the same way, human rights law is rarely an effective limit on the conduct of ruthless states that are ready to torture and "disappear" any potential opponents. Human rights law works more effectively where regimes, or significant groups within a country, recognize the power and authority of the rules of this law and seek to bring state conduct into conformity with these rules. We need to be mindful of these limits, for it may be that to try to apply the rule of international law to a situation and to have it fail, may do more damage than not to have made the attempt. Yet, in many other cases, international law offers a strong and effective tool to help shape and implement our nation's foreign policy. In the process, I hope that I and my colleagues in the Office of the Legal Adviser will continue to play a significant and constructive role.

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18. *See generally* Richard J. Goldstone, J., *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT'L L. 5 (1995).

19. The effect of creating new tribunals on international law is not always seen as positive because of the perceived risk that new tribunals may lead to fragmentation of the law. Such concerns do not seem warranted as to the tribunals mentioned here. *See* John R. Crook, *The Iran-U.S. Claims Tribunal and the United Nations Compensation Commission: New Machinery for Resolving Claims, in* IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 28 (ASIL BULL., Nov. 1995).