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**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW  
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**ITEM 7 : ORGANISATION AND FUNCTIONS OF THE OFFICE OF THE LEGAL ADVISER  
OF THE MINISTRY FOR FOREIGN AFFAIRS**

Document submitted by  
the Delegation of the United Kingdom

## Organisation and Functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs: The Role of the Legal Adviser

### Special nature of the international legal system

The nature of public international law, and of the international legal system, may suggest that the role of the governmental public international law adviser is somewhat special. A lawyer in private practice, or an in-house lawyer for a corporation, or indeed a government lawyer acting in the field of domestic law, will generally see his essential task as assisting the client, with only minimal concern for the health of the legal system in which he is operating. The public international lawyer, on the other hand, may well regard the promotion of the international legal system as an essential part of his or her functions.<sup>1</sup>

The international legal system is special in various ways:

*First*, customary international law develops through State practice, which includes “what foreign ministries do and what foreign ministry legal advisers advise their ministers it is lawful for them to do”.<sup>2</sup> This places a special onus on the foreign ministry legal adviser. A related point is that states and international organisations are expected to act consistently; what your client argues one day may be held to his disadvantage the next. When expressing a position, a government international lawyer must bear in mind the possibility that he or she may well one day wish they had not said it, or said it somewhat differently.

*Second*, there is, for the most part, no court or tribunal with compulsory jurisdiction in the international legal system. This remains so in most cases, despite the “proliferation” of international courts and tribunals. As Sir Gerald Fitzmaurice once said (in an unpublished address):

*“The public, or at any rate the more enlightened section of it, expects the international lawyer to stand up for what is abstractly right and just, and they seem to expect this far more than they expect it of a lawyer practising in the domestic field. I think there is a sound basis for this differentiation, because in the domestic field, courts and judges exist, to whom questions of justice can be safely left. This sets the practising lawyer free to act in the best interest of his client. Each side argues its case, and the question of where right and justice lie is a matter for the judge. In the international field, however, the situation is quite different ... and if international lawyers themselves do not view their subject from the angle of right and justice as well as strict legality, no one will. The government international lawyer is not in any way exempt from this duty, which might be said to be a duty to the law.”*

*Third*, public international law is more often rather less clear than domestic law. This is especially true of customary international law.

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<sup>1</sup> As a preliminary point, it should be noted that within the national legal system a lawyer is bound by clear – and enforceable – rules of professional conduct. Lawyers operating in the field of public international law, including before international courts and tribunals, are subject to no such formal code of ethics, except to the extent that their national rules may be applicable (and for British solicitors, barristers and advocates they are – though how effective they are to control conduct before international courts is another matter). In the United Kingdom, the Civil Service Code (and the parallel Diplomatic Service Code) confers upon civil servants “the duty to comply with the law, including international law and treaty obligations”. There is parallel provision in the Ministerial Code (See Berman, “The Role of the International Lawyer in the Making of Foreign Policy”, in: *The International Lawyer as Practitioner* (ed. Wickremasinghe, 2000), 3.)

<sup>2</sup> Watts, “International Law and International Relations: United Kingdom Practice”, *EJIL*, 2 (1991), 157 at 164.

*Fourth*, there is no legislature in the international legal system to develop or correct the law if it is inadequate or unsatisfactory.

Role of the Foreign Ministry Legal Adviser

**In what ways may these special attributes of the international legal system impact on the role of the legal adviser?**

*First*, in the words of Sir Franklin Berman –

*“the main role of the governmental legal adviser is to “make” his government comply with international law. One must of course put the word “make” in mental inverted commas. It would be a rare case indeed if a Governmental legal adviser were in a position to compel the Government he serves to act in one way or another. But it cannot by the same token be the limit of the function of even someone whose role is that of “adviser” simply to ascertain what the law is, to explain it to the best of his ability to his client, and leave it at that. Of course, when it comes to action the final decision may not be his. It is a truism to say that the question whether or not to comply with what international law requires is always a question of policy. But even the meanest definition of the role of the international law adviser in government cannot treat that policy question as if it were an entirely neutral one. It must be assumed to be a necessary part of the role that the international law adviser should be expected to use his gifts of exposition and persuasion to bring those with whom the power of decision lies to use this power to the right result.”<sup>3</sup>*

It should be remembered that the State, for these purposes, includes the central government, local governments, the legislature and the courts. It must also be his role to ensure that international organisations of which his State is a member comply with international law.

It is also necessary to ensure that those with whom your State is acting equally comply, because otherwise your State itself may bear international responsibility under the law on state responsibility (eg. aiding and assisting in the commission of an internationally wrongful act

*Second*, it is important to ensure that the State supports international legal institutions, and takes their work seriously. This often requires a long-term perspective, something Governments are generally not very good at. It is important to make time for this, not least, support for international courts and tribunals and for the International Law Commission. Support includes ensuring the nomination of good candidates, and working for the election of good candidates (of whatever nationality). The recent nominating system in the United Kingdom, which has been used for the European Court of Human Rights, the International Criminal Court, the Luxembourg Courts and other bodies has worked well. Support also involves taking judicial cases seriously: foreign ministry legal advisers often act as Agents coordinating positions across government and within the government’s legal team, in which capacity they owe a duty to the international tribunal as well as to their State. There is also an important role in ensuring adequate financial support, appropriate visits, respect for judgments and orders (even when the Government does not like them); and taking seriously input to the International Law Commission’s work.

*Third*, there is a role in developing public international law and its institutions in a healthy direction. The 2004 United Nations Convention on the Immunity of States and their Property affords an example. Another important role is active participation in conferences in which treaties are drafted, reviewed or implemented, such as the law of the sea conferences and the Antarctic Treaty Consultative Meetings.

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<sup>3</sup> *Loc. cit.* at n. 2 above, 4.

*Fourth*, foreign ministry legal advisers tend to work together within the international legal community. In fact, far more of their role is cooperative than is sometimes appreciated. International life is not only about disputes. One should not underestimate the importance of these regular contacts. There is, to some large degree, a community of government international legal advisers. In this context CAHDI, the “International Law Week” at the UN, along with the many ad hoc meetings that take place all offer legal advisers an opportunity to share views and collaborate on international law matters.<sup>4</sup>

*Fifth*, MFA Legal Advisers often work closely together with those outside government, such as the International Committee of the Red Cross, the Institute of International Law, the International Law Association, the European Society for International Law, the American Society of International Law, the British Institute of International and Comparative Law. Academic contacts are important: the FCO Legal Advisers organise an annual academic seminar at the FCO with 70-80 people attending. They also spend some time going to the universities (and not only because it can be good for recruitment). They are encouraged to write articles and books. Fitzmaurice, it has been said, “regarded being a good scholar as part of the job of a good legal adviser”.<sup>5</sup>

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<sup>4</sup> Corell, “Legal Advisers meet at U.N. Headquarters in New York, *AJIL*, 85 (1991), 371; and reports on subsequent meetings (by various authors) in : *Nordic Journal of International Law*, 61 (1992), 3; *AJIL*, 87 (1993); *AJIL*, 88 (1994), 379; *AJIL*, 89 (1995), 644;

<sup>5</sup> *BYBIL*, (1984), 1.