

COOPERATION AMONG LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

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I. Introduction

On the occasion of the fortieth anniversary of the Asian-African Legal Consultative Committee (AALCC), I have been asked to contribute an article relating to the meetings of legal advisers which have been held in connection with the work of the Sixth (Legal) Committee of the United Nations General Assembly since 1990, and of which I was one of the initiators.¹ Although in my present capacity I have no other function in relation to these meetings than to make certain that the necessary practical arrangements are made, I accepted the invitation and agreed to offer also some reflections on the role the legal adviser based on my personal experiences as legal adviser in my own country.

It should be emphasized that the role of the legal adviser is multifaceted and that there may be different opinions on how to serve in this capacity in the most competent and efficient manner. Needless to say, my years in the judiciary and the Ministry of Justice before I joined the Ministry of Foreign Affairs in 1984 have also influenced my thoughts as well as the fact that my experience is rooted in a particular legal system. I am, however, convinced that the differences between legal systems are often exaggerated, especially if you focus on one of the core elements of what is commonly referred to as the rule of law: "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".² The common

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¹ The invitation to the first meeting in 1990 was signed by Hans Corell (Sweden), Edward G. Lee (Canada), Janusz Mickiewicz (Poland), Prakash Shah (India) and Alberto Székely (Mexico). In Canada the initiative has been taken over by Barry Mawhinney and later by Philippe Kirsch, in India by P. S. Rao, in Mexico by Miguel Ángel González Félix, in Poland by Janusz Stanczyk and in Sweden by Lars Magnuson.

² Article 1, paragraph 3, of the Charter of the United Nations.

denominators of the different legal systems should therefore be emphasized rather than the differences, in particular in the instances where those denominators can be identified in international law.

It should also be noted at the outset that the term "legal adviser" in this context has the same meaning as was indicated in the invitation to the meetings, namely, "the person who is responsible for international legal matters within the Ministry of Foreign Affairs and for formulating instructions to the representatives of his or her country in the Sixth Committee of the General Assembly or for supervising this activity".

II. The Legal Advisers' Meetings

The first meeting of legal advisers in connection with the work of the Sixth Committee of the United Nations General Assembly was held on 29 and 30 October 1990. The initiative sprung from a common concern among certain colleagues that the working methods of the Sixth Committee in dealing with the report of the International Law Commission (ILC) were not appropriate. The question was how to improve these working methods in such a way that the Committee could assume its proper role: to provide clear policy guidance to the ILC and not, as was often the case, to discuss draft articles piecemeal. It was also felt that the legal advisers of the Ministries of Foreign Affairs around the world should have many interests in common and that meetings among them could be fruitful. It was noted at the time that such meetings often took place at the regional level (Council of Europe, North Atlantic Treaty Organization (NATO), European Union and AALCC).

The initiative to convene the first meeting was taken by the legal advisers of the Ministries of Foreign Affairs of Canada, India, Mexico, Poland and Sweden, and it was organized with the assistance of the then Legal Counsel of the United Nations, Under-Secretary-General Carl August Fleischhauer. Subsequently, eight additional meetings have been held in the period from 1991 to 1998. The tenth meeting is planned for November 1999. Short reports of the meetings have been circulated among colleagues, and also appear in an abbreviated form in international legal journals.³

³ See, for example, H. Corell, "Legal Advisers Meet at U.N. Headquarters in New York", *American Journal of International Law*, vol. 85, No. 2 (1991), pp. 371-373; Hans Corell, "Second Legal Advisers' Meeting at U.N. Headquarters in New York",

The meetings have been well attended. As many as 40 to 50 legal advisers or their deputies have been present, in addition to many lawyers from the permanent missions in New York. The meetings have been held in conference room 5 which has been filled to the last seat, at least during the first afternoon (see below).

Many topics have been discussed. During the first meetings, the focus was on the role of the legal adviser. Other topics discussed were: the future work of the ILC; legal aspects of the increased role of the Security Council in matters of peace and security; other areas of international law and practice, such as international environmental law and international humanitarian law; the draft statute for the international criminal court proposed by the ILC; Security Council resolutions on sanctions; and the desirability of the proposed third Hague Peace Conference in 1999.

Particular focus was given to the role of legal advisers in relation to the Sixth Committee and the ILC. It was agreed that the meetings of the legal advisers should certainly not compete with the debate in the Sixth Committee. On the contrary, it was agreed that the legal advisers form part of that Committee as and when they participate in their national delegations to the Committee. It was considered important that the meetings of the legal advisers remain informal with no fixed agenda and that decisions on what matters should be discussed are made at the beginning of each meeting. No delegation is excluded from the meetings which are announced in the *Journal of the United Nations* under the title: "Informal Consultations on Legal Matters pending before the ... session of the General Assembly". It was also considered important that the dates of the legal advisers' meetings always coincide with the target date fixed for the beginning of the debate on the report of the ILC, which date appears in one of the last paragraphs of the General Assembly resolution on this agenda item.

Nordic Journal of International Law, vol. 61 (1992), pp. 3-6; H. Corell, "Third Legal Advisers' Meeting at U.N. Headquarters in New York", *American Journal of International Law*, vol. 87, No. 2 (1993), pp. 323-328; M. A. González Félix, "Fifth Legal Advisers' Meeting at U.N. Headquarters in New York", *American Journal of International Law*, vol. 89, No. 3 (1995), pp. 644-649; B. Mawhinney and K. Girtel, "Fourth Legal Advisers' Meeting at U.N. Headquarters in New York", *American Journal of International Law*, vol. 88, No. 2 (1994), pp. 379-382; and P.S. Rao, "Sixth Meeting of Legal Advisers of the U.N. Member States", *Indian Journal of International Law*, vol. 36, No. 4 (1996), p. 75.

The legal advisers' meeting normally takes place in the afternoons of the first and second days of that debate.

In some cases the discussion has led to a recommendation that an initiative should be taken. For example, it has been suggested that the growing powers of the Security Council, translated into resolutions with national legislative implications, have created more legal and administrative work for legal advisers. It has been further suggested that it would be very useful to produce a comparative compilation of national measures relating to the implementation of Security Council resolutions. It remains to be seen whether such a compilation will be made. Of particular concern in this context is the fact that many Governments have not yet taken the necessary legislative action to implement the resolutions establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda.

The overall impression of the meetings is that they have been successful. It is recognized that there is a value per se of meeting with colleagues with similar responsibilities. Furthermore, legal advisers often work in a certain solitude and might feel the need to share common concerns with someone in a similar position. The meetings also provide opportunities for legal advisers to resolve bilateral issues.

In this context, I should like to concentrate on one particular topic which was discussed during the first three meetings: the role of the legal adviser.

III. The Discussions on the Role of the Legal Adviser Held in 1990-1992

The first three meetings, and in particular the second and third meetings, of the legal advisers in 1990-1992, were devoted to a discussion on the role of the legal adviser. This topic had been discussed in other fora earlier and there were also those who had contributed writings on the topic.⁴ In this context, it is of particular

⁴ See, for example, R. B. Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs", *American Journal of International Law*, vol. 56, (1962), pp. 633-684; R. B. Bilder, "International Law and United States Foreign Policy: Some Reflections on the ASIL/ILA Report on the Role of the Legal Adviser", *Transnational Law & Contemporary Problems*, vol. 1, (1991), pp. 201-208; G. Guillaume, "Droit international et action diplomatique -- le cas de la France", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 136-147; R. St. J. MacDonald, "The Role of the Legal Adviser of Ministries of Foreign Affairs", *Collected Courses of*

interest to note that the AALCC made an analytical study of the topic for discussion in 1973. The discussion took place on two occasions, the latest being in 1978.⁵ There is now an established practice for legal advisers of members of the AALCC to meet in New York during the General Assembly.

Between the second and third meetings, a questionnaire was circulated and the discussion centred on some of the replies to that questionnaire. During the discussion, it was noted that legal advisers could assume an "active" or "passive" role. Those who participated in the debate agreed that a legal adviser must play an active role and should be involved in a matter as early as possible, which means that the legal adviser should be present when important political issues are discussed within the Ministry of Foreign Affairs or in higher level fora. In this way, he or she is in a better position to assess whether there are any legal problems that need attention. The interaction with policy makers was stressed. It was also noted that the legal adviser could be seen as a law maker in the instances in which he or she formulated advice where the law was unclear and there was little precedent. It was said that the legal adviser's function is also part of the policy-formulation process. Therefore, it is necessary that the legal adviser participates actively and continuously in this process. The right of direct

the Hague Academy of International Law, 1977-III (Alphen aan den Rijn, Sijthoff & Nordhoff, 1980) vol. 156, pp. 377-482; H.C.L. Merillat, ed., *Legal Advisers and Foreign Affairs*, (Dobbs Ferry, New York, Oceana Publications, 1964); H.C.L. Merillat, ed., *Legal Advisers and International Organizations*, Dobbs Ferry, New York, Oceana Publications, 1966); M. Krafft, "L'attitude de la Suisse à l'égard du droit international", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 148-156; M. Sapiro, "Advising the United States Government on International Law", *New York University Journal of International Law and Politics*, vol. 27, No. 3 (1995), pp. 619-623; S. M. Schwebel, "Remarks on the Role of the Legal Advisor of the US State Department", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 132-135; Sir I. Sinclair, "The Practice of International Law: The Foreign and Commonwealth Office", *International Law: Teaching and Practice*, Bin Cheng, ed. (London, Stevens & Sons, 1982), pp. 123-134; A. D. Watts, "International Law and International Relations: United Kingdom Practice", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 157-164; E. D. Williamson, "International Law and the Role of the Legal Adviser in the Persian Gulf Crisis", *New York University Journal of International Law and Politics*, vol. 23, No. 2 (1991), pp. 361-371; S. Yachi, "The Role of the Treaties Bureau of the Ministry of Foreign Affairs in Japan's Foreign Policy Decision-Making Process", *The Japanese Annual of International Law*, No. 31 (1988), pp. 82-93; and "The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee established by the American Society of International Law and the American Branch of the International Law Association", *American Journal of International Law*, vol. 85, No. 2 (1991), pp. 358-373.

⁵ Role of the Legal Adviser, Annual Sessions of the Asian-African Legal Consultative Committee, Doha-Qatar. (AALCC Secretariat-New Delhi, 1978).

access to the Minister of Foreign Affairs was stressed by many, both during the discussions and in the answers to the questionnaire. Almost all legal advisers who participated in the discussions and replied to the questionnaire appeared to have such direct access. Because of the sensitivity of the role of the legal adviser, the issue of the personalities of the Minister and the legal adviser was also mentioned. The legal adviser must have the confidence of the Minister and also the opportunity of working closely with the Minister and other senior functionaries of the Ministry of Foreign Affairs and the Government at large.

One conclusion drawn from the discussion (which was not always evident from the answers to the questionnaire) was that it is necessary to maintain an institution, with sufficient personnel and other support, within the Ministry of Foreign Affairs charged with the functions of a Legal Department. The functions of such a department were described as monitoring international meetings, performing work related to the codification and progressive development of international law, providing legal advice and advocacy, engaging in treaty negotiation and administration, and organizing the settlement of international disputes.

Other matters discussed in relation to the role of the legal adviser included their role in relation to the United Nations Decade of International Law; enhancing the role of the legal adviser; supporting new regional cooperation; providing technical assistance to colleagues in new States and in some developing countries; initiating or encouraging development aid to fund university courses for legal officers from developing countries; and exchanging legal officers between legal departments.

Many examples were given of regional cooperation among legal advisers. Participants from areas where such regional cooperation did not occur expressed interest in organizing or participating in such cooperation.

Of particular importance was the fact that many colleagues from developing countries and newly independent States had the opportunity to share their experiences with the other participants. These colleagues made it clear that they often worked under great difficulties: no proper legal office, too small a staff, unexpected events upsetting work schedules, insufficient library facilities, etc. In this context it was

mentioned that a "pocket library" for legal advisers was being contemplated (see the "Basic Library" below).

During the 1992 meeting, the future meetings of legal advisers were discussed. It was pointed out by the initiators that there were two prerequisites for such meetings to be successful. First, the meetings should be informal and the participants should primarily be the legal advisers from capitals. Secondly, the underlying motive for these meetings should be not only to provide a forum where legal advisers can meet and exchange views, but also an incentive for legal advisers to come to New York to participate in the debate of the Sixth Committee.

IV. Reflections on the Role of the Legal Adviser

As was shown in the previous section, the role of the legal adviser on public international law has been the subject of an interesting discussion for some time. Comprehensive studies have been made, and some colleagues have contributed ideas on the topic based on their own experience. In this connection, I wish to share with you some thoughts which have come to my mind, partly as a result of the many interesting discussions which I have had with colleagues from all around the world.

At the outset, it is important to note that the tasks of the legal advisers of Ministries of Foreign Affairs differ from State to State. In many instances, the legal adviser is precisely that -- an adviser. In other cases, he or she is also the head of the Legal Department or similar entity within the Ministry. In this latter capacity, the legal adviser also performs an executive/administrative function similar to the one performed by other high-level officers in the Government. He or she has to apply regulations and rules and make a number of decisions, often final decisions, but perhaps subject to judicial appeal. The tasks may also include the preparation of decisions to be taken at a higher level, in particular at the Cabinet level. The legal adviser's role as head of department naturally differs depending on the legal system of the country in question, but basically the function is very much the same.

If a legal adviser is entrusted with the function just mentioned, he or she is also automatically charged with the administrative duties which fall upon every head of department. In short, the legal adviser is also a "manager", even if many colleagues might not like to identify themselves as such. The workload, of course, depends on the size of the office or department in question. Experience shows that the administrative functions, in which I also include the planning and

monitoring of the work of the office or department, may be quite substantial, which might detract from the legal adviser's ability to engage in detail in the substantive work of the department. However, "management" has become an integral part of the responsibilities of any higher official, and today a person to be appointed head of department in any major organization -- public or private -- must certainly demonstrate ability in this field.

Another feature of the role of the legal adviser relates to representing his or her country before national or international bodies. In this capacity the adviser is, just like any representative, subject to the directions which he or she may be given by the Government. Of particular interest here is the role which the legal adviser may play before institutions, such as the International Court of Justice, other international courts and the control mechanisms established by certain international conventions, such as the committees provided for in the International Covenant on Civil and Political Rights of 1966,⁶ the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.⁷ In many instances, the legal adviser is appointed as the head of the delegation to the Sixth Committee of the United Nations General Assembly, or to an international diplomatic conference or an entity established within an international organization or other arrangement.⁸ Also here, the legal adviser is acting upon instructions from his or her Government and is requested to report to the Minister or some other superior within the Ministry, although it can be assumed that the adviser may be authorized to act rather independently, in particular in the legal-technical field.

The functions indicated above are similar to functions which can be assigned to other government officials. The adviser acts in such capacity independently or under instructions from the Government. Certainly, the adviser's background and experience, as well as the legal tradition on of the country in question will determine to what extent his

⁶ United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407.

⁷ United Nations, *Treaty Series*, vol. 660, p. 195.

⁸ In this context, it is interesting to note that the Conference on Security and Cooperation in Europe set up the 1975 Helsinki Final Act. *European Yearbook, 1975*, (The Hague, Martinus Nijhoff, 1977), vol. XXIII, p. 211. In spite of the fact that the name of the conference has been changed to the Organization for Security and Cooperation in Europe (OSCE), the Organization is still a political process rather than a legal entity under international law. The OSCE is considered to be a "regional arrangement" under Chapter VIII of the Charter of the United Nations and has engaged in substantial legal work, including the elaboration of the European Convention on Peaceful Settlement of Disputes, United Nations, *Treaty Series*, vol. 320, p. 243.

or her services will be used for such tasks. In many cases, all these tasks will be common to legal advisers, but not in all cases.

Common to all colleagues is the role of the legal adviser as counsel. This function was also the focus of our discussions during the first meetings of legal advisers in New York. Of particular interest was the discussion on how the legal adviser to the Ministry of Foreign Affairs should be able to fulfil his or her function. The most important conclusions that I draw from that discussion are that the adviser should:

- Be present when important political issues are discussed within the Ministry;
- Be asked at an appropriate time to give advice and be able to give timely and constructive advice;
- Play an active role and take initiatives as necessary;
- Focus on significant issues;
- Have direct access to and the confidence of the Minister for Foreign Affairs and be given the opportunity to work closely with the Minister and other senior officials of the Ministry and the Government.

One particular aspect which became clear during the meetings of legal advisers is that many colleagues in developing countries do not have access to a sufficiently modern library to support them in their work. This led to an initiative which is presently being pursued by the International Law Association (ILA) with financial support from one of the Member States of the United Nations: a "Basic Library" for legal advisers. A Selection Committee within the ILA⁹ has drawn up a list of books which will be used as the basis for the purchase of a small standard library (in English and French) to be distributed free of charge to colleagues most in need of such support. The list has been approved in principle by the Executive Council of the ILA and negotiations are under way with publishers to obtain multiple copies for distribution at a reasonable discount.¹⁰ Once the list has been finalized it will be given

⁹ The Selection Committee consisted of Judges Ranjeva and Shahabuddeen of the International Court of Justice, Professor Catherine Kessedjian (French Branch), Professor Peter Malanczuk (Dutch Branch) and Professor Georg Ress (German Branch), with the Director of Studies, Professor James Crawford, as Convenor.

¹⁰ Correspondence about the Basic Library project should be addressed to

broad publicity, including those on the legal advisers list (see below). Colleagues who are not eligible for a Basic Library might nonetheless find the list of literature useful. The Legal Department of the International Committee of the Red Cross will donate a set of books on the Geneva Conventions and related subjects to the same recipients.¹¹

An important aspect of the role of the legal adviser is his or her duty to follow attentively the development of public international law. This development takes place in many forums and it is not always easy to get a full picture of the state of affairs in a particular field, and to some extent there are overlaps. A special problem emerges from the fact that there are many organizations that are active at the international level and that Governments are represented in these organizations by officials from different ministries or branches of the Government. This may be due to the fact that substantive responsibility for the subject matter in question may rest with a ministry other than the Ministry of Foreign Affairs. As a matter of fact, in many, perhaps most countries, the substantive responsibility for matters subject to international negotiations and treaty making rests not with the Ministry of Foreign Affairs, but with another branch of the Government (although, often officials from the Ministry of Foreign Affairs participate in the work at the international level because of their international experience). This means that there is a great need for coordination between different ministries or other entities in order to achieve a coherent policy -- to speak with one voice at the international level. In this context, the legal adviser of the Ministry of Foreign Affairs could play a coordinating role by bringing important aspects of a common character to the attention of colleagues or other appropriate interlocutors in other ministries.

Of particular interest is the clear link between the work of the Sixth Committee of the United Nations General Assembly -- mostly followed by representatives from Ministries of Foreign Affairs -- and the substantive responsibility of other ministries at the national level, in particular Ministries of Justice. This has led to the trend that delegations of Member States to the Sixth Committee and its subcommittees may also include representatives from other ministries. But this is a "luxury" that not all Member States can afford. In these instances, it is all the more important that the legal adviser of the Ministry of Foreign Affairs keeps his or her counterparts in other ministries abreast of

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¹¹ *American Journal of International Law*, vol. 87, No. 2 (1993), p. 325.

developments. The adoption of an international instrument may ultimately lead to incorporation or transformation at the national level and it may be a body other than the Ministry of Foreign Affairs that must prepare the necessary proposals for the national diet for the purpose of ratification or accession. In my view, the legal adviser of the Ministry of Foreign Affairs can act as an important link between the work at the international level and the work within the different branches of the Government at the national level.

A related issue concerns the monitoring of already existing obligations under international law. Let me take human rights as an example. By now, an extensive body of international law exists in this field, which is based on the Universal Declaration of Human Rights¹² and the International Covenant on Civil and Political Rights. Corresponding obligations also flow from instruments elaborated at the regional level.¹³ These instruments are widely accepted, which means that the States Members of the United Nations are, more often than not, bound by international obligations in this field. A common feature of these instruments is that they are dynamic in the sense that they have to be applied in the light of recent developments, in particular emerging features in the relations between peoples and their Governments, technical developments, etc. Another common feature is that the application of these instruments is monitored by bodies – courts, commissions or committees – established by the instruments themselves. This has resulted in the development of a growing case law which serves as a complementary factor in the interpretation of the instruments.

As a consequence, legislative work at the national level has become increasingly complex. Not only is it necessary for the national legislator to ascertain that the legislation contemplated is within the bounds established by the national constitution, it is also necessary to confirm that it is in conformity with international obligations flowing from treaties and the case law of the bodies established to monitor them. In this intersection of national and international law, the legal adviser of the Ministry of Foreign Affairs can play an important role, *inter alia*, by assisting in the preparation of the draft national legislation or in reviewing such drafts or, as the case may be, drawing attention to

¹² General Assembly resolution 217A (III).

¹³ See, for example, the European Convention on Human Rights (1950), United Nations, *Treaty Series*, vol. 213, p. 222; the American Convention on Human Rights (1969), United Nations, *Treaty Series*, vol. 1144, p. 123; the African Charter on Human and Peoples Rights (1981), OAU Doc. CAB/LEG/67/3/Rev. 5.

particular international commitments which may limit the freedom of action of the national legislator. It is true that such assistance can sometimes be seen by others as "causing legal complications". But if States take their international commitments seriously, they should avoid getting into situations where discrepancies are discovered at a later stage and where the damage may already have occurred.

The same observation could, of course, be made with respect to other fields of international law. However, in cases other than those involving human rights, knowledge concerning international obligations is probably better in the substantive ministries. The field of human rights, with its clear links to constitutional law, is different and requires more of an overview and general understanding of how national and international law interact. The legal adviser of the Ministry of Foreign Affairs has an important role to play here.

In this context, it should also be mentioned that many international conventions in the field of human rights require that States parties submit periodic reports for review by a committee established by the convention in question. The preparation of such reports is often a major undertaking, involving many ministries or branches of the Government. Also here, the legal adviser of the Ministry of Foreign Affairs should play an important role as adviser and coordinator. Experience shows that it may not always be easy to extract the necessary contributions from those involved, who may have other priorities in their busy schedules. The legal adviser should impress upon those participating the importance of timely reporting, and he or she could also appear before the committee to explain details of the report and respond to questions. It should be noted that the comments by the committee may also entail additional work at the national level, including the preparation of new legislation.

One feature of the role of the legal adviser of the Ministry of Foreign Affairs which was briefly touched upon in the discussions is the question whether he or she should be "active" or "passive". In my view, the adviser should be active, take initiatives and alert the Minister of Foreign Affairs to matters which may create problems if they are not attended to properly and in a timely manner. However, this is a delicate matter, in particular since advice may entail drawing attention to international commitments which in one way or another may limit the Government's or the Minister's freedom of action; and, by definition, Heads of Government and Ministers do not favour being advised that they cannot do as they please in a particular situation.

Therefore, this element of the function of the legal adviser requires special experience and tact. This is also why, in the discussions among the legal advisers in October 1992, the view was expressed that the legal adviser must have the confidence of the Minister of Foreign Affairs and that he or she must also have direct access to the Minister. An adviser who lacks both of these elements or even one of them will have great difficulties in performing his or her functions properly. The adviser should also have the ability of making his or her point in no uncertain terms. A Government or a Minister is ill served by an adviser who acts meekly or expresses opportunistic views. But at the same time, the adviser must never forget that he or she is precisely an adviser. The decision always rests – and should always rest – with the Government and/or the Minister. When that decision is taken, it must be fully respected and loyally executed. I disregard here a situation which hopefully should not occur, namely, that the decision taken is in clear violation of obligations under international law and where the matter is so serious that the legal adviser might have to reconsider rendering further services to the Government.

A related question is at what stage in the decision-making process legal advice should be sought. In some instances it might be tempting to the Minister, faced with a problem, to turn to the legal adviser and ask him or her to present a suitable solution. This may be appropriate, if the problem is of a purely legal nature. However, more often than not, the question is likely to have many aspects, not the least of which political aspects. In such situations, the legal adviser should not be asked to provide the solution. Rather, he or she should be approached when there is an understanding at the political level of how the problem should be solved: "This is what we have in mind. Is it possible to go ahead from a legal point of view?". If the solution is in accordance with the law, the legal adviser should say so and leave the matter as it is. If not, the legal adviser should attempt to find a solution along the lines contemplated but acceptable from a legal point of view. A simple negative reply always risks creating the impression that the legal adviser is a person who tends to find problems and is, in general, not very helpful; as a consequence, this may lead to a tendency not to involve him or her in the decision making. It is therefore important for the legal adviser to make a positive contribution to the policy-formation process by suggesting alternative approaches by which a particular policy objective can be reached. In this regard, the legal adviser should provide continuity and demonstrate creativity.

It is sometimes said that the role of the legal adviser should always be to find a legal justification for whatever action the Government intends to take. Some suggest that international law is often vague and allows great leeway for government actions. To this it could be added that it is true that international law is not always clear and that the scope of the international commitment is not always readily apparent. On the other hand, in many concrete cases -- in particular in the field of human rights and humanitarian law -- the meaning of the law is very clear indeed. Consequently, whatever the reason for a request from the Government to justify actions that are dubious or in violation of these important elements of international law, the legal adviser should not lend him/herself to legal hair-splitting, but make a clear distinction between what is permitted and what is not. There is, of course, sometimes room for different views as to the meaning of the law and, no doubt, it is possible to find also among colleagues different opinions on one and the same question. But, in the situations referred to in this particular context, the distinction ought to be quite clear. It is also important to remember that the decision ultimately taken must stand the test of international scrutiny, in particular the scrutiny of a growing community of international lawyers who follow State actions with great attention and who may also influence their own Governments to take action against States who are perceived as violating international law.

A particularly difficult situation occurs when the decision taken by the Government is contrary to the advice of the legal adviser. He or she might not be in a position to disclose the contents of the advice, and in many cases the advice should not be disclosed. No doubt, there are colleagues who observe with regret the way in which their Governments sometimes act. In such cases, it is not fair to direct criticism against the legal adviser; as we have just concluded, he or she is not the decision maker. Furthermore, a demonstration on the part of the legal adviser; e.g. a resignation, may not be feasible or even desirable from a legal point of view; the likelihood is that the replacement may be someone who shows more "flexibility".

The role of the legal adviser can sometimes be very difficult and one should be careful not to draw too hasty conclusions about the way in which colleagues render their important services to their respective Governments.

V. Future Challenges -- Closer Cooperation

Public international law has undergone a dramatic development during the last few decades. Ever larger portions of this law have been codified either under the auspices of the United Nations or in other forums. This development has been described very expressively by Brian Urquhart and the late Erskine Childers:

“International law, only yesterday a seemingly quiet backwater in human affairs, is reaching into hitherto unimagined fields. The nations of the world have acceded to an unprecedented number of agreements in virtually all branches of human activity – from the ocean floor to the planet’s climate to outer space – in only the last forty years. There has been a truly astonishing growth of public international law which will accelerate into the coming century. The pressing need for an international system based on law has never been so evident.”¹⁴

In addition, the tensions between the two major political blocks have ceased and given room to a growing realization that relations between States (as well as between States and peoples) must be governed by law and that the disputes that inevitably occur must be settled by peaceful means. Therefore, among the many challenges that lie ahead for the international community is the establishment of a more prominent legal regime at the international level, a regime accepted and defended by the many actors that appear at this level, and in particular by sovereign States. Imagine if the international law that exists today was really observed by all States!

In this context, it is interesting to note the recent developments in the field of international criminal law with the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993 and for Rwanda in 1994, the completion of the draft Code of Crimes against the Peace and Security of Mankind in 1996 and the adoption of the Rome Statute of the International Criminal Court in 1998. Another effort to strengthen the rule of law at the international level is the adoption of the United Nations Convention on the Law of the Sea¹⁵ and the establishment of the International Tribunal for the Law of the Sea.

¹⁴ B. Urquhart and E. Childers, *A World in Need of Leadership: Tomorrow's United Nations – A Fresh Appraisal*, (Uppsala, Dag Hammarskjöld Foundation, 1996), p. 13.

¹⁵ Document A/CONF.62/122 and Corr. 1-11.

These are examples of efforts to not only create international legal obligations for States and other entities concerned, but also to establish international mechanisms to make certain that these obligations are respected.

Against this background, it is fair to assume that international law will be an increasingly important element in the decision-making process of Governments in the future. Correspondingly, it is fair to assume that the role of the legal adviser will gradually grow in importance. Legal services will be more in demand in bilateral matters, in particular with respect to dispute settlement. With the likelihood that disputes might be settled by judicial means or by arbitration, States must act with more prudence so as not to risk being on the losing side if a dispute should occur. But also the growing multilateral interaction between States will mean that there is an increased need to cover the legal aspects of this activity. Furthermore, the growing tendency of States to accept international control over their application of treaties in the field of human rights will require a higher level of legal preparedness at the national level. Another element is the rising awareness of the necessity to define the rights of minorities and to provide for their protection. Migration and environmental issues will require close legal observation. A growing number of active non-governmental organizations, often very well informed and with great expertise in international law, will demand and must be given more attention. In short, there is a very important role for the legal adviser in the future. With some hesitation, I decided to attach a tentative description of a legal adviser's responsibilities (see annex).

In many States with a well-developed tradition in this area, the future will probably mean that the function of the legal adviser will be consolidated and, when necessary, strengthened. For newly independent States and developing countries, the situation may require more determined action. As already mentioned, many colleagues in those countries work under very difficult circumstances and with scarce resources. Therefore, they need all the support they can get. Direct support is, of course, difficult to arrange other than through allocation of the necessary resources at the national level, which is a matter for the national authorities. However, support can also be given in other forms.

One such form of support is the cooperation between legal advisers at the international level. It is against this background that the legal advisers' meetings held in conjunction with those of the Sixth Committee of the United Nations should be seen. One of the main

purposes of these meetings is to provide an informal forum in which colleagues from all over the world can meet and exchange views on matters of common interest. Whether and in what form these meetings will continue in the future is for the legal advisers themselves to decide. Unfortunately, the resources available for this kind of cooperation vary greatly in different countries. Of particular concern is that too many colleagues from newly independent States and developing countries lack the necessary financial resources to participate as well as to attend the meetings of the Sixth Committee during the debate under the agenda item entitled "Report of the International Law Commission".

In order to facilitate cooperation among legal advisers, the Legal Counsel of the United Nations, on a personal basis, now maintains a list of names and addresses of legal advisers worldwide. The list is updated and disseminated at the legal advisers' meetings in New York and also circulated shortly thereafter via the permanent missions to the United Nations in New York. It is appreciated if changes to the list are communicated promptly.

Irrespective of how the cooperation between the legal advisers will be organized in the future, it is important to note that such cooperation is of great importance and will greatly enhance the common understanding of the special demands that fall upon those who are responsible for the function at the national level. Therefore, it is to be hoped that there will be more opportunities for colleagues, and in particular colleagues from newly independent States and developing countries, to participate more actively. It may be that the States that the legal advisers serve have different interests at times, and certainly the legal advisers will be called upon to represent their countries in disputes with other States. But this is no reason why legal advisers should not cooperate as professionals. Moreover, it should be to the advantage of States to be served by legal advisers who communicate on the same wavelength and who serve with competence and integrity.

The idea of promoting cooperation between legal advisers on matters of public international law can very well be summarized by quoting a few lines from a letter sent by the initiators of the 1991 meeting in New York to their colleagues:

"As initiators of the Legal Advisers' meeting, we think that the exercise in which we are engaged at present is of great importance. In a changing world where the Cold War is over and where law will have

an increasing importance in the relations between States, the responsibilities of the Legal Departments of the Ministries of Foreign Affairs will have an even more significant role to play -- directly or in a coordinating capacity. We should prepare ourselves for this.

We should also bear in mind that there are constant changes in our circle. Colleagues are retiring or taking up other posts -- others succeed them. It is therefore important that we achieve something together which can be passed on to assist our successors. We therefore hope that as many of you as possible will contribute to our common endeavour; by ... participating in our discussion or otherwise. In this way we can learn from each other and -- to quote one of the participants -- develop our professional integrity as lawyers. We should not underestimate the importance of Legal Departments all around the world, led by persons with a common understanding about their role and with a feeling of collegiality."¹⁶

Finally, as mentioned above, one important function that a legal adviser should perform is to provide continuity with respect to decision making in matters that concern international law. Another aspect of this continuity should be to inform successors about the international cooperation among legal advisers and the results of our common efforts. Therefore, whenever a legal adviser leaves his or her position, he or she should hand over to the successor all the information gained through his or her cooperation with other legal advisers worldwide.

¹⁶ H. Corell, "Second Legal Advisor's Meeting at United Nations Headquarters in New York", *Nordic Journal of International Law*, vol. 61 (1992), p. 5 at p. 7.

Annex

A Tentative Description of a Legal Adviser's Responsibilities

As has been pointed out at the outset, the role of the legal adviser is multifaceted. There may be different opinions on how to serve in this capacity in the most competent and efficient manner. It was therefore with some hesitation that I embarked upon the present description. Its purpose is certainly not to suggest that the legal adviser must necessarily engage in all of the matters on the list. On the other hand, I am convinced that there are colleagues who would provide a different and more extensive description if they were asked to prepare one. Nonetheless, there might be colleagues who will find the description useful. Therefore, the description should be seen as "food for thought" rather than as a model.

1. Providing legal advice to the Minister of Foreign Affairs and to the Ministry:
 - a) Participate in intra-ministerial meetings,
 - b) Follow the development of international law,
 - c) Follow international political developments on a day-to-day basis,
 - d) Prepare oral or written advice as appropriate,
 - e) Alert the Minister to important legal issues and
 - f) Coordinate with appropriate officers in the Ministry of Foreign Affairs and other Ministries.

2. Codification and progressive development of international law:
 - a) Coordinate with other Ministries in determining the position of the Government in negotiations in different international fora,
 - b) Review texts of draft international conventions and other legal instruments,
 - c) Formulate instructions for delegates participating in international negotiations and
 - d) Participate as appropriate in such negotiations.

3. Treaty negotiations and administration:
 - a) Provide advice to functional Ministries and departments on treaty law,
 - b) Negotiate treaties that fall within the substantive responsibility of the Department of Legal Affairs and

- c) Register treaties for national treaty collection and supervise the submission of bilateral treaties to the United Nations Secretariat for registration (Article 102 of the Charter).
4. Participation in international meetings:
- a) Act as head or member of delegations to organs of the United Nations General Assembly or other international bodies,
 - b) Provide advice on United Nations law and practice,
 - c) Participate, as appropriate, in meetings of regional organizations or arrangements and
 - d) Provide advice concerning the competence of such organizations or arrangements.
5. Human rights:
- a) Provide advice on human rights requirements for the national legislative process,
 - b) Prepare or coordinate the preparation of periodic reports under international conventions,
 - c) Appear before committees established under such conventions,
 - d) Appear before courts of human rights and
 - e) Provide advice on how reports and judgments from such committees and courts should be executed.
6. Humanitarian law:
- a) Provide advice on the interpretation of conventions on humanitarian law and
 - b) Assist the appropriate authorities in educating the military in humanitarian law (article 47 of the First, article 48 of the Second, article 127 of the Third, and article 144 of the Fourth Geneva Convention of 12 August 1949; and article 83, paragraph 1, of Additional Protocol I of 8 June 1977).¹⁷

¹⁷ Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, United Nations, *Treaty Series*, vol. 75, p. 31; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea, United Nations, *Treaty Series*, vol. 75, p. 85; Geneva Convention relative to the treatment of prisoners of war, United Nations, *Treaty Series*, vol. 75, p. 135; Geneva Convention relative to the protection of civilian persons in time of war, United Nations, *Treaty Series*, vol. 75, p. 287; and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection

7. Participation in the national legislative process:
 - a) Review draft legislation and
 - b) Assist colleagues in functional ministries in defining obligations under international law, in particular in the field of human rights.

8. Diplomatic and consular privileges and immunities:
 - a) Provide advice on the interpretation of the 1961 and 1963 Vienna Conventions¹⁸ and
 - b) Provide advice on obligations under other conventions in the field, in particular the Convention on the Privileges and Immunities of the United Nations of 13 February 1946,¹⁹ the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947²⁰, and the Convention on Special Missions of 8 December 1969.²¹

9. Consular affairs:
 - a) Provide for protection of nationals abroad (functional duty or in an advisory function),
 - b) Provide advice on matters concerning the granting or refusal of passports and
 - c) Provide advice on other matters concerning assistance to nationals abroad.

10. Settlement of international disputes:
 - a) Provide advice on the legal ramifications of the dispute in question,
 - b) If requested, negotiate with a view to settling the dispute,
 - c) Make practical arrangements for establishing a panel of arbitrators or litigation,
 - d) Appear before the International Court of Justice and other international courts and

of victims of international armed conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 609.

¹⁸ Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95; and Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261.

¹⁹ United Nations, *Treaty Series*, vol. 1, p. 15.

²⁰ United Nations, *Treaty Series*, vol. 33, p. 521.

²¹ United Nations, *Treaty Series*, vol. 1400, p. 231.

- e) Appear before bodies established by human rights conventions (see above).
11. Investment protection:
 - a) Negotiate agreements concerning investment protection and
 - b) Assist nationals in the application of such agreements; jus protectionis.
 12. Law of the sea:
 - a) Provide advice on the implementation of the United Nations Convention on the Law of the Sea,
 - b) Provide assistance in matters concerning maritime delimitation and
 - c) Provide substantial support in relation to the International Tribunal for the Law of the Sea, the International Seabed Authority and the Commission on the Continental Shelf.
 13. Boundaries:
 - a) Provide advice on the application of treaties on boundary issues and
 - b) Assist in revision of boundaries, in particular in recurring revisions required by bilateral treaties.
 14. Environmental law:

Provide advice on the interpretation of pollution conventions and other international rules on protection of the environment.
 15. International legal assistance:

Provide advice and practical assistance in matters concerning international legal cooperation (extradition, hearing of witnesses, etc.).
 16. Assistance to national courts:
 - a) Answer requests from national courts in cases concerning litigation between private parties and
 - b) If necessary, issue certificates on matters where the Ministry of Foreign Affairs has a special expertise (whether a person is entitled to diplomatic status; extent of national jurisdiction in another country, etc.).

17. **Head of a Legal Department (if this is the case):**
 - a) **Manage and supervise the department,**
 - b) **Interact with other heads of department in the Ministry of Foreign Affairs,**
 - c) **Prepare budget requests and monitor expenditures and**
 - d) **Provide for recruitment and promotion.**